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Criminalising Dissent: Sedition Laws in India

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As protests against the new Citizenship (Amendment) Act 2019 grip the streets of India, the state has clamped down with all that is available in its coercive toolbox. One of these is the law of sedition. This raises the question of why a twenty-first century democracy still criminalises speech as seditious, and whether it is time to reconsider imprisoning people for their political views. This article discusses the purpose of prohibiting sedition, then contextualises India's experience by historicising its colonial past and quasi-authoritarian present. It concludes with a discussion on the law's use as a political weapon, and questions whether it should be repealed or reformed to save Indian democracy from its rule of law crisis.

The 'Crime' of Sedition

Sedition is a political crime. It is the subversion of the social or political order by spoken or written word. It is against the security of the state, 'intended to bring the sovereign state into hatred or contempt, to urge disaffection against the Constitution or democratically elected

government, or the attempt to procure change in government by unlawful means' (Sorial, 2010). Usually, a causal link between the utterance of a word and incitement of violence is required. However, precedence shows that some speech is *inherently* seen to be seditious, even when disconnected from violence. In words that do not cause violence or lead to it, thought is criminalised. Sedition is thus at loggerheads with freedom of speech.

Can thoughts be inherently violent? States which used sedition to clamp down on the advocacy of communism answered in the affirmative, since it was seen as incitement to overthrow the social order. Today, other controversial thoughts and beliefs may also fall under this umbrella, and include abolition of the death penalty, as was seen in protests against the Kashmiri separatist Afzal Guru's hanging by the Indian state, for his involvement in the 2001 terrorist attack on the Indian Parliament. This curbs legitimate political dissent, stifling debate on important public issues, such as capital punishment or the situation in Kashmir.

India's History with Sedition

Sedition is codified in Section 124A of the Indian Penal Code (IPC). It states that:

> *Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*

Evidently, sedition is a cognisable, non-bailable, non-compoundable offence, punishable by imprisonment for life and a fine, or imprisonment for 3 years and a fine, or a fine. Enacted in 1870 as a tool of the repressive colonial state, it continues to play an important part in the modern state's coercive apparatus.

Colonial Past

The British imported this law into India and codified it in Section 124A. It was used to curb nationalist dissent. Bal Gangadhar Tilak, an Indian freedom fighter, was put to trial thrice and argued that the crime was not sedition of the people against the British Indian government (*Rajdroha*), but the Government against the Indian people (*Deshdroha*). The most famous trial under the colonial law, however, was that of Mahatma Gandhi. His commentary on the philosophy underlying the law must be re-read in today's context:

> *Section 124A under which I am happily charged is perhaps the prince among the political sections of the [Indian Penal Code] designed to suppress the liberty of the citizen... I hold it a virtue to be disaffected towards a Government, which in its totality has done more harm to India than (the) previous system... Holding such a belief, I consider it to be a sin to have affection for the system.*

The legal debate on the doctrine of sedition can also be traced to the colonial era. The clash was between the interpretations of the Federal Court in India and the Privy Council in Britain. The former ruled that words were by themselves not seditious and 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency' (*Niharendu Dutt Majumdar v The King Emperor*, 1939). This, however, was overturned by

the latter which said that 'the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small' (*King Emperor v Sadashiv Narayan Bhalerao*, 1942). Evidently, this broadened the definition, making it over-inclusive.

The shaping of India's future was in this context. The Indian Constituent Assembly, writing on the eve of independence, consisted of those who were often charged with and convicted of sedition. The Constitution of India thus did not contain sedition as one of the exceptions to the fundamental right to freedom of speech and expression.

Post-Colonial Legacy

The fundamental right to speech, enshrined in Article 19(1)(a) of the Constitution, was antithetical to sedition. Soon after, however, in the 1950s, the judiciary adopted a hands-off approach towards legislative and executive action aimed at restricting speech. Two 1949 cases, the *Romesh Thapar* case, in which the court overruled a ban on a left-leaning magazine, and the *Brij Bhushan* case, where a right-wing Hindu group mouthpiece was charged with sedition for far-right publications, prompted the Nehru government – the first government of independent India under Prime Minister Jawaharlal Nehru – to initiate legislative change. The nascent democratic state had to be protected and the First Amendment to the Indian Constitution was thus introduced. More exceptions were added and the word 'reasonable' was supplemented before 'restrictions' (Bhatia, 2016). The term 'reasonableness' and its judicial application is, however, ambiguous at best. In other areas of law it has proven to be infinitely malleable to lead to the conclusion that the judges want. After all, the reasonable man is simply the judge.

However, a marked turn in the interpretation of Section 124A came in *Kedar Nath Singh v State of Bihar* (1962). First, it held the law to be constitutional, and said that:

> *"Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in s. 124A has been characterised, comes under Chapter VI relating to offences against the State.*

Second, it also laid down important guidelines to prevent misuse of the law. It used the Federal Court's interpretation, as explained above:

> *(S)trong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section*

For Bhatia (2016), this period was characterised by a cautious, incremental move back towards a speech-protective, rigorous-scrutiny approach. However, it is submitted that the tides have now turned, which will be discussed further below.

Politicising Criminal Law

Comparative law shows three conclusions about sedition laws in other democracies. In some nations, such as the United Kingdom and New Zealand, it has been abolished. It is ironic that the coloniser repealed the law in 2009, but the colony retains it. Noting this, Nuggehalli (2016)

wrote: 'The British are inspired by our history while we ignore it.' In other nations, including the United States and Nigeria, prosecution rarely occurs, and the law has fallen into disuse. Where it still exists, such as in Malaysia and Australia, it has invited sharp criticism and there are ongoing movements to repeal it. In other cases, punishment is minimal – either a fine, or minor levels of imprisonment (Ramnath et al, 2011).

Yet in India, the law has been used indiscriminately to suppress political dissent. It is used against human rights activists, artists, academics and students. For instance, Arundhati Roy was facing the threat of arrest for being a panellist on a seminar on the political situation in Kashmir (Chamberlain, 2010). The alleged crimes have ranged from sending text messages criticising the Prime Minister to questioning the government's inaction during the Gujarat floods and protesting against atrocities committed against marginalised groups (Vij, 2010). This shows that even though the government and the nation are not synonymous, they have been fused together in practice.

Moreover, the judiciary is becoming increasingly nationalised and is blurring the distinction between the 'seditious' and the 'anti-national' on one hand and the legal and illegal on the other. In the Delhi High Court's order regarding Kanhaiya Kumar's interim bail, strong nationalist rhetoric predominated: 'Our forces are protecting our frontiers in the most difficult terrain in the world i.e. Siachen Glacier or Rann of Kutch…' and the JNU community '…are in this safe environment because our forces are there at the battle field…' (Bagchi, 2016). The Court simply asserted that '…the anti-national attitude which can be gathered from the material relied upon by the State should be a ground to keep him (Kanhaiya) in Jail…' This 'anti-nationalism', however, is not a penal offence (Bagchi, 2016) and a court should not be involved in politicising a criminal case.

The reality is that even when conviction is not absolute, harassment using Section 124A has a chilling effect on free speech. The 'process is the bloody punishment' (Liang, 2016). The severity of the punishment and the 'mere fact that the provision exists and the fact that it allows for the possibility for someone to file a police complaint or threaten police action serves the purpose of intimidating speakers, readers, and organisers regardless of the fact that in most cases if it were to go to trial, it would be highly unlikely that the offending act would be found to be in violation of the provisions' (Liang, 2012). The unspeakable is thus never spoken.

Reform of Repeal?

Sedition not only protects the government, but also the majority religion, in an increasingly authoritarian India. In fact, the law has often been used to protect majoritarian Hindu sentiments and has been characterised as the 'Hindutva version of blasphemy' (Hashmi, 2011). This is especially so because of the fact that a Hindu nationalist government is in power today, having been re-elected with an overwhelming majority last year. Since the law is riddled with uncertainty and lacks uniformity in application, free rein has been given to Hindutva (Hindu nationalist) forces while liberal voices have been suppressed. This was seen most recently in the aftermath of the riots in Delhi earlier this year, where politicians' hate speech was overlooked, but students and activists protesting the new discriminatory citizenship law were arrested (Sen, 2020). The law's scope is vague, and it has become a political tool for harassment. Undeniably, it has contributed to the rule of law crisis.

The reality is that the Court's interpretation in *Kedar Nath* is rarely followed. Reforming the jurisprudence has thus not led to tangible results. It is unlikely that statutory reform would be any better, since

there is already a chasm between what the law says and how it is enforced. Thus, room for reform is limited and misuse is inevitable. Repealing it is the only option. The temptation to use such a law for political purposes is far too prevalent and it is facilitated by its existence in the books. Furthermore, existing provisions of the IPC are sufficient to address all threats to violence and public order, thereby making this law redundant (Sirnate and Sambandan, 2016).

Conclusion

Free speech rests on the assumption that ideas must battle it out in a free marketplace. The prohibition of one kind of thought or shutting down the other side of the debate can hinder democracy. The questions that 'seditious speech' pose must be answered, and further questions must be posed. Yet, those who prohibit this speech have no answer, they only have a flag (Vij, 2010). In a battle between the nation-state and democracy, the former triumphs while sedition laws still exist.

The Indian state must refashion itself, not as the inheritor of a repressive colonial state but as a modern democratic one. This would mean that criminal sanctions for criticism of policy, leaders, and governments, or questioning the integrity of the state or its borders (especially by marginalised sections such as the tribal communities, Kashmiris and Dalits) must be off limits, and defended against by an independent legal system and a free press.

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