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DOES SEDITION END THE RIGHT TO FREE SPEECH? (A CRITICAL STUDY ON SEDITION LAWS IN PRESENT INDIA)

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Abstract-Freedom of Speech is the bulwark of democratic government. Free speech is regarded as the first condition of liberty. However, one of the biggest and most threatening challenges which it faces, even in a democratic set up, is from the laws on sedition. The Indian Constitution guarantees, in Article 19(1)(a), the right to freedom of speech and expression, which includes free press and all forms of communication. Only reasonable restrictions can be imposed by law on specified grounds, such as sovereignty and integrity of India, public order etc. The draft Constitution included sedition as a ground as well, but it was dropped eventually. Citizens in India are free to criticise their governments at the Centre or in the states — which they do quite frequently, and boldly and fearlessly as well; as they must, because that is what a participatory democracy is all about. The recent spate in instances of invoking sedition laws against human rights activists, journalists and public intellectuals in the country have raised important questions on the undemocratic nature of these laws, which were introduced by the British colonial government. Sedition laws were used to curb dissent in England, but it was in the colonies that they assumed their most draconian form, helping to sustain imperial power in the face of rising nationalism in the colonies including India. Targets of this law included renowned nationalists like Mahatma Gandhi and Bal Gangadhar Tilak. It is ironic that these laws have survived the demise of colonial rule and continue to haunt media personnel, human rights activists, political dissenters and public intellectuals across the country. The case for repealing the law of sedition in India is rooted in its impact on the ability of citizens to freely express themselves as well as to constructively criticise or express dissent against their government.

"Every man who says frankly and fully what he thinks is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions."

— John Stuart Mill, On Liberty

Freedom of speech and expression is an inseparable element of democratic society. Whether a society is democratic or not can be defined from the factor of independent press and mass media. The essence of free speech is the ability to think and speak freely and to obtain information from others through publications and public discourse without fear of retribution, restriction, or repression by the government. It is through free speech, people could come together to achieve political influence, to strengthen their morality, and to help others to become moral and enlightened citizens. Speech is in fact considered as God's gift to mankind. It is through speech that man conveys his thoughts and sentiments to others. Thus, freedom of speech and expression is a natural right which a human being acquires from birth. It is, therefore, a basic right. The right to freedom of speech as one of the basic human rights is enshrined in main international human rights documents.

"Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration Of Human Rights (1948)[1]. Similarly, the European Convention on Human Rights (ECHR) provides:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises"[2]

Another international instrument - International Covenant on Civil and Political Rights (ICCPR) provides: "Everyone shall have the right to hold opinions without interference; Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"[3]

WHY IS FREE SPEECH FUNDAMENTAL?

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

- John Milton

One of the most eloquent and distinguished of American judges, Justice Brandeis, said referring to the vital need for freedom of speech in a democratic way of life as follows: "We must never forget that unless speech is free for everybody, it is free for nobody; that unless it is free for error, it is not free for truth, and that the only limitations which may safely be placed upon it are those which forbid slander, obscenity and incitement to a crime."There are a number of reasons why freedom of speech is so solidly entrenched in our constitutional law and widely embraced by the general public. On an individual level, speech is a means of participation, the vehicle through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity. Free speech serves the individual's right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator (Freedom of Speech and Freedom of Press). A reason that free speech is foundational to human flourishing is that it is essential to democracy and a bulwark against tyranny. How did the monstrous regimes of the 20th century gain and hold power? The answer is that groups of armed fanatics silenced their critics and adversaries. (The 1933 election that gave the Nazis a plurality was preceded by years of intimidation, murder, and violent mayhem.) And once in power, the totalitarians criminalized any criticism of the regime (Pinker, 2015). In a democracy, free debate about and between political parties exposes their strengths and weaknesses. Freedom of speech and expression opens up channels of free

[1] Universal Declaration on Human Rights (1948), Article 19

[2] European Convention on Human Rights (1950), Article 10, paragraph 1

[3] International Covenant on Civil and Political Rights (1966), Article 19, paragraph 1,2.

discussions of issues. This enables voters to form an opinion about who is best qualified to run the country and to vote accordingly. Media scrutiny of the government and the opposition helps expose corruption or other improprieties and prevents a culture of dishonesty. They promote good governance by enabling citizens to raise their concerns with the authorities. If people can speak their minds without fear, and the media are allowed to report what is being said, the government can become aware of any concerns and address them. For all these reasons, the international community has recognised freedom of expression and freedom of information as some of the most important human rights.

FREEDOM OF SPEECH AND EXPRESSION IN INDIA

In the Preamble to the Constitution of India, the people of India declared their solemn resolve to secure to all its citizen liberty of thought and expression. The Constitution affirms the right to freedom of expression, which includes the right to voice one's opinion, the right to seek information and ideas, the right to receive information and the right to impart information. Part III of the Indian Constitution embodies the six fundamental rights conferred to the people. The foremost amongst these are the six fundamental rights in the nature of "freedoms" which are guaranteed to the citizens by the Constitution[4].

Patanjali Sastri, J., rightly observed that-

'Freedom of Speech and of Press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of Government, is possible'

Article 19(1)(a) provides that "*all citizens shall have the right to freedom of free speech and expression".* The phrase "speech and expression" used in Article 19(1) (a) has a broad connotation. The freedom to receive and communicate information and ideas without interference is an important aspect of freedom of speech and expression[5] This right includes the right to communicate, print and advertise the information. In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Article 19(1)(a). The freedom of the press is regarded as a **"**species of which freedom of expression is a genus"[6]. On the issue of whether 'advertising' would fall under the scope of the Article, the Supreme Court pointed out that the right of a citizen to exhibit films is a part of the fundamental right of speech and expression guaranteed by Article 19(1)(a) of the Constitution[7].The freedom of speech is the matrix, the indispensible condition of nearly every other form of freedom. It is the well spring of civilization and without it liberty of thought would shrivel (Basu, 2013). It occupies a preferred position in the hierarchy of liberties giving succours and protection to all other liberties. It has been truly said that it is the mother of all liberties (Jain, 2004). Man as rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. The guarantee of each

[4] Article 19 of the Constitution of India, 1950.
[5] Cricket Association of Bengal (1995) 2 SCC 161
[6] Sakal Papers V. Union of India AIR 1962 SC 305
[7] Odyssey Communications Pvt. Ltd. V. Lok Vidyayan Sanghatana AIR 1988 SC 1642

of the above right is, therefore, restricted by the Constitution in the larger interest of the community. This right is available only to a citizen of India and not to foreign nationals. This right is, however, not absolute and it allows Government to frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency and morality and contempt of court, defamation and incitement to an offence. The right to freedom of speech and expression is subject to limitations imposed under Article 19(2). Very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression[8]

Article 19(2) as originally enacted provided that: "Nothing in sub clause (a) of Cl.(1) shall affect the operation of any existing law in so far as it relates to, or prevents the state from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency, or morality or which undermines the security of, or tends to overthrow, the State"

This sub Article was retrospectively amended by the Constitution (1st Amendment) Act, 1951, which provides: "Nothing in this sub clause (a) of clause (1) shall affect the operation of an existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality; or in relation to contempt of Court, Defamation or incitement to an offence." Any limitation on the exercise of the right under Art. 19(1)(a) not following within the four corners of Art 19(2) cannot be valid. It has been rightly observed that to say that a thing is constitutional, is not to say it is desirable[9].Therefore, to say that restrains on the freedom of speech and expression are permissible under our Constitution is not to say that any particular restrain is desirable or ought to be imposed (Seervai, 2005)

SEDITION: "Love thy government or love thy nation?"

The full meaning of sedition was explained by Lord Fitzgerald in his address to the jury in Reg v. Alexander Martin Sullivan[10], which was later followed in Reg v. Burns[11], thus:

"Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the Empire. The objects of Sedition generally are to induce discontent and insurrection, and to stir up opposition to the Government and bring the administration of justice into contempt, and the very tendency of sedition is to incite the people into insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war, or to bring into hatred or contempt the

[8] Romesh Thappar AIR 1950 SC 124

[9] Dennis v. U.S. (1950) 341 U.S. 494, 552-3, 95 L.ed. 1137, 1175

[10] (1868) 11 Cox's Criminal Cases 44.

[11] (1873) 16 Cox's Criminal Cases 355.

Sovereign or the Government, the laws or Constitution of the realm and generally all endeavours to promote public disorder[12]."

Section 124A of the Indian Penal Code deals with law of sedition in India[13].The word "Sedition" does not occur in Section 124-A of the Indian Penal Code or in the Defense of India Rule. It is only found as a marginal note to Section 124-A, and is not an operative part of the section but merely provides the name by which the crime defined in the section will be known. This definition of sedition, as is only plainly evident, is exceedingly broadly worded. Its vagueness certainly did wonders for the colonialists (Parthasarathy, 2016). It was originally s 113 of Macaulay's Draft Penal Code of 1837. It was proposed to be included in the Penal Code. However, for unaccountable reasons, it was omitted from the Penal Code when the IPC was enacted in 1860. However, the need for such a provision was felt in 1870 when s 124A was placed in the statute book by the Indian Penal Code (Amendment) Act 1870(Act XXVII of 1870. Mahatma Gandhi was prescient in recognising the fundamental threat it provided to democracy when he called it the 'prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen.' Prominent persons charged with sedition under this law include Bal Gangadhar Tilak and Mohandas Gandhi. After the Constitution was adopted in 1950, it appeared Section 124-A would soon be denounced as an abhorrent relic of our colonial past. After all, efforts made by some members of the Constituent Assembly to include sedition as an express ground for limiting speech in Article 19(2) had been successfully resisted. Moreover, the reasoning adopted in the two earliest free speech cases decided by the Supreme Court — Brij Bhushan v. State of Delhi and Romesh Thapar v. Union of India — also pointed to the incompatibility of laws of sedition with the Constitution. In 1951, India's PM Jawaharlal Nehru publicly voiced his dislike of Section 124A, saying, "that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons." However, this was ironic given these words were spoken on the occasion of the First Amendment to the Constitution, which imposed greater restrictions on the right to free speech. Later, on the eve of the Bangladesh War in 1971, the Law Commission of India thumpingly endorsed the criminalisation of sedition because its "ultimate end is to destroy the bond between the Government and those whose obedience

[12](1868) 11 Cox's Criminal Cases 44, at p 45. The Supreme Court of India also quoted with approval in Nazir Khan v. State of Delhi AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 (SC).

[13] Section 124 A, as it stands today, reads:

"Sedition.-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.

Explanation 1. - The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2. - Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3. - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

the Government is entitled to command."Yet, more than 65 years later, sedition continues to not only remain in the IPC, but also occupies a pride of place in the state's arsenal.

"MALICIOUS WORDS" VS "FREE SPEECH"

After the Constitution of India came into operation, the constitutional validity of the provisions of s 124A of the Indian Penal Code was questioned on the ground that it contravenes the 'freedom of speech and expression' guaranteed under art 19 of the Constitution. In Tara Singh Gopichand v State[14], in which for the first time the constitutional validity of s 124A was put to judicial scrutiny, it was contended that the section goes against the letter and spirit of art 19(1)(a).

The Allahabad High Court in Ram Nandan v State of Uttar Pradesh[15], held that s 124 A imposed restrictions on the freedom of speech and expression not in the interest of general public and thereby infringed the fundamental right of freedom of speech. To avert the constitutional difficulty as a result of the above referred case. The constitutional 1st (Amendment) Act, 1951 added in Art 19 (2) two words of widest import, wiz., "in the interest of" "public order". Thereby including the legislative restrictions on freedom of speech and expression The Supreme Court finally put the judicial ambivalence to rest in the case of Kedar Nath v State of Bihar[16]. It said that if the interpretation of the offence of sedition is held in consonance with the views expressed by the Federal Court in the case in Niharendu Dutt's case, then the law under s 124A will be within the permissible limits laid down in clause 2 of art 19 of the Constitution. The Court rejected the literal interpretation to Section 124-A in favour of the interpretation that would hold the constitutionality of the sedition provision and held:

"If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which *merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make then unconstitutional* in view of Article 19(1)(*a*) read with clause (2)…. It is only when the words, written or spoken, etc. which have the *pernicious tendency or intention of creating public disorder or disturbance of law and order* that the law steps in to prevent such activities in the interest of public order"

In the year 2015, the Gujarat government booked a Patel leader under sedition for sending messages containing "offensive language against the Prime Minister, the State Chief Minister and Amit Shah, the President of BJP". These cases are indicative of a high level of intolerance being displayed by governments towards the basic freedom enjoyed by citizens. Legally, there is no doubt that instances such as those of Aseem Trivedi, the 8000 sedition cases filed against the protesters at Koodankulam, Arundhati Roy's arrest, the JNU row and countless others are blatant abuses of law as it is being regularly used as a tool for political persecution, has no business being on the statute books.

[14] AIR 1951 East Punjab 27

[15] AIR 1959 All 101, (1959) Cr LJ 128 (All)(FB)

[16] AIR 1962 SC 955

However, in spite of the Supreme Court narrowing the scope of sedition, and in spite of the more recently evolved tests to determine when mere speech or expression can be prosecuted, governments have routinely invoked Section 124-A with a view to restricting even benign forms of dissent. To argue against sedition does not tantamount to arguing in favour of absolute free speech (Parthasarathy, 2016). That words which directly provoke violence or which directly threaten the maintenance of public order deserve censure is unquestionable, especially given India's constitutional structure. But that's not what the offence of sedition seeks to achieve. At its core, it is a devastating provision that is meant to assist in crushing all opposition to the ruling dispensation. Its use continues to have the effect of chilling free speech and expression in India. Section 124-A of the IPC negates the right to dissent, which is an essential condition of any reasonable government.

In Binayak Sen v. State of Chhattisgarh[17], one of the accused Piyush Guha made an extra-judicial confession that Binayak Sen, a public health advocate, had delivered certain letters to him to be delivered to Kolkata. These letter allegedly contained naxal literature – some contained information on police atrocities and human rights. Convicting the accused of sedition, the High Court cited the widespread violence by banned Naxalite groups against members of the armed forces. However, it did not explain how the mere possession and distribution of literature could constitute a seditious act. Further, the High Court did not address the question of incitement to violence, which was evidently absent in this case. Consequently, the judgment of the Chhattisgarh High Court in this case has also been the subject of immense criticism. Granting bail to Dr Binayak Sen, the Supreme Court said in 2011, "We are a democratic country. He may be a (Maoist) sympathiser. That does not make him guilty of sedition." The court said that the Chhattisgarh government had failed to make out a case for sedition. That is, it had failed to prove there was incitement to or involvement in violence. Merely possessing Maoist literature, the court said, did not make him a member of the banned CPI (Maoist). The court asked if keeping Gandhi's autobiography at home made one a Gandhian.

Last year, in Shreya Singhal v. Union of India, in declaring unconstitutional the notorious Section 66A of the Information Technology Act, the court ruled that speech howsoever offensive, annoying or inconvenient cannot be prosecuted unless its utterance has, at the least, a proximate connection with any incitement to disrupt public order. In this particular case, the Supreme Court drew a clear distinction between "advocacy" and "incitement", stating that only the latter could be punished. Therefore, advocating revolution, or advocating even violent overthrow of the State, does not amount to sedition, unless there is incitement to violence, and more importantly, the incitement is to 'imminent' violence (Liang, 2016). For instance, in Balwant Singh v. State of Punjab, the Supreme Court overturned the convictions for 'sedition', (124A, IPC) and 'promoting enmity between different groups on grounds

[17] Binayak Sen v. State of Chhattisgarh, (2011) 266 ELT 193

of religion, race etc.', (153A, IPC), and acquitted persons who had shouted – "Khalistan zindabaad, Raj Karega Khalsa," and, "Hindustan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da", late evening on 31 October 1984, i.e. a few hours after Indira Gandhi's assassination – outside a cinema in a market frequented by Hindus. At this juncture, it becomes important to mention the most highlighted case of sedition this year which is that of Kanhaiya Kumar. Kanhaiya Kumar, the president of Jawaharlal Nehru University's Student Union and also the leader of the All India Student Federation(AISF), the student wing of the Communist Party of India was arrested and charged with sedition by the Delhi in February 2016. It was alleged that he raised anti- India slogans in a student rally called to protest the 2013 hanging of Afzal Guru, a Kashmiri separatist convicted for 2001 Indian Parliament attack. This incident clearly represented an open declaration by the government that it would not tolerate any dissent. Some of the students may have been deeply misguided in the beliefs they hold. But a university is the space to debate them: yes, even the hanging of Afzal Guru. But nothing they said amounts to a definition of illegality that should befit a liberal democracy (Mehta, 2016)**.** In fact, at the risk of hyperbole, it would not be incorrect to say that nothing that the students did poses as much threat to India as the repression of the freedom and judgement of the government represented.

CONCLUSION

Since its origin in the court of Star Chamber in England, the law of sedition has been defined by uncertainty and non-uniformity in its application. By keeping its scope deliberately vague, generations of members of the ruling political class have ensured that they have a tool to censor any speech that goes against their interests. An analysis of the judgment of the Supreme Court in Kedar Nath itself demonstrates certain deficiencies in how the law is currently understood. There has been a shift in how we understand 'security of the state' as a ground for limiting the freedom of speech and expression. Further, a change in the nature of the government and the susceptibility of the common people to be incited to violence by an inflammatory speech has also reduced considerably[18]. The existence of sedition laws in India's statute books and the resulting criminalization of 'disaffection' towards the state is unacceptable in a democratic society. These laws are clearly colonial remnants with their origin in extremely repressive measures used by the colonial government against nationalists fighting for Indian independence. Courts have ruled that any expression must involve incitement to imminent violence for it to amount to sedition. But the law has been used again and again to arrest journalists, activists and human rights defenders simply for expressing critical views. Democracy has no meaning without the basic freedoms like that of speech and expression and sedition as interpreted and applied by the governments today is a negation of it.

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