SEDIMENT: AN INSIGHT ON HISTORY, EVOLUTION, SHORTCOMING AND RELEVANCE OF THIS LAW IN POST COLONIAL INDIA

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Genesis and pre-independence Interpretation of sedition in India

The law derives its controversial antecedents from the colonial era. Lord Thomas Babington Macaulay is credited for proposing the section of sedition in the first draft, in which he gave the pre-1898 definition of sedition. However, it is to be noted that Macaulay did not use the word “sedition” per se in the draft of 1837. After being mothballed for almost 23 years, the draft saw it light during the enactment of IPC in 1860, but the section proposed by Macaulay was been inexplicably omitted in the first draft.

Following the tumultuous years of the Independence uprising and the Wahabbi Movement gaining traction, the British felt a desperate need of a law to quell the nationalist sentiment brewing in the country and, it was in 1870, that a Special Act (XXVII of 1870) was passed by James Fitzjames Stephen through an amendment to the Penal Code and the section of sedition as given by Lord Macaulay, was added verbatim to the Indian Penal Code, the framework of this section on sedition was borrowed from various sources such as the Treason Felony Act, the common law of seditious libel.

It was in 1891 that the law set in motion in the Queen Empress v. Jogendra Chundra Bose case, alias the “Bangobasi” Case in which a weekly published a column, criticising the government on the Age of Consent Act of 1891, excoriating that this act was aimed at subduing the long-followed cultural practices in the country. Interestingly, the court held that violence or disorder did not play any role. A mere speech or writing against the government would be sufficient to be construed as disaffection. A person who excites or attempts to excite a feeling contrasting to affection is liable for sedition.

In a similar case of Bal Gangadhar tilak vs Queen-Empress in 1898, Tilak wrote a polemic in his weekly vernacular newspaper Kesari in which he criticised the British government on its supine and conniving stance on land revenue policy when the country was facing a severe famine and thousands of people and livestock were succumbing to it right and left. He criticised the grave inhumane treatment hurled by the British on Indians by invading the privacy of Indians by barging into their doors in absence of men in the house and, in the name of hygiene inspection, ravaging the house by throwing things hither tither, leaving the house in shambles and misbehaving with

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2 Queen Empress v. Jogendra Chunder Bose, ILR 1892 19 Cal 35.

3 Queen Empress v. Bal Gangadhar Tilak, ILR 1898 22 Bom 112.
children and women and in some case even stripping women clad. In one of his polemic Tilak quoted Bhagwad Gita saying:

“Did Shivaji commit a sin in killing Afzal Khan, or how? Its answer lies in Shrimad Krishna’s advice in the Gita to kill even our teachers and our kinsmen. No blame attaches to any person if he is doing deeds without being actuated by a desire to reap the fruit of his deeds”

Within a week of publishing this article, Lt. Ayerst and Walter Charles Rand the chairman of the plague commission under whose tutelage the inspection was done, were killed by “Chapekar” brothers who allegedly were influenced by Tilak’s writings. The court held Bal Gangadhar tilak liable for preaching disaffection, and was sentenced to 18 months of prison. Justice Arthur Strachey, opined that even if the accused neither excited nor intended to excite any rebellion against the authority of the government, he still shall be guilty if he tried to excite a feeling of hostility against the government.

The amendment to the definition was done in 1898. Wretchedly, this amendment did no good to the already ambiguous law. In contrast, it further exacerbated the ambiguity by adding the word “Disloyalty”, which made the definition vaguer. Subsequently, in the following years, the British government used it as a whip to quell free speech and expression, most notable being the second trial of Bal Gangadhar tilak. Tilak continued writing articles, criticising the measures of the government at that time.IN 1908 he penned two prominent articles titled: “The Country’s misfortune” and “These remedies are not enough”. In the same year few weeks later, Khudiram Bose and Prafulla Chakravarty bombed a carriage to kill a British barrister. the attempt turned abortive, unfortunately killing two English women, following which a search warrant was issued against Tilak whose writings allegedly incited the bombing and through the course of the investigation, two books on making bombs were discovered in his drawer and the bombings were construed to be in direct association with the incident. Consequently, he was charged under section 124A & 153A of IPC for sedition and spreading communal hatred.

Tilak defending through his counsel Mohammed Ali Jinnah argued that the translation and interpretation of his article was erroneous; besides this, it was unfair that the jury did not even have one Marathi speaking jury member who could have interpreted the true meaning and the connotation attached to it. He also argued that the books found in his drawer were actually a reference for his next article and even if they weren’t for referencing, the mere fact the books found in his drawer were on making bombs did not construe that he instigated the bombing. The trial was preposterous at best, court sentenced him six years in prison in Mandalay. Few years later another and among the most prominent cases of Sedition came up against Mahatma Gandhi, for which he was punished for three years but was released after two years. What made this case noteworthy was the famous statement put

forth by Mahatma Gandhi against Judge C.N. Broomfield:

“Section 124-A 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. Affection cannot be manufactured or regulated by law.

If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite violence... I have no personal ill will against any administrator; much less can I have any disaffection towards the King’s person. But I hold it to be a virtue to be disaffected towards a government which in its totality had done more harm to India than any previous system.”

The Constituent Assembly Debates

The debate instituted in the constituent assembly regarding the need for this law in the post-independence democratic India. K.M. Munshi, T.T Krishnamachari strongly advocated against this colonial law and its redundancy in the post-colonial era. The argument was that the continuation of this draconian law, which was used to stifle the dissent by the colonial government would hinder the freedom of speech and expression and therefore finds no relevance in the post-independence India. A noteworthy objection to the incorporation of sedition as an exception to the freedom of speech and expression was levelled by Sardar Hukum Singh who demurred granting sweeping protection to any law that the Parliament may legislate upon, by doing so, the courts in India would be handicapped from striking down a wayward law for violating the right to the freedom of speech and expression in future.

Sardar Vallabhbhai Patel, C Rajagopalachari who initially were the proponents of the idea of removal of sedition law, felt a need of this law as our fledgeling nation was at a very nascent stage post-independence and hence very prone to destabilising attempts by the separatist forces acting in the different parts of the country. The initial debate was to keep sedition under Article 19(2) as a constitutional limit to fundamental right, however, following a concerted and spirited discussion a common ground was reached following the spirited debate and sedition was not kept under article 19 as a reasonable restriction.

Saying that issue ended here would be specious because law still persisted in IPC which in turn actually made both the laws stand contradictory to each other.

During 1950 the judgements of two very crucial cases came up: Brijbhushan vs State of Punjab and State of Madras vs Romesh Thapar. Both the cases had a publication accused of publishing seditious columns in their newspaper. The first one was a right-wing RSS Mouthpiece. The second one was “Crossroads”, a left-wing communist publication from Bombay by Romesh Thapar. The State governments East Punjab and Madras, invoking the clause of public order as a restriction on fundamental right, restricted the circulation of publication in East Punjab and Madras respectively because of the incendiary columns which had an

6 Brij Bhushan and Anr. v. State of Delhi, 950 AIR 129
7 Romesh Thapar v. State of Madras, 1950 AIR 124

PIF 6.242 www.supremoamicus.org
alleged tendency to disrupt public order. The court held that Public Order was not a constitutional restriction under Article 19(2) on freedom of speech and as the public order acts of the State Government were invoked here, the Court found no correlation between freedom of expression and public order and observed that free political discussion is at the heart of democracy and hence struck down the section 9 of Madras act and section 7 of East Punjab act. Following this, the central government came together and moved the first amendment with a retrospective effect which abridged the previously existing lacunae in the correlation of sedition and public order by adding the word “Public Order” as a reasonable restriction under article 19 which indirectly made sedition a restriction on freedom of speech. Following the amendment, public order was made a reasonable restriction as well as a ground for sedition. But the judiciary didn’t seem to be on same page with the Government. In Tara Singh vs The State8, the Supreme Court held that sedition is a colonial law which cannot stay muster under our new constitution and stuck down. Patna high court held a different view from SC Judgement in Romesh Thapar v State of Madras stating that it was not a good law anymore because public order was now added as a reasonable restriction. Manipur High court held that its good until it does not lead to violence. 

Full bench of Punjab High Court struck down the sedition and same was done by Allahabad High Court and there was a lot of kerfuffle and ambiguity following a conflicting stand by different high courts. The stage was now set for the final showdown of Kedarnath Singh vs State of Bihar but two years before the Kedarnath case, in 1960 came a very crucial case of Ram Manohar lohia v superintendent Central prison, Fatehgarh in which court held a very liberal and a commendable interpretation. Ram Manohar lohia was making speeches asking people not to pay taxes to the government the petitioner argued that the speeches made by Ram Manohar lohia had a tendency to disrupt public order which was a reasonable restriction under article 19(2). The court held that only proximate cause to the disruption of public order would be considered as a ground for sedition a farfetched or a remote cause would be not considered for invoking sedition. The court iterated that asking people to not pay taxes is the exercise of his fundamental right and rhat he is free to express propagate and advocate his thought. And finally, came the case of Kedarnath Singh vs State of Bihar9 in which the Supreme Court upheld the constitutional validity of the case but with certain caveats that the cases which attempt to subvert the government established by law would be penalized as they jeopardise the very existence of the State. The court held that any speech or writing which incites violence would be held under sedition.

In 1995, with the case of Balwant Singh vs State of Punjab where a person raised slogans “Khalistan zindabad!” in a cinema hall on the day when Indira Gandhi was assassinated, the Supreme court in the case held that a casual sloganeering once or twice would not tantamount to incitement of violence and hence acquitted Balwant Singh.

8 Tara Singh v. State, AIR 1951 SC 441.

9 Kedar Nath Singh vs State Of Bihar,1962 AIR 955
The free speech test was laid down in United States of America in the Brandenburg v. Ohio (1969) case which held that an expression must be penalised only if there is the incitement of an illegal action is imminent. It emphasises on the principle of proximity of violence which was later reiterated in India by Justice R.F. Nariman in the Shreya singhal vs Union of India case in 2015.

**NATIONALISM AND ANTI NATIONALISM NOTION AND FREEDOM OF EXPRESSION**

We should rather owe our allegiance to a principle than a commitment to the state. Let us not secede the ground to any citizen to decide who has the right to decide whether one is national or an antinational. The problem with the polarised debate on nationalism is that it creates an idealisation where there is kind of wounded narcissism whenever criticised. As said by Prof. Upendra Baxi, Moral vigilantism finds no room in the modern democracy one needs to understand the distinction between constitutional and statist nationalism.

In the present scenario of globalisation and internationalism, the definition of nationalism has become parochial. The word nationalism was much relevant in the 18th and 19th century where the countries were discrete. The idea of nationalism became more extreme during the second world war with the evolution of of Fascism and Nazism. But gradually this nationalism has metamorphosised evolved into present day jingoism and the popularism. In present day it has become more of revivalism.

In the present time sloganeering and flag raising have become touchstone for nationalism. In a society different people will be holding different views and respecting this diversity in opinions and thoughts is the very essential of democracy.

History has been evident that dissenting has been pivotal in evolution of society. What may seem inconceivable or ambitious at this moment can be the future.

Just for reference in the field of Jurisprudence John Austin and Austinian theory of legal positivism was considered infallible by his proponents earlier and that was considered as the bible of jurisprudence. But gradually, it was the dissenting opinions, arguments and perspectives raised by the likes of Salmond, Hall and others that opened the floodgate for debates and various schools of jurisprudence emerged.

Dissenting is the gateway to the unfathomed and unimagined state of affairs and well being. It is questioning of the previously unquestioned tenets and assumption which leads to alteration of social norms. Let the people have different opinion because everyone in their own distinct way sees and aspires their India.

And I would like to quote the law commission’s consultation of 2018 that said “In a democracy, singing from the same songbook is not a benchmark of patriotism”. Freedom of speech and expression and all other rights are not something that is bestowed to us by the government but those are the rights which we as a citizen of this democracy have inherited from our founding fathers. The edifice of modern-day democracy stands on the substratum of freedom of thoughts and rather than stifling them the government should encourage multifarious thoughts and set aside its vanity and listen to the arguments raised by the citizen as it would of mutual benefit both to the government and to the citizen because
then a citizen would have a feeling that the Government is there to listen to their demands and thoughts. Freedom of expression acts as a safety valve and smothering it could have deleterious effect on the citizen-government harmony.

In LIC vs Manubhai shah court said “freedom of speech and expression is lifeline of any democracy and stifling this would sound a death knell to the democracy and usher in autocracy”. A democratic State as a “school provides its “students” (citizens) with a canvas which provides space to the them to bring out their imagination and this diversity in ideas and opinion is what constitutes the essence of democracy.

ISSUES WITH THE LAW OF SEDITION

STIGMA ATTACHED TO SEDITION

Sedition is among the most serious charges in India. It rests in chapter six of the Indian Penal Code. Generally, being invoked along with the cases of terrorism, the most notable being the Samjhauta express blast case. It is seen more as an axillary of terrorism. Hence it creates a stigma in the society against the accused. A person charged with sedition is dubbed as an antinational. The accused may be a nationalist and even more than the ones by whom he/she judged but just by the virtue of charges levelled against him he is frowned upon and has to face ostracization in the society. A man is by nature a social animal and no matter how much liberal or mentally strong he becomes, the stigma which attaches itself with the case can have deep rooted and lasting psychological and emotional impact. The irony is what earlier was considered a patriotism is now considered “deshdroh”. and hence the trial is itself is a punishment!

JUDICIAL TRIAL

The most significant shortcoming in this law is that the accused is considered guilty until proven innocent. Sedition, earlier a bailable offence was made non bailable offence during the emergency days in 1974 during times of emergency and hence, a person charged have to wait for the trial in the country where judicial backlog is a daunting issue in itself and generally, as per the data of NCRB the majority population charged under this provision is a youth and in the age group of 18-30, ergo at the golden period of their life. He/she has to bear to the brunt of judicial delay. And even in this group most of the accused are the students pursuing their graduation or post-graduation in the Universities.

The Universities, which are considered a haven where a student has the right to express his views openly and freely without any fear of being charged under this draconian law

The misuse of this law would have chilling effect on freedom of speech and expression. The government must understand that opinions and thoughts are like tinted glass everyone wears a different one what may seem blue to government might be red for someone else. Just because the view is different from them doesn’t make that view wrong. The government must get rid of this philosophical insularity and have a wider and inclusive outlook towards differing thoughts and speech

The foremost step that can be taken is decriminalising any form of dissent making and making any speech offence automatically bailable Being charged under such a serious offence the accused youth misses the golden period of his life owing to sluggish case proceedings. It must be remembered that law is made to empower its citizen not to weaken them.
The present-day definition of sedition that exist in IPC is the old definition, i.e., the definition of 1898. The definition has been trimmed down through various judicial decision in the following years through many interpretations and judgements by the Supreme court. But apparently the issue seems to be that the administrative authorities at some level are failing to interpret the law. A solution could be a sensitization drive under the tutelage of High Courts of that state and edifying the police personnel on what should be the yardstick for arresting someone accused of seditious action or comment; a basic and proper investigation should be done at a ground level before arresting someone. Another solution could be to establish high level a committee headed by retired supreme court judges to prima facie review the cases of sedition which would atleast absolve the accused if he/she has been wrongfully accused.

**TOOL TO MUZZLE**

Sedition law is being used as a tool to put down dissent. The actual problem is that the government is not worried whether the accused is convicted or not. Instead, it is used as a tranquiliser to suppress the dissent ad interim. And the sad reality that many of these cases do not lead to conviction reflects in the data of NCRB: “Between 2016 and 2019, the number of cases filed under Section 124-A (sedition) of the Indian Penal Code (IPC) shot up by 160% while the rate of conviction dropped to 3.3% in 2019 from 33.3% in 2016”.

Out of 96 citizen arrested so far only 2 have been convicted which reflects the sorry state of affairs in the country.

One must not forget that sedition is a very grave offence it is kept in same chapters for crimes against state which include grave offences to the likes of waging war against a state and supplying arms against state such is the degree of harshness against this law that its punishment is life imprisonment! If such high is the gravity of this offence, then the tools for adjudging should be very refined but sadly it’s not the reality.

**FINAL VERDICT**

Making a black and white remark on whether this law is a bane or boon would specious as a law cannot be simply categorised as a boon or a bane. The problem is with implementation of this law. Repealing this law altogether would not be a wise step we can’t take example of western countries as there exists a yawning gap between the historical, social and cultural setup in India and the western countries. In western countries there may be dissenting voices against policies but in India the threat is to some extent from Inside. with the Naxalites forces in Chhattisgarh, NSCN Militants in North east region and the Kashmiri militants in the Kashmir valley we can’t take blinding decisions in these sensitive matters. In these cases, we have to balance the national interest along with the rights ensured to the citizen. But the apparatus for balancing is in the process of being eroded.

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10 The Economic Times, 17 February, 2021 *Arrests under sedition charges rise but conviction falls to 3%,* available at https://economictimes.indiatimes.com/news/politic
hands of the government which must ensure that it stands true to the power and responsibility it is entrusted with and for this judiciary has a major role to play

Misuse of this law can’t be a reason to totally repeal this law as there are false rape cases in India, false dowry case but that does not mean we bring down those laws completely every law has a particular function to fulfil in a society and in the rendering of this function judiciary must ensure that the motive of the government is not adulterated.