

AN ANALYSIS OF THE MODERN OFFENCE OF SEDITION

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*Of all the laws that were inherited from the colonial regime in India, few have been as controversial as those related to seditious offences. Since independence, the law has been modified and interpreted to incorporate safeguards so it may withstand constitutional scrutiny. However, it still acts as an effective means to restrict free speech, and has been used by contemporary governments for reasons that are arguably similar to those of our former oppressive rulers. In this paper, we make a case in favour of repealing the law of sedition. Through an examination of how the law has been interpreted and applied by the courts even after it was read down in *Kedar Nath v. Union of India*, it is argued that it is indeterminate and vague by its very nature and cannot be applied uniformly. Further, the law was enacted by a colonial autocratic regime for a specific purpose, which cannot extend to a post-independence democratically elected government. An analysis of the cases of sedition before the High Courts and Supreme Court show that the offence of sedition is increasingly becoming obsolete. Problems of public order, which the law purportedly addresses, may instead be addressed through other laws that have been enacted for that specific purpose.*

I. INTRODUCTION

The law relating to the offence of sedition was first introduced in colonial India through Clause 113 of the Draft Indian Penal Code ('Draft Penal Code'), proposed by Thomas Babington Macaulay in 1837.¹ However, when the Indian Penal Code ('IPC') was finally enacted after a period of 20 years in 1860, the said section pertaining to sedition had inexplicably been omitted. Although Sir James Fitzjames Stephen, architect of the Indian Evidence Act, 1872, and the Law Secretary to the Government of India at the time, attributed the omission to an 'unaccountable mistake',² various other explanations for the omission have been given. Some believe that the British government wanted

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¹ ARVIND GANACHARI, EVOLUTION OF THE LAW OF "SEDITION" IN THE CONTEXT OF THE INDIAN FREEDOM STRUGGLE IN NATIONALISM AND SOCIAL REFORM IN A COLONIAL SITUATION 54 (2005).

² Walter Russel Donogh, *A treatise on the law of sedition and cognate offences in British India*, available at <http://archive.org/stream/onlawofsedition00dono#page/n23/mode/2up> (Last visited on March 10, 2014).

to endorse more comprehensive and powerful strategies against the press such as the institution of a deposit forfeiture system along with more preventive and regulatory measures.³ Others proffered that the omission was to be primarily attributed to the existence of §§121 and 121A of the IPC, 1860.⁴ It was assumed that seditious proceedings of all kinds were to be subject to official scrutiny within the ambit of these sections.

The immediate necessity of amending the law, in order to allow the government to deal more efficiently with seditious activities was first recognised by the British in light of increased Wahabi activities in the period leading up to 1870.⁵ With increasing incidents of mutinous activities against the British, the need to make sedition a substantive offence was widely acknowledged, and the insertion of a section pertaining specifically to seditious rebellion was considered exigent. It was the recognition of this rising wave of nationalism at the turn of the 20th century which led to the bill containing the law of sedition finally being passed. The offence of sedition was incorporated under §124A of the IPC on November 25, 1870, and continued without modification till February 18, 1898.⁶

The amended legislation of 1870 was roughly structured around the law prevailing in England insofar as it drew heavily from the Treason Felony Act, the common law with regard to seditious libels and the law relating to seditious words. The Treason Felony Act,⁷ extensively regarded as one of the

³ R. DHAVAN, *ONLY THE GOOD NEWS: ON THE LAW OF THE PRESS IN INDIA* 285-87 (1987).

⁴ These sections dealt with “waging war against the government” and “abetting to wage a war” respectively. See Edmund C. Cox, *Police and Crime in India* 86-7 available at <http://archive.org/stream/policecrimeinind00coxeich#page/86/mode/2up> (Last visited on March 10, 2014).

⁵ Ganachari, *supra* note 1; See generally, R. SAMMADAR, *EMERGENCE OF THE POLITICAL SUBJECT* 45 (2010) (The Wahabis have been described as an extensive network of rebels who principally participated in the First War of Indian Independence in 1857. They followed a well-organised model of mass preaching, mostly concentrating on political and religious issues to win the support of the people); See also NARAHARI KAVIRAJ, *WAHABI AND FARAZI REBELS OF BENGAL* 72 (1982).

⁶ The Indian Penal Code, 1898, §124-A (read as follows:

“Whosoever, by words, either spoken or intended to be read or by signs or by visible representations or otherwise excite or attempts to excite feelings of disaffection to the Government established by Law in British India, shall be punishable with transportation of life ... to three years to which fine may be added.”);

See also Donogh, *supra* note 2, 9.

⁷ The Treason-Felony Act, 1848, §3 (It states:

“If any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our Most Gracious Lady the Queen, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty’s dominions and countries, or to levy war against her Majesty, within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of

defining Acts of the English law pertaining to treason, imposed liability on all those who harboured feelings of disloyalty towards the Queen. Any thought connoting unfaithfulness or treachery towards the Crown, coupled with the presence of an overt act, *i.e.*, an act from which an apparent criminal intention could be inferred, was subject to punishment within the ambit of this legislation.

After the initiation of the law of sedition in 1870, it was allowed to remain in force, unaltered, for a period of 27 years. Throughout this period, one of the primary objectives of the British Government was to strengthen this law. Therefore, it ultimately approved the enactment of two cognate laws: the Dramatic Performances Act XIX of 1876 ('DPA') and the Vernacular Press Act (IX) of 1878. These Acts came to be popularly referred to as 'preventive measures'.⁸ While the former law was primarily introduced to keep a check on seditious activities in plays,⁹ the latter was formulated to actively suppress criticism against British policies and decisions in the wake of the Deccan Agricultural riots of 1875-76.¹⁰

Since it came into operation in 1870, the law of sedition has continued to be used to stifle voices of protest, dissent or criticism of the government. While the indeterminate invoking of the provision has put it in the media spotlight, there has been very little academic discussion with respect to the nature of the law and its possible repeal.

The punishment for seditious offences is known to be especially harsh compared to other offences in the IPC. It is a cognisable, non-bailable and non-compoundable offence that can be tried by a court of sessions.¹¹ It may attract a prison term of up to seven years if one is found guilty of com-

her Majesty's dominions or countries under the obeisance of her Majesty, and such compassing, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable ... to be transported beyond the seas for the term of his or her natural life.");

See also Donogh, *supra* note 2, 4.

⁸ Ganachari, *supra* note 1, 57.

⁹ See Ganachari, *supra* note 1, 58 (The institution of the Dramatic Performances Act of 1876 was prompted by the allegedly seditious nature of the two plays – *Cha Ka Darpan* in Marathi and *Maharraoche Natak* in Bengali. It was in acknowledgement of the provocative nature of these plays that Mr Hobhouse, while introducing the Act, observed that "drama has been found to be one of the strongest stimulants that can be applied to the passions of men. And in times of excitement no surer mode has been found of directing public feeling against an individual, a class or a government than to bring them on stage in an odious light").

¹⁰ See Arvind Ganachari, *Combating Terror of Law in Colonial India: The Law of Sedition and the Nationalist Response* in ENGAGING TERROR: A CRITICAL AND INTERDISCIPLINARY APPROACH 98 (2008) (This Act aimed to establish control over the editors and publishers of vernaculars and periodical magazines published in native languages. This it sought to do through the development of a system of personal security).

¹¹ The Code of Criminal Procedure, 1973, Schedule I.

mitting seditious acts.¹² It is very difficult for a person accused of sedition to get bail.¹³ The highly subjective nature of the offence makes it necessary that courts determine on a case-to-case basis if any threat is caused to the stability of the State or its democratic order. Leaving such a determination to legislative or executive fiat only enables a repressive government to undermine the free speech guarantee.¹⁴

In this paper, we attempt to make a case for scrapping the provision for sedition in the IPC and any other laws making seditious acts an offence. In Part II, we examine the judicial application of the law of sedition in India since the colonial era to highlight their vagueness and the non-uniform way in which it has been applied. In Part III, we discuss the findings of the court in *Kedar Nath v. State of Bihar*¹⁵ ('Kedar Nath'), which upheld the constitutional validity of §124A, and demonstrate that the law has evolved considerably since then. In Part IV, we analyse two specific aspects of the offence of sedition: the nature of the 'government established by law' and the effect of the shift to a democratic form of government post independence. In Part V, we undertake an analysis of all sedition cases that have come before the high courts and the Supreme Court of India between 2000 and 2015. We will draw from the English experience with the crime of sedition, explaining why it should find no place in a modern democracy. Finally, in Part VI, we provide some concluding remarks to our discussion.

II. THE JUDICIAL INTERPRETATION OF 'DISAFFECTION' IS PLAGUED BY VAGUENESS AND NON-UNIFORMITY

A. THE ORIGINS OF SEDITION LAW

In the 13th century, the rulers in England viewed the printing press as a threat to their sovereignty.¹⁶ The widespread use of the printing press thus prompted a series of measures to control the press and the dissemination of information in the latter half of the century.¹⁷ These measures may broadly be categorised as the collection of acts concerning *Scandalum Magnatum* and the offence of Treason. While the former addressed the act of speaking ill of the King, the latter was a more direct offence "against the person or government of the King".¹⁸

¹² The Indian Penal Code, 1898, §124-A.

¹³ See PSA PILLAI, CRIMINAL LAW 1131 (K.I. Vibhute eds., 2009).

¹⁴ Barendt, *infra* note 160.

¹⁵ *Kedar Nath v. State of Bihar*, AIR 1962 SC 955.

¹⁶ William T. Mayton, *Seditious Libel and a Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 92 (1984).

¹⁷ *Id.*, 94.

¹⁸ *Id.*

The first category of offences, classified as acts concerning *Scandalum Magnatum*, were a series of statutes enacted in 1275 and later.¹⁹ These created a statutory offence of defamation, which made it illegal to concoct or disseminate ‘false news’ (either written or spoken) about the king or the magnates of the realm.²⁰ However, its application was limited to the extent that the information had to necessarily be a representation of facts as the truth.²¹ Thus, truth was a valid defence to the act.²²

The second category of offences was that of treason, subsequently interpreted as constructive treason. Essentially, treason was an offence against the State.²³ It was understood that all the subjects of the rulers owed a duty of loyalty to the king.²⁴ Thus, if any person committed an act detrimental to the interests of the rulers, they would be guilty of the offence of treason. Initially, the offence required that an *overt* act be committed to qualify as treason.²⁵ However, by the 14th century, the scope of the offence was expanded through legislation and judicial pronouncements to include even speech in its ambit.²⁶ This modified offence was known as constructive treason.

Despite the existence of the aforementioned categories of offences, the rulers faced many hurdles in curbing the expression of undesirable opinions about them. While the ‘expression of fact’ and truth acted as defences to the offence of *Scandalum Magnatum*, the offence of treason also had various safeguards. Only common law courts had jurisdiction over the offence.²⁷ Further, it necessitated a procedure wherein one would have to secure an indictment for the accused before they faced a trial by the jury.²⁸ Initially, the overt act requirement also acted as a complication while trying to secure convictions. However, with the expansion in the scope of the crime to include speech, this defence became unavailable. To overcome these procedural and substantive difficulties, the offence of seditious libel was literally invented in the court of the Star Chamber.²⁹

¹⁹ Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 668 (1985).

²⁰ *Id.*, 669.

²¹ *Id.*

²² *Id.*

²³ Mayton, *supra* note 16.

²⁴ MATHEW HALE & GEORGE WILSON THOMAS, *THE HISTORY OF THE PLEAS OF THE CROWN*, Vol. 1 59 (1st edn., 1800) (“[A]s the subject hath his protection from the King and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the King”).

²⁵ Mayton, *supra* note 16, 105.

²⁶ *Id.*

²⁷ *Id.*, 122.

²⁸ *Id.*, 125.

²⁹ *Id.* (These courts were akin to administrative tribunals in the service of the Crown. Its members were often part of the King’s council and would serve at the King’s pleasure. This court was not subject to the same procedural rigours as the common law courts. Its proceedings were inquisitorial in nature and were intended to secure efficacious prosecutions for various offences).

The offence of seditious libel was first devised in the Star Chamber decision in *de Libellis Famosis*.³⁰ In this case, the defendants had confessed to ridiculing some clergymen of high status. While drawing from the common law private offence of libel, the court eschewed the requirements thereof. Instead, it condemned the criticism of public officials and the government and stressed that any criticism directed at them would inculcate disrespect for public authority.³¹ Since the goal of this new offence was to cultivate respect for the government in power, truth was not considered a defence.³² It also evaded the various safeguards of the offences of Treason and *Scandalum Magnatum* that it was modelled on. This judgment cited no precedent, as there was none. Previously, ‘libels’ were purely private actions for damages.

Henceforth, the offence of seditious libel was used as a ruthless tool for the curbing of any speech detrimental to the government.³³ Over the course of many cases, it came to mean slander or libel upon the reputations and/or actions, public or private, of public officials, magistrates and prelates, which sought to divide and alienate “the *presente* governors” from “the *sounde* and well affected *parte* of the *subjects*”.³⁴ If the speech published was true, the offence was only aggravated as it was considered more likely to cause a breach of the peace.³⁵

By the 18th century, the crime of seditious libel was viewed as a harsh and unjust law that was used by the ruling classes to trample any criticism of the Crown.³⁶ However, given its utility, it was seen as a convenient tool in the hands of the rulers. Thus, when a penal code was being drafted for colonial India, where the rulers had the task of suppressing opposition, it was only obvious that seditious libel would be imported into the territory of India.

³⁰ *Id.*, 125.

³¹ *Id.*

³² *Id.*

³³ One such infamous case is Fourde’s case (1604). Anticipating that an injunction that would be passed against him in the Court of Chancery would bring ruin upon his family, Fourde petitioned the King to stay the injunction. King James I sent a message to the Lord Chancellor asking him to stay the injunction. Fourde then presented a second petition before the King suggesting “that the question now was whether the commandment of the king or the order of the Chancellor should take effect”. He was charged with sedition before the Court of Star Chamber for “sowing sedition between the King and his Peers.” He was sentenced to undergo every sentence that the Court of Star Chamber was empowered to give: placards proclaiming his slander of magistrates and justice, riding with his face to the horse’s tail, the pillory, loss of his ears, a fine of £1100 and perpetual imprisonment. One of the judges, Thomas Cecil, second Lord Burghley pronounced: “Let all men hereby take heede how they complayne in words againste any magistrate, for they are gods..”

³⁴ Roger B. Manning, *The Origins of the Doctrine of Sedition*, 12(2) ALBION 99 (Summer 1980).

³⁵ *Id.*

³⁶ *Id.*, 675.

B. DEFINING 'DISAFFECTION' UNDER THE COLONIAL REGIME

The law of sedition that was introduced in India, despite being partly deduced from the provisions of the Treason Felony Act, was less severe and yet more precise. Sir James Stephen, while introducing the amendment, justified its inclusion in the Act by asserting that it was "free from a great amount of vagueness and obscurity with which the Law of England was hampered."³⁷ However, when this provision came to be interpreted by the Indian courts, there was great uncertainty as to the precise definition of the term 'disaffection'. This was sought to be resolved in various cases, which will be discussed in this part of the paper.

The first recorded state trial for sedition is that of *Queen Empress v. Jogendra Chunder Bose*³⁸ ('Jogendra Bose'). The Court, in its much debated judgment, laid down the distinction between 'disaffection' and 'disapprobation'. Disaffection was defined as the use of spoken or written words to create a disposition in the minds of those to whom the words were addressed, not to obey the lawful authority of the government, or to resist that authority.³⁹ It was also observed that:

"It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with an intention to create such feeling."⁴⁰

Another significant case which had a direct bearing on the 1898 amendment was that of *Queen Empress v. Bal Gangadhar Tilak*⁴¹ ('Tilak'). Allegations of sedition against Bal Gangadhar Tilak were first forwarded when the magazine *Kesari* published detailed reports of the proceedings that had taken place at the Shivaji Coronation Festival, during the celebration of which several patriotic lectures and speeches were delivered. It was alleged that these speeches made references to Shivaji's call for *Swarajya* (independence) and alluded to the trials of the people under the British rule.⁴² Although the Coronation

³⁷ Donogh, *supra* note 2, 5.

³⁸ *Queen Empress v. Jogendra Chunder Bose*, ILR (1892) 19 Cal 35.

³⁹ *Id.*, 40-42.

⁴⁰ *Id.*, 45 (This expression is an example of how the law was a direct import from the English case law of the time and is noteworthy insofar as it became the basis for the 1898 amendment to the legislation. Eventually, the accused himself tendered an apology and all proceedings against him were dropped).

⁴¹ *Queen Empress v. Bal Gangadhar Tilak*, ILR (1898) 22 Bom 112.

⁴² Ganachari, *supra* note 10, 60; See also Siddharth Narrain, "Disaffection" and the Law: The Chilling Effect of Sedition Laws in India, XLVI (8) EPW 34 (2011) (The allegedly seditious report comprised of two sets of publications. The first was a metaphorical poem entitled

Ceremony in itself was peaceful, the weeks following the publication of the report on June 15, 1897, saw the murder of two eminent British officials.⁴³

In perhaps one of the most comprehensive expositions of the law in colonial India, the Court, transcending the arguments from both sides, interpreted §124A mainly as exciting ‘feelings of disaffection’ towards the government, which covered within its ambit sentiments such as hatred, enmity, dislike, hostility, contempt, and all forms of ill-will. It expanded the scope of the offence by holding that it was not the gravity of the action or the intensity of disaffection, but the presence of *feelings* that was paramount⁴⁴ and mere attempt to excite such feelings was sufficient to constitute an offence.⁴⁵

The meaning of ‘disaffection’ and ‘disapprobation’ was further clarified by the court in *Queen Empress v. Ramchandra Narayan*⁴⁶ in which accusations against the editor and proprietor of the *Pratod* newspaper for publishing an article entitled “Preparation for Becoming Independent”. The Court did not agree with the notion that ‘disaffection’ was necessarily the opposite of affection, but it advocated that an attempt to excite disaffection amongst the masses was to be construed as an attempt to “excite political discontent and alienation from their allegiance to a foreign sovereign.”⁴⁷ In *Queen Empress v. Amba Prasad*,⁴⁸ the Court, however, held that even in cases of ‘disapprobation’ of the measures of the government, if it can be deduced from a “fair and impartial consideration of what was spoken or written”, that the intention of the accused was to excite feelings of disaffection towards the government and therefore it could be considered a seditious act.⁴⁹ Thus ‘disaffection’ would include the “absence” or “negation” of affection as well as a “positive feeling of aversion” towards the government.⁵⁰

“Shivaji’s utterances”. It was asserted that strong symbolic parallels could be drawn from the poem insofar as it linked Shivaji’s attempt to attain “*swarajya*” with the Indian struggle for independence. The second was a compilation of speeches delivered at the Shivaji coronation ceremony. It was believed that these speeches, by referring to the killing of Afzal Khan by Shivaji, sought to justify acts of political assassination and were directly responsible for the murder of Commissioner Rand and Lieutenant Ayherst, both of whom were killed within a week of publication).

⁴³ See Ganachari, *supra* note 10, 60 (The legal proceedings against Tilak were precipitated by the pressure which the Imperialist Anglo-Indian press put on the Government. Leading newspapers of the era, such as the Times of India and the Bombay Gazette, laid accusations of sedition against Tilak and urged the Crown to bring him to trial under §124-A).

⁴⁴ Janaki Bakhle, *Savarkar (1983-1966), Sedition and Surveillance: the rule of law in a colonial situation*, February 12, 2010, available at <http://www.scribd.com/doc/94493285/Bakhle-Sedition-and-Savarkar> (Last visited on March 10, 2014).

⁴⁵ *Id.*

⁴⁶ *Queen Empress v. Ramchandra Narayan*, ILR (1898) 22 Bom 152.

⁴⁷ *Id.*, Ganachari, *supra* note 10, 62.

⁴⁸ *Queen Empress v. Amba Prasad*, ILR (1898) 20 All 55.

⁴⁹ *Id.*

⁵⁰ *Id.*

A conflict arose when the Federal Court of India, the highest judicial body of the country till the establishment of the Supreme Court, overturned the conviction of Majumdar in *Niharendu Dutt Majumdar v. King Emperor*⁵¹ ('Niharendu Majumdar'). Charges of sedition had first been pressed against Majumdar on account of him allegedly delivering violent and provocative speeches in the Bengal legislative assembly highlighting the inefficiency of the State Government to maintain law and order in the aftermath of the Dacca riots.⁵² Sir Maurice Gwyer, Chief Justice of the Federal Court at the time, held that the mere presence of violent words does not make a speech or publication seditious. Instead, he was of the belief that in order to be brought under the ambit of sedition, "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."⁵³

Subsequently, the soundness of the decision given by the Federal Court in *Niharendu Majumdar* came to be discussed in great detail in *King Emperor v. Sadashiv Narayan Bhalerao*⁵⁴ ('Sadashiv Bhalerao'). This case, pertaining to the publication and distribution of leaflets containing prejudicial reports, was heard before the Privy Council. The Judicial Committee of the Privy Council opined that *Niharendu Majumdar* was decided on the basis of a wrongful construction of §124A. In acknowledgement of the model of literal interpretation followed by Strachey, J., in *Tilak case*,⁵⁵ it asserted that the view proposing the imposition of the offence of sedition only on the basis of suggesting rebellion or forcible resistance to the government was inadmissible.⁵⁶

C. OPPOSITION IN THE CONSTITUENT ASSEMBLY

At the time of the Indian movement for independence from British rule, the law of sedition was applied against great nationalists, such as Annie Besant, Bal Gangadhar Tilak and Mahatma Gandhi, as a tool to curb dissent. Keeping such excesses in mind, the Freedom of Speech and Expression was originally encompassed in Article 13 of the Draft Constitution. In its original form, this provision guaranteed this right subject to restrictions imposed by Federal Law to protect aboriginal tribes and backward classes and to preserve public safety and peace.⁵⁷

⁵¹ *Niharendu Dutt Majumdar v. King Emperor*, AIR 1942 FC 22.

⁵² *Id.*

⁵³ *Id.*, See also Narrain, *supra* note 42.

⁵⁴ *King Emperor v. Sadashiv Narayan Bhalerao*, (1947) LR 74 IA 89.

⁵⁵ Where he had stated that such an interpretation would be "absolutely opposed to the express words of the section itself, which as plainly as possible, made the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt."

⁵⁶ *King Emperor v. Sadashiv Narayan Bhalerao*, [1947] L.R. 74 I.A. 89.

⁵⁷ CONSTITUTIONAL ASSEMBLY DEBATES, December 7, 1948, *speech by DAMODAR SWARUP SETH 17* available at <http://164.100.47.132/LssNew/constituent/vol7p21.pdf> (Last visited on March 10,

A proposal for an amendment to this provision was moved in the Constituent Assembly to permit the imposition of limitations on this right on the grounds of “libel, slander, defamation, offences against decency or morality or sedition or other matters which undermine the security of the State.”⁵⁸ However, in light of the biased nature of judicial pronouncements pertaining to cases of sedition in India, along with a precipitous rise in the abuse of sedition law to incarcerate nationalists, the final drafters of the Constitution felt the need to exclude sedition from the exceptions to the right to freedom of speech and expression.⁵⁹

A prominent objection to the inclusion of sedition as an exception to the freedom of speech and expression was raised by Sardar Hukum Singh, who noted that in the United States of America, any law that limited a fundamental right is mandatorily subjected to judicial scrutiny and must be deemed constitutional. However, by granting a blanket protection to any sedition law that the Parliament may legislate upon, the courts in India would be incapacitated from striking down an errant law for violating the right to the freedom of speech and expression.⁶⁰ He also criticised the validation of laws on the ground that they were “in the interest of public order” or undermined the “authority or foundation of the state” as classifications that were too vague.⁶¹

There was a clear consensus among the members of the Constituent Assembly on the oppressive nature of sedition laws. They expressed their reluctance to include it as a ground for the restriction of the freedom of speech and expression. The term ‘sedition’ was thus dropped from the suggested amendment to Article 13 of the Draft Constitution.

2014).

⁵⁸ *Id.*

⁵⁹ Soli J. Sorabjee, *Confusion about Sedition*, August 12, 2012, available at <http://www.indianexpress.com/news/confusion-about-sedition/987140> (Last visited on March 10, 2014); See also Soli J Sorabjee, *Aseem Trivedi's cartoon's don't constitute sedition*, September 15, 2012, available at <http://newindianexpress.com/opinion/article607411.ece> (Last visited on March 10, 2014) (The most vocal opposition to such an inclusion came from the renowned activist and lawyer Dr. K.M. Munshi. To support his position, Dr. Munshi cited the wide divergence in the judicial interpretation of the term “sedition”. Further, he believed that public opinion with respect to sedition had evolved over the years, and taking cognizance of the changing nature of public opinion, a line needed to be drawn between constructive criticism of the Government which was crucial to address the grievances of the people, and an incitement to violence which would undermine security and disrupt public law and order).

⁶⁰ CONSTITUTIONAL ASSEMBLY DEBATES, December 7, 1948, *speech by S.H. SINGH* 16 available at <http://164.100.47.132/LssNew/constituent/vol7p21.pdf> (Last visited on March 10, 2014).

⁶¹ *Id.*

D. DEVELOPMENTS IN THE LAW POST-INDEPENDENCE

After India attained independence in 1947, the offence of sedition continued to remain in operation under §124A of the IPC.⁶² Even though sedition was expressly excluded by the Constituent Assembly as a ground for the limitation of the right to freedom of speech and expression, this right was still being curbed under the guise of this provision of the IPC. On three significant occasions, the constitutionality of this provision was challenged in the courts. These cases shaped the subsequent discourse in the law of sedition.

Following the decision in *Niharendu Majumdar*, §124A was struck down as unconstitutional in *Romesh Thappar v. State of Madras*,⁶³ *Ram Nandan v. State*,⁶⁴ and *Tara Singh v. State*⁶⁵ ('Tara Singh'). In *Tara Singh*, the East Punjab High Court relied on the principle that a restriction on a fundamental right shall fail *in toto* if the language restricting such a right is wide enough to cover instances falling both within and outside the limits of constitutionally permissible legislative action affecting such a right.⁶⁶

During the debates surrounding the first amendment to the Constitution, the then Prime Minister Jawaharlal Nehru was subjected to severe criticism by members of the opposition for the rampant curbs that were being placed on the freedom of speech and expression under his regime.⁶⁷ This criticism, accompanied by the rulings of the courts in the aforementioned judgments holding §124A to be unconstitutional, compelled Nehru to suggest an amendment to the Constitution.⁶⁸

⁶² The Indian Penal Code, 1860, §124A. ("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").

⁶³ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124.

⁶⁴ *Ram Nandan v. State*, AIR 1959 All 101.

⁶⁵ *Tara Singh v. State*, AIR 1951 SC 441.

⁶⁶ *Id.*

⁶⁷ Narrain, *supra* note 42.

⁶⁸ *Id.*

Thus, through the first amendment to the Constitution, the additional grounds of ‘public order’ and ‘relations with friendly states’ were added to the Article 19(2) list of permissible restrictions on the freedom of speech and expression guaranteed under Article 19(1)(a).⁶⁹ Further, the word ‘reasonable’ was added before ‘restrictions’ to limit the possibility of misuse by the government.⁷⁰ In the parliamentary debates, Nehru stated that the intent behind the amendment was not the validation of laws like sedition. He described §124A as ‘objectionable and obnoxious’⁷¹ and opined that it did not deserve a place in the scheme of the IPC.

III. KEDAR NATH AND THE MODERN DEFINITION OF SEDITION

As stated earlier, the decision of the Supreme Court in Kedar Nath laid down the interpretation of the law of sedition as it is understood today. In this decision, five appeals to the Apex Court were clubbed together to decide the issue of the constitutionality of §124A of the IPC in light of Article 19(1)(a) of the Constitution. In the Court’s interpretation the incitement to violence was considered an essential ingredient of the offence of sedition.⁷² Here, the court followed the interpretation given by the Federal Court in Niharendu Majumdar. Thus, the crime of sedition was established as a crime against public tranquility⁷³ as opposed to a political crime affecting the very basis of the State.

The Court looked at the pre-legislative history and the opposition in the Constituent Assembly debates around Article 19 of the Constitution. Here, it noted that sedition had specifically been excluded as a valid ground to limit the freedom of speech and expression even though it was included in the draft Constitution.⁷⁴ This was indicative of a legislative intent that sedition not be considered a valid exception to this freedom.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See PILLAI, *supra* note 13, 482.

⁷³ See *REX v. Aldred*, (1909) 22 Cox CC 1.

⁷⁴ *Kedar Nath v. State of Bihar*, AIR 1962 SC 955, ¶30; See also *Romesh Thappar v. Madras*, AIR 1950 SC 124 (*per* Sastri, J.:

“Deletion of the word ‘sedition’ from draft Art. 13(2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State.”

Further, the court also observed that the Irish formula of “undermining the public order or the authority of the State” as a standard to impose limits on the freedom of speech and expression had not found favour with the drafters of the Constitution).

⁷⁵ *Kedar Nath v. Union of India*, AIR 1962 SC 955, ¶29.

As a consequence, sedition could only fall within the purview of constitutional validity if it could be read into any of the six grounds listed in Article 19(2) of the Constitution.⁷⁶ Out of the six grounds in Article 19(2), the Court considered the ‘security of the state’ as a possible ground to support the constitutionality of §124A of the IPC.⁷⁷ The Court made use of the principle that when more than one interpretation may be given to a legal provision, it must uphold that interpretation which makes the provision constitutional.⁷⁸ Any interpretation that makes a provision *ultra vires* the Constitution must be rejected. Thus, even though a plain reading of the section does not suggest such a requirement, it was held to be mandatory that any seditious act must be accompanied by an attempt to incite violence and disorder.⁷⁹

However, the fact that the aforementioned Irish formula of “undermining the public order or the authority of the State” that been rejected by the members of the Constituent Assembly was ignored by the Court. This was despite making a reference to this fact earlier in the judgment. The reasoning of the Court was that since sedition laws would be used to maintain public order, and the maintenance of public order would in turn be in the interests of the security of the state, these laws could be justified in the interests of the latter.⁸⁰

A. MAINTENANCE OF PUBLIC ORDER AS A LIMIT ON FREE SPEECH

The reason the drafters of the Constitution omitted the term ‘sedition’ from the enacted Constitution was the divergence in interpretation of the term.⁸¹ To avoid any complications that may arise out of this ambiguity in interpretation, they used the term ‘security of the state’ that was to include grave crimes like sedition.⁸² Concurring with this reasoning, the Court in Kedar Nath stated that the section related to sedition was a reasonable restriction both on grounds of ‘public order’ and ‘security of the state’. Further, the addition of the phrase ‘in the interest of public order’ in Article 19(2) through the first constitutional amendment with retrospective application was seen as an attempt to validate the interpretation given by Fazl Ali, J. in *Brij Bhushan v. State of Delhi*⁸³ (‘Brij Bhushan’) whereby ‘public order’ was allied to ‘security of the

⁷⁶ *Id.*, ¶38.

⁷⁷ *Id.*

⁷⁸ *Id.*, ¶39 (citing *R.M.D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628).

⁷⁹ *Id.*

⁸⁰ *Id.*, ¶31.

⁸¹ Narrain, *supra* note 42.

⁸² While it was widely accepted by various scholars and authorities that sedition was essentially an offence against public tranquillity and was represented by any form of public disorder, the Judicial Committee had stated that the intention or tendency to incite disorder was not an essential element of the crime of sedition as defined in the IPC.

⁸³ *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129 : (1950) 51 Cri LJ 1525.

state'.⁸⁴ The insertion of the words 'in the interest of' before public order in Article 19(2) was seen as providing a wide amplitude of powers to the State for the curtailment of free speech.⁸⁵ Consequently, the amendment was seen as a validation of the law of sedition.

Since then, however, a clear distinction has been drawn by courts between the terms 'public order' and 'security of the state'.⁸⁶ The difference, essentially, is one of degree. While the terms have not been precisely defined, public order is synonymous with public safety and tranquillity and has only local significance. Security of the state, on the other hand, would involve a national upheaval such as revolution, civil strife or war.⁸⁷ Thus, an argument that a law justified 'in the interest of public order' would also consequently be justified in the interests of the 'security of the state' would not stand.

Further, it would also be difficult to argue that the law could be saved on the grounds of being 'in the interests of public order'. For the purpose of permissible restriction, the breach of public peace may be categorised as: offences against 'law and order', 'public order' and 'security of the state'. According to the judgment of the Supreme Court in *Ram Manohar v. State of Bihar*⁸⁸ ('Ram Manohar Lohia') these may be viewed as three concentric circles, with 'law and order' forming the outermost circle, 'public order' the next circle and 'security of the state' the innermost circle. These form a hierarchy of disturbances of peace, with security of the state possessing the highest standard of proof. Thus, if a restriction is to be justified on the grounds of 'security of the state', it would have to be subjected to a higher standard than that applied in cases of 'public order'.

As has already been stated, sedition is an offence against the State and punishes an act intended to subvert the government established by law. It is difficult to imagine how the mere disturbance of public order could attract a charge for an offence against the state, given that the term 'in the interests of public order' is used in an extremely localised context.⁸⁹ These could include punishing loud and raucous noise caused by noise-amplifying instruments in public places or preventing utterances likely to cause a riot. Thus, in light of the clear distinction that has been drawn between 'public order' and 'security of the state' in *Ram Manohar Lohia*, the courts have in subsequent decisions on sedition imposed a disturbance of public order requirement for the offence to be proved.⁹⁰

⁸⁴ *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955, ¶29.

⁸⁵ *Id.*, ¶33 (The Court cited the decision in *Debi Soren v. State*, AIR 1954 Pat 254 to support this contention).

⁸⁶ V.N. SHUKLA, *CONSTITUTION OF INDIA* 135 (M.P. Singh, 2008).

⁸⁷ *Id.*

⁸⁸ *Ram Manohar v. State of Bihar*, AIR 1966 SC 740 : (1966) 1 SCR 709.

⁸⁹ *Id.*

⁹⁰ *Balwant Singh v. State of Punjab*, (1995) 3 SCC 214 : AIR 1995 SC 1785.

IV. AN OFFENCE AGAINST THE ‘STATE’?

A. ‘STATE’ V. ‘PEOPLE FOR TIME BEING ENGAGED IN GOVERNMENT’

1. Distinction between Government and People engaged in Administration.

While defining the contours of the crime of sedition, the court in *Kedar Nath* also sought to distinguish between ‘the Government established by law’ as used in §124A of the IPC from people engaged in the administration for the time being. The former was said to be represented by the visible symbol of the State.⁹¹ Any attempt to subvert the government established by law would jeopardise the very existence of the State. However, any *bona fide* criticism of government officials with a view to improve the functioning of the government will not be illegal under this section.⁹² This exception was introduced to protect journalists criticising any government measures.⁹³

It is submitted, however, that on closer scrutiny, this distinction is murky and is difficult to practically implement. Any persons involved in the daily administration of the government or acting as a representative of the people in the government would also necessarily constitute a visible symbol of the state.⁹⁴ As a result of this tenuous distinction, a conflicting situation is created. While calling all the bureaucrats of a government “thugs and profiteers” does not qualify as a seditious act,⁹⁵ attributing the same qualities to the government as a whole would bring the speech within the ambit of sedition.

B. POST-INDEPENDENCE CHANGE IN NATURE OF GOVERNMENT

It must be noted that the Court was still driven by the notion of sedition as a crime that affected the very basis of the State. It had thus been included under the section related to ‘Offences against the State’ in the IPC. The rationale for the criminalisation of such acts is generally that it fosters “an environment and psychological climate conducive to criminal activity” even though it may not incite a specific offence.⁹⁶

⁹¹ *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955, ¶36.

⁹² *Id.*

⁹³ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA 2547 (Justice Y.V Chandrachud et al, 8th ed., 2008).

⁹⁴ R.A. NELSON, INDIAN PENAL CODE 665 (S.K. Sarvaria, 2008).

⁹⁵ *Om Prakash v. Emperor*, 42 PLR 382.

⁹⁶ Modechai Kremnitzer & Khalid Ghanayim, *Incitement, Not Sedition* in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 197 (David Kretzmer & Francine Hazen eds., 2000).

Given that sedition is a crime against the state, one must take into consideration the changing nature of the State with time. At the time when sedition was introduced in the IPC, India was still a part of the British Empire and was ruled by the British monarchs. Since all authority emanated from the Crown and the subject owed personal allegiance to the Crown, it was considered impermissible to attempt to overthrow the monarchs through any means.⁹⁷ Subsequent to the attainment of independence, however, all authority is derived from the Constitution of India, rather than an abstract 'ruling state'.⁹⁸ The 'State' now consists of the representatives of the people that are elected by them through democratic elections. Thus, a crime that is premised on preventing any attempt to alter the government loses its significance.⁹⁹ It is possible for governments to come and go without the very foundations of the State being affected.¹⁰⁰

In fact, in *Tara Singh*, while striking down §124A as being *ultra vires* Article 19(1)(a) of the Constitution, the Court drew a distinction between a democratically elected government and a government that was established under foreign rule. In the former, a government may come in power and be made to abdicate that power, without adversely affecting the foundations of the state. This change in the form of government has made a law of the nature of sedition obsolete and unnecessary.

Lastly, it has also been emphasised that the courts must take into consideration the growing awareness and maturity of its citizenry while determining which speech would be sufficient to incite them to attempt to overthrow the government through the use of violence.¹⁰¹ Words and acts that would endanger society differ from time to time depending on how stable that society is. Thus, meetings and processions that would have been considered seditious 150 years ago would not qualify as sedition today.¹⁰² This is because times have changed and society is stronger than before.¹⁰³

This consideration becomes crucial in determining the threshold of incitement required to justify a restriction on speech. Thus, the audience must be kept in mind in making such a determination. In *S. Rangarajan v. P. Jagjivan Ram*¹⁰⁴ ('Rangarajan'), the Court held that "the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who

⁹⁷ Cass R. Sunstein, *Free Speech Now*, U. CHI. L. REV. 260 (1992).

⁹⁸ *Id.*

⁹⁹ It must be remembered, however, that a call to alter the form of Government is not punishable under this section.

¹⁰⁰ See *Tara Singh Gopi Chand v. State*, 1951 Cri LJ 449 (per Eric Weston, C.J.).

¹⁰¹ SEERVAI, CONSTITUTIONAL LAW OF INDIA 718 (2010).

¹⁰² *Id.*

¹⁰³ *Bowman v. Secular Society Ltd*, 1917 AC 406 (per Lord Sumner).

¹⁰⁴ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574.

scent danger in every hostile point of view.”¹⁰⁵ It gives an indication of what sort of acts might be considered seditious, when it observes that the film in question did not threaten to overthrow the government by unlawful or unconstitutional means, secession or attempts to impair the integrity of the country.

V. RECENT EXPERIENCE WITH SEDITION

A. ANALYSING JUDGMENTS BETWEEN 2000-2015

Since the eponymous decision of the Supreme Court in Kedar Nath, the courts have applied the law of sedition on various occasions. To examine how the courts have dealt with cases of sedition in the recent past, we have examined all cases that came before the high courts and Supreme Court between the years 2000 and 2015. Of these cases, the cases where the question of sedition was not directly in issue or where the court did not address the issue of sedition were eliminated. It was found that there have been only fourteen cases of sedition in the last fifteen years, of which only two were heard before the Supreme Court. Further, there have been only three convictions, of which one conviction was made by the Supreme Court. In this part of the paper, we will briefly analyse these cases. For the purpose of clarity, we have categorised them as ‘Clear Acquittal Cases’, ‘Grey Area Cases’ and ‘Convictions’. While the Clear Acquittal Cases are those where it could easily be determined that the requirements for sedition were not satisfied, the Grey Area Cases are where the courts acquitted the accused, but where these acquittals give us crucial guidance on what activities *do not* qualify as sedition.

1. Clear Acquittal Cases

Of the fourteen cases of sedition before the courts, six can be categorised as Clear Acquittal Cases. As per Kedar Nath, it is necessary that the act causes disaffection towards the government established by law and that it incites people to violence and to disrupt public order. It can be seen from the facts of these cases that the acts involved clearly did not satisfy these requirements. The courts recorded findings to this effect, and acquitted the accused in these cases. In one such case, *P.J. Manuel v. State of Kerala*,¹⁰⁶ the accused affixed posters on a board at the Kozhikode public library and research centre, exhorting people to boycott the general election to the Legislative Assembly of the state.¹⁰⁷ The poster proclaimed, “No vote for the masters who have become swollen exploiting the people, irrespective of difference in parties.” Consequently, criminal proceedings were initiated against him under §124A of the IPC for the offence of sedition.

¹⁰⁵ *Id.*, ¶¶20.

¹⁰⁶ *P.J. Manuel v. State of Kerala*, ILR (2013) 1 Ker 793.

¹⁰⁷ *Id.*

The Kerala High Court observed that it needs to be examined whether the publication or preaching of protest, or even questioning the foundation or form of government should be imputed as “causing disaffection towards the government” in a modern democracy. The content of the offence of sedition must be determined with reference to the letter and spirit of the Constitution and not to the standards applied during colonial rule. In support of its view, it cited authority to demonstrate that even the shouting of slogans for the establishment of a classless society in line with the tenets of socialism would not be punishable as sedition.¹⁰⁸ Further, it noted that §196 of the Code of Criminal Procedure, 1973, (‘CrPC’) mandates that the government must expressly authorise any complaint filed for an offence against the State (under Part VI of the IPC) before the Court can take cognisance of such an offence. It thus held that the impugned act did not constitute the act of sedition and quashed the criminal proceedings against the petitioner.

The courts reached a similar conclusion in a case where the editor of a newspaper published articles claiming that the Police Commissioner of Ahmedabad city was corrupt and was responsible for a high profile murder,¹⁰⁹ where the publisher and editor of an Urdu weekly was charged for publishing articles that claimed denounced the ‘injustice’ being done to Muslims and claimed that former Prime Ministers Indira Gandhi and Atal Bihari Vajpayee had conspired against Muslims,¹¹⁰ and where the Chief Minister of Jammu and Kashmir had tweeted that if their Assembly had passed a resolution pardoning the death sentence of a terrorist (as had been done by the Tamil Nadu Assembly), the reactions would not have been so muted.¹¹¹ Acquittals were also obtained by a filmmaker who made a documentary that highlighted the violence that affects the life of people in Kashmir,¹¹² and by a cartoonist who drew cartoons highlighting and lampooning the corruption in the government.¹¹³

2. Grey Area Cases

In five cases of sedition before the courts, the accused also managed to obtain acquittals on this charge. However, these cases have been categorised as Grey Area Cases as they involved acts that could be categorised as anti-national, secessionist or terrorist activities. However, the courts found that in the absence of an immediate threat of violence, these ideologies could not be criminalised.

¹⁰⁸ ALAVI V. STATE OF KERALA, 1982 KLT 205; BALWANT SINGH V. STATE OF PUNJAB, (1995) 3 SCC 214 : AIR 1995 SC 1785.

¹⁰⁹ Bharat Desai v. State of Gujarat, Cri Misc App 7536 of 2008 (Guj) (Unreported).

¹¹⁰ Javed Habib v. State (NCT of Delhi), (2007) 96 DRJ 693.

¹¹¹ K. Neelamegam v. State, Cri OP (MD) No. 14086 of 2011 (Mad) (Unreported).

¹¹² Pankaj Butalia v. Central Board of Film Certification, WP (C) 675 of 2015 (Del) (Unreported).

¹¹³ Sanskar Marathe v. State of Maharashtra, Cri PIL No. 3 of 2015 (Bom) (Unreported).

In *Gurjatinder Pal Singh v. State of Punjab*,¹¹⁴ for example, the accused petitioned the Punjab & Haryana High Court for an order to quash the First Information Report ('FIR') that had been filed against him under §§124A and 153B of the IPC. At a religious ceremony organised in memory of the martyrs during Operation Blue Star, the petitioner gave a speech to the people present advocating the establishment of a buffer state between Pakistan and India known as Khalistan. He stated that the Constitution was a "worthless/useless" books for the Sikhs. The supporters of the petitioner then raised aggressive slogans and naked swords were raised in the air. The High Court cited the decision of the Supreme Court in *Balwant Singh v. State of Punjab*,¹¹⁵ where it was held that the mere casual raising of slogans a couple of times without the *intention* to incite people to create disorder would not constitute a threat to the Government of India. Crucially, it held that even explicit demands for secession and the establishment of a separate State would also not constitute a seditious act.¹¹⁶ Thus, the FIR against the accused was quashed.

Courts have also consistently found that criminal conspiracies and acts of terrorism did not constitute seditious acts. In *Mohd. Yaqub v. State of W.B.*,¹¹⁷ the accused had admitted to being a spy for the Pakistani intelligence agency ISI. He would receive instructions from the agency to carry out anti-national activities. He was thus charged for sedition under §124A of the IPC. Citing the elements of sedition that were laid down in *Kedar Nath*, the Calcutta High Court found that the prosecution had failed to establish that the acts were seditious and that they had the effect of inciting people to violence. Thus, the accused were found not guilty as the strict evidentiary requirements were not met.

Similarly, in *Indra Das v. State of Assam*¹¹⁸ ('Indra Das'), the accused had been shown to be a member of the banned organisation ULFA. It was also alleged that he had murdered another man, even though there was no evidence for the same. Applying the decision of the Court in *Kedar Nath* and *Niharendu Majumdar*, the Supreme Court found that no seditious acts could be imputed to the accused, and the appeal was allowed. This strict evidentiary requirement was also echoed in the decision of the courts in *State of Assam v. Fasiullah Hussain*¹¹⁹ and *State of Rajasthan v. Ravindra Singhi*,¹²⁰ where the courts acquitted the accused of the charge of sedition on the grounds that the prosecution had failed to produce sufficient evidence to prove that they had committed a seditious act.

¹¹⁴ *Gurjatinder Pal Singh v. State of Punjab*, (2009) 3 RCR (Cri) 224.

¹¹⁵ *Balwant Singh v. State of Punjab*, (1995) 3 SCC 214 : AIR 1995 SC 1785.

¹¹⁶ *Partap Singh v. UT, Chandigarh*, Cri Misc No. 11926-M of 1991.

¹¹⁷ *Mohd. Yaqub v. State of W.B.*, (2004) 4 CHN 406.

¹¹⁸ *Indra Das v. State of Assam*, (2011) 3 SCC 380.

¹¹⁹ *State of Assam v. Fasiullah Hussain*, (2013) 4 GLT 284.

¹²⁰ *State of Rajasthan v. Ravindra Singhi*, (2001) 3 WLN 242.

3. Convictions

Finally, there were only three cases where the accused was convicted of the charge of sedition. While two of these cases were before the Chhattisgarh High Court, one was before the Supreme Court. However, as will be argued in this part, these cases were *per incuriam* and were based on an incorrect application of the law and failure to take into cognisance the legally binding precedent on the matter.

In *Binayak Sen v. State of Chhattisgarh*,¹²¹ 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.¹²²

In *Nazir Khan v. State of Delhi*¹²³ ('Nazir Khan'), the accused underwent training with militant organisations such as *Jamet-e-Islamic* and *Al-e-Hadees*, and was given the task of carrying out terrorist activities in India. He then kidnapped British and American nationals visiting India, and demanded that ten terrorists that were confined in jail be released in exchange for the release of the foreign nationals. However, he was caught by the police after one of the hostages managed to escape. He was subsequently tried for several offences, including sedition. The Trial Court had convicted the accused on this charge, stating that they were trying to 'overawe' the Government of India by criminal force and arousing hatred, contempt and dissatisfaction in a section of people in India against the government. Further, they had collected materials and arms to carry out these acts. The Supreme Court noted that the "line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set up cannot be neatly drawn." However, it then disposes of its analysis of whether the act qualified as sedition in a paragraph without citing any precedent. It does not give any reasons why the particular acts in this case were seditious, but instead merely posits that "[t]he objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the

¹²¹ *Binayak Sen v. State of Chhattisgarh*, (2011) 266 ELT 193.

¹²² See, e.g., Tehelka, Not a 21st Century Law, April 30, 2011, available at http://archive.tehelka.com/story_main49.asp?filename=Op300411Not21st.asp (Last visited on June 17, 2015).

¹²³ *Nazir Khan v. State of Delhi*, (2003) 8 SCC 461 : AIR 2003 SC 4427.

very tendency of sedition is to incite the people to insurrection and rebellion.” It then states that the offence under §124A has been “clearly established”.

In this case, the Court appears to blur the distinction between the ‘act’ and the ‘incitement’ to the detriment of public order by suggesting that the act of sedition itself has the tendency to incite people to insurrection and rebellion. It thus disposes of the need to examine whether the acts of the accused had the tendency to incite people to disrupt public order, as the act itself constitutes the incitement. We argue that this interpretation of the Court is *per incuriam*, as it has been made without reference to several cases that operate as binding legal precedent on the matter. Most significantly, it ignores the decision in *Kedar Nath*, which was passed by a five-judge bench and was thus binding on the two-judge bench in this case. In *Kedar Nath*, as has been explained in Part III of this paper, the Court drew a clear distinction between the act of sedition and the incitement to public disorder. Inciting disaffection against the government would not constitute sedition unless it was accompanied by the direct incitement to violence. In fact, it was this distinction that rendered the provision constitutional. Thus, the decision of the Court in *Nazir Khan* is incorrect in holding that seditious acts themselves constituted incitements to violence.

In *Asit Kumar Sen Gupta v. State of Chhattisgarh*¹²⁴ (‘Asit Gupta’), the appellant challenged his conviction *inter alia* under §124A of the IPC before the Chhattisgarh High Court (Bilaspur Bench), for which he had been sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 500. He was found to be in possession of Maoist literature and was a member of the banned organisation Communist Party of India (Maoist). He was accused of “inciting” and “provoking” people to join the organisation, with the intention of overthrowing the current “capitalist” government through armed rebellion. In coming to its conclusion, the Court cited the decision of the Supreme Court in *Raghubir Singh v. State of Bihar*,¹²⁵ where it was held that the accused does not necessarily have to be the author of seditious material for a charge of sedition to be established. It was enough to prove that the accused had circulated or distributed the seditious material. Thus, it concluded that in this case it was enough that the accused was in possession of this Naxalite literature and was propagating the information contained therein. However, while the Court established that merely circulating or distributing seditious material could make a person liable under §124A, we argue that its reasoning with respect to the content of the offence was lacking in several respects.

To determine the content of the offence of sedition, the Court applied the decision of the Supreme Court in *Nazir Khan*, to conclude that “the very tendency of sedition is to incite the people to insurrection and rebellion”.¹²⁶

¹²⁴ *Asit Kumar Sen Gupta v. State of Chhattisgarh*, Cri App No. 86 of 2011 (Chh) (Unreported).

¹²⁵ *Raghubir Singh v. State of Bihar*, (1986) 4 SCC 481.

¹²⁶ *Nazir Khan v. State of Delhi*, (2003) 8 SCC 461 : AIR 2003 SC 4427.

However, as we have explained above, the decision of the Court in Nazir Khan was *per incuriam*, and thus the Court in Asit Gupta incorrectly applied it as precedent. The binding authority in this matter still remains Kedar Nath, and the courts must apply the ratio in that case faithfully.

Next, the Court observed that the Naxalite material that had been seized from the appellant showed that he was “exciting and encouraging” the people to wage war against the Government established by law through armed rebellion by inciting them to join the Naxal forces. While the literature did prescribe overthrowing the State through armed rebellion, the question that arises is what standard and threshold must be applied to determine incitement to violence. Before discussing the application of the law by the Court in Asit Gupta, it would be helpful to summarise the position of law on permissible restrictions on speech in the interest of public order. Three distinct threads of jurisprudence have emerged in this respect at the Supreme Court.¹²⁷ In the *first* thread, exemplified by cases such as *Ramji Lal Modi v. State of U.P.*,¹²⁸ *Virendra v. State of Punjab*¹²⁹ and Kedar Nath, the Supreme Court applied an older and weaker American standard, which required merely the ‘tendency’ or ‘likelihood’ of violence as a consequence of speech. It was opined that the use of the words ‘in the interest of’ before ‘public order’ in Article 19(2) implied a ‘wide ambit’ of protection and would even include acts with the mere tendency to cause violence.¹³⁰

The *second* thread is exemplified by cases such as Ram Manohar Lohia and Rangarajan where the Court has applied a higher threshold, namely the ‘proportionality’ or ‘proximity’ test. In Ram Manohar Lohia, the Court held that the restriction in question must have a proximate relation with the object sought to be achieved, must be proportionate and must not be ‘remote, arbitrary or fanciful’.¹³¹ Being a five-judge bench decision, this case is the *locus classicus* and binding authority on the issue. In Rangarajan as well, the Court held that the anticipated danger should have a proximate and direct nexus with the expression, and likened it to the infamous “spark in a powder keg”.¹³² Finally, the *third* thread is exemplified by some recent cases such as Indra Das, *Arup Bhuyan v. State of Assam*¹³³ (‘Arup Bhuyan’), and *Shreya Singhal v. Union of India*¹³⁴ (‘Shreya Singhal’) where the Supreme Court has applied the modern American test of a ‘clear and present danger’. Laid down most prominently in the decision of the Supreme Court of the United States in *Brandenburg v.*

¹²⁷ See Sunil Abraham, *Shreya Singhal and 66-A: A Cup Half Full and Half Empty*, 50 (15) EPW 12 (2015).

¹²⁸ *Ramji Lal Modi v. State of U.P.*, AIR 1957 SC 620.

¹²⁹ *Virendra v. State of Punjab*, AIR 1957 SC 896.

¹³⁰ *Ramji Lal Modi v. State of U.P.*, AIR 1957 SC 620, ¶8.

¹³¹ *Id.*, ¶13.

¹³² *Id.*, ¶45.

¹³³ *Arup Bhuyan v. State of Assam*, (2011) 3 SCC 377.

¹³⁴ *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

Ohio,¹³⁵ the test requires that restrictions cannot be placed on speech unless it is directed to inciting, and is likely to incite “imminent lawless action”. At the same time, however, the Indian Supreme Court has also rejected the application of the Brandenburg test in *Kameshwar Prasad v. State of Bihar*¹³⁶ and *Ramlila Maidan Incident, In re.*¹³⁷

In *Asit Gupta*, the High Court stated that it was applying *Kedar Nath* to arrive at its conclusion that the appellants were guilty of sedition, as both Arup Bhuyan and Indra Das could be distinguished on facts from the present case. As explained above, the ‘proportionality and proximity’ test of *Ram Manohar Lohia* would be the binding test applicable in this case. However, even if the test of *Kedar Nath* were to be applied, the High Court did not explain how the acts in the current case even had the tendency to incite the public to violence.

Further, it failed to explain how the possession and distribution of Naxalite literature, even if it advocated overthrowing the government and replacing it with a new form of government, would constitute a seditious act in the absence of an explicit and direct incitement to violence. In fact, these actions were not considered seditious even during the period of British rule. By way of illustration, consider the decision of *Kamal Krishna Sircar v. Emperor*,¹³⁸ where the accused was charged under §124A of the IPC for making a speech advocating that a Bolshevik form of government replace the government of the time. It must be noted that this ideology also espoused the overthrow of the capitalist form of government.¹³⁹ Acquitting the accused, Lord Williams, J. observed that supporting communism did not constitute a seditious act.¹⁴⁰

¹³⁵ *Brandenburg v. Ohio*, 23 L Ed 2d 430 : 395 US 444 (1969) (This case arose out of an inflammatory speech made by a leader of the Ku Klux Klan, swearing “revengeance” against members of certain racial communities. The court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Thus, any government action curtailing the freedom of speech may only be justified if it satisfies the threefold requirements of intent, imminence and likelihood).

¹³⁶ *Kameshwar Prasad v. State of Bihar*, AIR 1962 SC 1166.

¹³⁷ *Ramlila Maidan Incident, In re.*, (2012) 5 SCC 1.

¹³⁸ *Kamal Krishna Sircar v. Emperor*, AIR 1935 Cal 636.

¹³⁹ Encyclopedia Britannica, *Communism*, October 29, 2014, available at <http://www.britannica.com/topic/communism> (Last visited on June 14, 2015).

¹⁴⁰ *Kamal Krishna Sircar v. Emperor*, AIR 1935 Cal 636 (It was observed:

“All that the speaker did was to encourage the young men, whom he was addressing, to join the Bengal Youth League and to carry on a [*sic*] propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia. It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of Government and in favour of some other form of Government might be allowed to lead to hatred of the Government, and it might be suggested that such ideas brought the Government into contempt. To suggest some other

It is evidenced from the foregoing analysis that the offence of sedition has now begun to wane in relevance. There have been only twelve cases at the High Court and three at the Supreme Court. Of these, the accused has been acquitted in a majority of the cases. Even where convictions have been obtained, it can be demonstrated that they were based on an incorrect application or disregard of the law, and were thus *per incuriam*.

B. LESSONS FROM THE REPEAL OF THE LAW OF SEDITION IN ENGLAND

The crime of sedition, as it came to be interpreted in modern England, was much wider in its scope than how it was applied in India.¹⁴¹ The punishment prescribed for committing the crime was also disproportionately high. Commission of the act attracted imprisonment for life or a high fine.¹⁴² However, with the development in England's criminal and constitutional law, the crime of sedition became almost obsolete. People have been charged with the crime only a few times over the last century.¹⁴³ It was considered unacceptable that the act was still in the statute books, despite the Law Reform Commission having recommended the abolition of the crime almost thirty years prior.¹⁴⁴ In its report, the Commission principally based its opinion on the fact that most of the potentially harmful acts against public peace that were involved in committing sedition would be punishable separately under various other statutory provisions.¹⁴⁵

The provision was also inconsistent with the human rights obligations of the UK at the international level.¹⁴⁶ The UK is signatory to the European Convention on Human Rights, which was implemented in England through the enactment of the Human Rights Act, 1998.¹⁴⁷ The section was seen as having a 'chilling effect' on the freedom of expression. Thus, the crime

form of Government is not necessarily to bring the present Government into hatred or contempt").

¹⁴¹ BASU, *supra* note 93, 2540.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Clare Feikert-Ahalt, *Sedition in England: The Abolition of a Law from a Bygone Era*, October 2, 2012, available at <http://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era/> (Last visited on March 15, 2014).

¹⁴⁵ *Id.*

¹⁴⁶ See *Handyside v. United Kingdom*, (1976) 1 EHRR 737 (Art. 10 of the European Convention on Human Rights, 1950 guarantees the freedom of expression (which includes the right to hold opinions and to receive and impart information without interference by a public authority). The European Court on Human Rights had previously held that the "Freedom of expression [...] is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population").

¹⁴⁷ Ministry of Justice, Government of the UK, *Making Sense of Human Rights: A Short Introduction*, October, 2006, available at <https://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf> (Last visited on March 6, 2014).

of seditious libel was abolished through the enactment of the aforementioned Coroners and Justice Act, 2009.¹⁴⁸

C. SIMILAR JUSTIFICATIONS FOR REPEAL IN INDIA?

Our analysis in this part shows that the crime of sedition is now waning in relevance. An examination of just the IPC demonstrates that these very acts would be covered by its other provisions, rendering §124A obsolete.

Chapter VIII of the IPC contains offences against public tranquillity. These include being the member of, joining, hiring people to join, or continuing an unlawful assembly.¹⁴⁹ It also includes rioting,¹⁵⁰ assaulting or obstructing a public servant trying to suppress a riot,¹⁵¹ provocation with the intent to spark a riot,¹⁵² and promoting enmity between different groups on the basis of religion, race, place of birth, residence, language etc.¹⁵³ Further, it also contains a provision for punishing acts that were prejudicial to national integration.¹⁵⁴ Minor squirmishes are covered by the crime of ‘affray’ which punishes the act of two or more persons disturbing the public peace by fighting in a public place.¹⁵⁵ Thus, any such act that was ‘prejudicial to the maintenance of harmony’ would be punishable. This would also include the organisation of any form of training activities (exercise, movement or drill) to train for the use of criminal force or violence.¹⁵⁶

Thus, the crux of the crimes of sedition, violence, and public disorder, can be contained by applying the aforementioned provisions of the IPC. The various states also have specific legislation addressing the issue of the maintenance of public order.¹⁵⁷ Consequently, there would be no need for a specific provision for the punishment of acts committed against the state or the government. Other provisions that are clearly defined and less stringent may instead be applied. An obvious advantage arising out of charging offenders under ordinary criminal laws as opposed to under the laws of sedition is that offenders are not counter-productively marked out and legitimised as ‘political offenders’ rather than ordinary criminals.¹⁵⁸

¹⁴⁸ Press Gazette, *Criminal libel and sedition offences abolished*, January 13, 2010, available at <http://www.pressgazette.co.uk/node/44884> (Last visited on March 15, 2014).

¹⁴⁹ The Indian Penal Code, 1860, §141.

¹⁵⁰ *Id.*, §146.

¹⁵¹ *Id.*, §152.

¹⁵² *Id.*, §153.

¹⁵³ *Id.*, §153-A.

¹⁵⁴ *Id.*, §153-B.

¹⁵⁵ *Id.*, §159.

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., the West Bengal Maintenance of Public Order Act, 1972; the Assam Maintenance of Public Order Act, 1947; the Goa Maintenance of Public Order and Safety Act, 1972.

¹⁵⁸ Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 UNSW LJ 874 (2005).

Additionally, the Supreme Court has also recognised the right of the citizens to gain access to information.¹⁵⁹ Given that most offences covered under sedition can potentially be addressed by other provisions in criminal law, it might be difficult to justify the retention of seditious offences in the statute books in light of its obsolescence. It only serves the purpose of undermining the public interest in having access to opposing political views.¹⁶⁰ Such access cannot be denied merely on the grounds that it might lead to the people adopting particular beliefs or acting on those beliefs.¹⁶¹

VI. 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.

The courts have also been unable to give a clear direction to the law. While the final position on the law in India was laid down as early as 1960, the law of sedition is characterised by its incorrect application and use as a tool for harassment. Thus, some of the reasons for which people have been booked under the provision (and often incarcerated) include liking a Facebook page,¹⁶² criticising a popular yoga expert,¹⁶³ cheering for the Pakistani team during a cricket match versus India,¹⁶⁴ asking a question about whether the stone-pelters in Jammu and Kashmir were the real heroes in a university exam,¹⁶⁵ making

¹⁵⁹ Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ; AIR 1995 SC 1236.

¹⁶⁰ Eric Barendt, *Interests in Freedom of Speech: Theory and Practice* in LEGAL EXPLORATIONS: ESSAYS IN HONOUR OF PROFESSOR MICHAEL CHESTERMAN 175 (Kam Fan Sin, 2003).

¹⁶¹ ERIC BARENDT, FREEDOM OF SPEECH 170 (2006).

¹⁶² Times News Network, *Facebook "like" case: No evidence of sedition, govt tells HC*, January 30, 2013, available at http://articles.timesofindia.indiatimes.com/2013-01-30/kochi/36635179_1_national-flag-facebook-post-sedition (Last visited on March 15, 2014).

¹⁶³ The Indian Express, *Sedition charge against Digvijay over remark against Ramdev*, June 6, 2011, available at <http://www.indianexpress.com/news/sedition-charge-against-digvijay-over-remark-against-ramdev/799912> (Last visited on March 15, 2014).

¹⁶⁴ NDTV, *Outrage over Sedition Charges against Students who cheered Pakistan*, March 6, 2014, available at <http://www.ndtv.com/article/india/outrage-over-sedition-charges-against-students-who-cheered-pakistan-492250> (Last visited on March 6, 2014).

¹⁶⁵ India Today, *Kashmir University lecturer released*, January 2, 2011, available at <http://indiatoday.intoday.in/story/kashmir-university-lecturer-released/1/125303.html> (Last visited on March 15, 2014).

cartoons that allegedly incite violence¹⁶⁶ and making a speech at a conference highlighting the various atrocities committed by the armed forces.¹⁶⁷

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. Even the maintenance of 'public order' cannot be used as a ground to justify these laws as it is intended to address local law and order issues rather than actions affecting the very basis of the State itself.

Drawing inspiration from the repeal of the law of sedition in England, it may also be argued that the law of sedition is now obsolete. Various other statutes govern the maintenance of public order and may be invoked to ensure public peace and tranquillity. In light of the above observations, it is time that the Indian legislature and judiciary reconsider the existence of provisions related to sedition in the statute books. These provisions remain as vestiges of colonial oppression and may prove to undermine the rights of the citizens to dissent, protest against or criticise the government in a democracy.

¹⁶⁶ India Today, *Anti-corruption cartoonist Aseem Trivedi arrested on sedition charges*, September 9, 2012, available at <http://indiatoday.intoday.in/story/anti-corruption-cartoonist-aseem-trivedi-arrested-on-sedition-charges/1/216643.html> (Last visited on March 15, 2014).

¹⁶⁷ Press Trust of India, *Sedition case registered against Arundhati Roy, Geelani*, November 29, 2010, available at <http://www.ndtv.com/article/india/sedition-case-registered-against-arundhati-roy-geelani-69431> (Last visited on March 15, 2014).