

## SEDITION MODULE

### 1. CONTEMPORARY RELEVANCE:

*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. – (Mahatma Gandhi, March 18, 1922.)*<sup>1</sup>

In this course, we have been examining freedom of speech and various legal restrictions upon this fundamental right. Sedition, (in particular as embodied in Section 124 A of the Indian Penal Code) is one such restriction.<sup>2</sup> The rationale for sedition is based on the principle that dissemination of seditious material undermines the loyalty of citizens, that disloyal citizens jeopardise the Government at Law, and that a weakened Government at Law threatens the very fabric of the state as well as public order and safety.

Thus, the various judicial justifications for the law of sedition conglomerate around invocations of the necessity for preserving the Government, without questioning whether the Government in fact is something worth protecting. Certainly many believed that in the context of British India, it was not. According to Gandhi, "...I hold it as a virtue to be disaffected towards a Government, which in its totality has done more harm to India than any previous system."<sup>3</sup>

The import of the present law of sedition cannot be abstracted from its historical context in colonial rule. The law of sedition is the unfortunate legacy of the British Government in India. Pre-independence, it was a mechanism employed by the courts to quash anti-government sentiment, by stemming the propagation of

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<sup>1</sup> Mohandas Gandhi, cited from "Famous Speeches by Mahatma Gandhi; Great Trial of 1922," Gandhian Institute Bombay Sarvodaya Mandai and Gandhi Research Foundation, [www.mkgandhi.org/speeches](http://www.mkgandhi.org/speeches), accessed on 16/04/2012.

<sup>2</sup> Section 124A, as it stands today, reads as follows:

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 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 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.

<sup>3</sup> Mohandas Gandhi, Op. cit 1.

ideas that might (either *did* or *wereintended to*) cause the listeners to feel “disaffection” for the Government of British India. It is for this reason that Mohandas Gandhi called 124A, the “prince” amongst mechanisms used to silence political opposition.

Certainly, the repressive implementation of 124A casts a long shadow. Today, the law still stands (though as we shall see with a modified interpretation at common law.) The recent wave of cases against writers, editors, politicians, lawyers, human rights activists, political activists and public intellectuals is demonstrative of the broad application of the statute. Many of those arrested have been high profile and respected figures, locally and nationally, such as BinayakSen, who is the subject of a case study below.

Recently, the author Arundhati Roy was charged along with other speakers at a seminar entitled “Azadi [Freedom]: the Only Way.” The seminar was organised by the Committee for the Release of Political Prisoners in Srinagar. Roy justified her speech saying that she did not want people to be “killed, raped, imprisoned or have their finger-nails pulled out in order to force them to say they are Indians.” These are merely two examples of the institutionalised misuse of sedition laws.

In the wake of such high profile trials, and threats of trials, there has been an increasing demand for the repeal of 124A, due to its draconian and outmoded nature. Amidst claims that the use and abuse of sedition is out of sync with the contemporary international climate, arrests continue unabated. Such action irritates the liberalist discourse of human rights as trumps, which may only be restricted minimally, cautiously and only when absolutely necessary. The mode of execution of sedition laws in India clearly does not jibe with this rhetoric.

For every publicised case there are many more that are unreported. The sheer proliferation of such trials is enough of itself to warrant some scepticism. In addition, these arrests and prosecutions are in fact, counter to the precedent established in the Indian Supreme Court.

#### *KedarNath*, but not in practice.

The current interpretation of 124A, is the Supreme Courts ruling in *KedarNath*.<sup>4</sup> The Supreme Court in subsequent cases has upheld this interpretation.<sup>5</sup> In *KedarNath* the Court propounded two points relevant for our purposes.

A). A distinction was drawn between the “the Government established at law” and “persons for the time being engaged in carrying on the administration.”

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<sup>4</sup> *Kedar Nath Singh v State of Bihar*, AIR 1962 SC 995.

<sup>5</sup> *Bilal Ahmed Kaloo v State of Andhra Pradesh*, AIR 1997 SC 3483, *Balwant Singh v State of Punjab*, AIR 1995 SC 1785.

And yet, sedition continues to be used by police to defend the names of the persons who carry out the duties of government. One example is of the arrest of a reporter, an editor and a photojournalist from *The Times of India* for an article, which alleged links between police officials and the mafia.<sup>6</sup> Another editor was arrested for an article that challenged a Chief Minister's administrative handling of the floods in Surat.<sup>7</sup> Such articles may or may not amount to libel of individual office holders but they hardly challenge the delicate fabric of Indian democracy.

B). In *KedarNath*, the Judges moved towards understanding sedition in terms of its tendency to create disorder or incitement to violence. The article in this case was finally read in respect of its *effect* rather than of the *feelings incited* or intended.

And yet, S 124A continues to be used to stifle free expression; expression which is not intended to incite disorder, but merely to encourage critique and to precipitate the free flow of ideas. One example is that of a Srinagar lecturer who was arrested for including the question in an exam; "Are stone throwers the real heroes?"<sup>8</sup>

By contrasting the Rule in *KedarNath* with the way that police and lower courts are implementing sedition law, we cannot help but notice a wide birth. There is an inconsistency between the position at law and its application on the ground, thus illuminating the tension between the higher and the lower courts.

### Readings

\* *KedarNath Singh v State of Bihar*, AIR 1962 SC 995

\* Amnesty International, "India: Human Rights Defenders Need Effective Protection; Amnesty International's written statement to the 19<sup>th</sup> session of the UN Human Rights Council (27 February – 23 March 2012)," 13/02/2012, [www.amnesty.org](http://www.amnesty.org) accessed 16/04/2012

\* Peoples Union for Democratic Rights, "Press release on Police Atrocities, Illegal Detention and Blatant Use of Seditious Case in Haryana," 06/19/2011, [www.pudr.org](http://www.pudr.org)

\* Arundhat Roy, *Transcript of Arundhat Roy's Speech at Seminar Called "Azadi – The Only Way" In New Delhi on October 21, 2010*, available at <http://leftyprof.files.wordpress.com/2010/11/transcript-of-arundhati-roy-seditious-speech.pdf>, accessed 18/04/2012.

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<sup>6</sup> "Modi Throttling Freedom of Expression" in *DNA India* (7 Jun., 2008).

<sup>7</sup> Subhash Gatade, "Article Writing Equals Sedition?," 03/06/2008, [www.countercurrents.org](http://www.countercurrents.org), accessed on 16/04/2012.

<sup>8</sup> Priscilla Jebaraj, "Binayak Sen Among Six People Charged With Sedition in 2010" *The Hindu*, 01/01/2011.

## 2. HISTORY OF THE LAW

Section 124A of the *Indian Penal Code*, was originally Section 133 of *Macaulay's Draft Penal Code* of 1837-39.<sup>9</sup> The Indian law of sedition was a statutory enunciation of the English common law of sedition. It was similar to the English statutory law of treason (under the *Treason-Felony Act 1848*). However, whereas the English treason law seeks to punish directly disloyal feelings (evidenced by the fact that they are made public), sedition is intended only to punish not ones *own* disloyal feelings but causing (or attempting to cause) *other people* to have disloyal feelings towards the government. According to Sir James Stephen "the great peculiarity of the English law of treason was to regard every thought of the heart as a crime which was to be punished as soon as it was manifest by any overt act."<sup>10</sup>

In practice however, this distinction is a problematic one. Why would one incite disaffection if they did not themselves feel disaffection? How could a person truly harbour disloyal feeling towards the government and not have the desire to change the minds of others? So despite the careful wording, intended not to illegalise a persons internal feelings, in practice what sedition does is make a "thought of the heart," a crime.

The problem with punishing internal states is that the law claims to have control over people's acts, not over their thoughts and feelings. For a government to have control over their citizens feelings is a frightful thought and the subject of many dystopian narratives such as the novel, *Nineteen Eighty-Four*, which infused into the popular vernacular the term thought crimes and gave us the adjective "Orwellian", which is synonymous with a terrifying totalitarian regime which asserts control over thoughts, as well as actions.

### Colonial Trials

These early trials were often justified as particularly apt for the Indian context. This thinly veiled racism followed the rhetoric of saving the impressionable and restless natives from themselves. For example, the British author Edmund Candler's novel presents a fictional account of the Indian political climate in the

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<sup>9</sup> Strangely, it was omitted from the original IPC in 1860, but ten years later this "mistake." According to Tripathi's *Law of Sedition in India*, says it was more likely that the Council was uncertain of its competence to enact a sedition law, on the grounds that it was more suited to a British jurisdiction to codify laws on Indian Sediton. Whatever the case, the matter was rectified by its incorporation by amendment into the IPC. See Tripathi, *The Law of Sedition in India*, M.P. Jain (Research Director), The Indian Law Institute, New Delhi, 1964, pp. 11-12.

<sup>10</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventive*, Thakker, Spink and Co. Calcutta, 1911, p 5.

early Twentieth Century in *Siri Ram Revolutionist*. Candler's protagonist, a Bengali dissident at the beginning of the twentieth century is portrayed, as Morton puts it, as a man who is "disaffected and suggestible."<sup>11</sup> Dissent was constructed, not as a reaction to English rule, but as a peculiarly Indian problem, the natural condition of a society so large and diverse.<sup>12</sup>

The first sedition case, which came before the courts, was the trial of Jogendra Chandra Bose in 1891 before the Calcutta High Court.<sup>13</sup> Bose, in his newspaper, *Bangobasi*, criticised a bill, which sought to (and later did) raise the age of consent from ten to twelve years. Bose claimed that the Hindu religion and society was "in danger of being destroyed." Though the article did not contain a detailed analysis of the bill itself, neither did it contain a direct incitement of rebellion. The proceedings were dropped after Bose tendered an apology.

#### The three Tilak trials:

The first of the trials of Bal Gangadhar Tilak occurred in 1897.<sup>14</sup> Tilak was liable as proprietor, publisher and Editor of *The Kesari* for an allegorical article published in this newspaper. The article in question was an article entitled "Shivaji's Utterances" and was about Shivaji killing Afzal Khan for the public good. A week later, after a reception in honour of the Diamond Jubilee of Queen Victoria's rule which Tilak himself had attended, two British officers were murdered. This event invited an atmosphere of panic, fuelled by the British Indian media, who called for Tilak's arrest.<sup>15</sup> Although the murders were not technically relevant to the case, they had the effect of rendering more visceral, more immediate and less abstract the threat to public order and safety, which the sedition laws were intended to curb.

The crown claimed that Tilak had used the occasion of a Shivaji festival to undermine the British Government in India.<sup>16</sup> Tilak challenged the courts' translations of the Marathi texts, a language that the majority of jurors did not know. In summing up, Tilak said to the jury that the articles "were not written with any seditious intention, and were not likely to produce that effect, and I do not think they have produced that effect on the readers of the *Kesari*, or would produce on any intelligent Marathi readers."<sup>17</sup>

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<sup>11</sup> Stephen Morton, "Terrorism, Literature and Sedition in Colonial India," Elleke Boehmer and Stephen Morton eds., *Terror and the Post-colonial*, Blackwells, 2010, p. 213.

<sup>12</sup> R. Dhavan, "Obtaining Moral Consensus in a Law and Order Society," *Only the Good News; On the Law of the Press in India*, Manohar Publications, 1987, pp. 273- 339.

<sup>13</sup> Queen-Empress v Jogendra Chandra Bose And Ors. 1891, (1892) ILR 19 Cal 35.

<sup>14</sup> Queen-Empress v Bal Gangadhar Tilak, ILR 22 Bom 112.

<sup>15</sup> A G Noorani, *Indian Political Trials; 1775-1947*, Oxford University Press, New Delhi, 2005, p. 116.

<sup>16</sup> Noorani, *Ibid.* p. 117.

<sup>17</sup> Cited from Stanley A. Wolpert, *Tilak and Gokale: Revolution and Reform in the Making of Modern India*, University of California Press, Berkeley and Los Angeles, 1961, p. 101.

Judge Stacey, notorious for his anti-native stance and for misdirecting the Jury, presided over the case.<sup>18</sup> The Privy Council upheld the guilty verdict of the Jury. The sentence was later commuted upon the proviso that Tilak would do nothing by act or speech to incite disaffection for the Government.

In 1908, Tilak was again tried for sedition.<sup>19</sup> The trial again was in the wake of an attack upon British Indians. This time it was a bomb blast which was intended for a sessions Judge at Muzaffarpur, but which unintentionally killed the wife and child of an English barrister. Again, none of the jurors were native Marathi speakers; again the majority of jurors were English. Tilak was this time sentenced to six years imprisonment with transportation.

The third of Tilak's trials for sedition was in 1916.<sup>20</sup> This time the offence was for attributing dishonest motives to government in three speeches that he had made criticising the bureaucracy. The Judge, Justice Bachelor, found that the speeches amounted to inciting disapprobation, but not to inciting disaffection (and thus were not seditious). Furthermore, although Batchelor J. explained that "disaffection," and not advocacy of swarajya was seditious, it is difficult to how one may be able to propose the instituting of a new system, without exciting disaffection for, or at least dissatisfaction with the current one.<sup>21</sup>

### Annie Besant

Annie Besant was tried for a for the publication of the newspaper *New India* of material that had a tendency to provoke hatred against His majesty's Government.<sup>22</sup> Besant, an English feminists and activist, was a staunch proponent of Indian home rule. In 1916 she published a number of articles critical of the Government. Justice Stacey ordered that the deposit of her printing press be confiscated under S 4 (1) of the Indian Press Act 1910.<sup>23</sup>

### Mahatma Gandhi

On the 18<sup>th</sup> March 1922 in the Ahmedabad High Court, Mahatma Gandhi, having pled guilty to the charge of sedition made the following statement before the Judge Broomfield, supporters and some members of the public.

I wanted to avoid violence. Non-violence is the first article of my faith. It is also the last article of my creed. But I had to make my choice. I had either to submit to a system which I considered had done an irreparable harm to my country, or incur the risk of themad fury of my people bursting forth when they understood the truth from my lips. I

<sup>18</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventive*, Thakker, Spink and Co. Calcutta, 1911, p. 42.

<sup>19</sup> *Emperor v Bal Gangadhar Tilak* (1908) 10 BOMLR 848.

<sup>20</sup> *Emperor v Bal Gangadhar Tilak*, 1916 (1917) 19 BOMLR 211.

<sup>21</sup> *Ibid*, para. 9.

<sup>22</sup> *Annie Besant v Advocate General of Madras*, (1919) 46 IA 176. (ILR 39 Mad 1085; AIR 1918 Mad 2010.)

<sup>23</sup> V. Ramasubramanian, "When Annie Besant Came to Court," *The Hindu*, 08/02/2012.

know that my people have sometimes gone mad. I am deeply sorry for it and I am, therefore, here to submit not to a light penalty but to the highest penalty. I do not ask for mercy. I do not plead any extenuating act... But by the time I have finished with my statement you will have a glimpse of what is raging within my breast to run this maddest risk which a sane man can run.

...I came reluctantly to the conclusion that the British connection had made India more helpless than she ever was before, politically and economically. ..My experience of political cases in India leads me to the conclusion, in nine out of every ten, the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety-nine cases out of hundred, justice has been denied to Indians as against Europeans in the courts of India. This is not an exaggerated picture. It is the experience of almost every Indian who has had anything to do with such cases. In my opinion, the administration of the law is thus prostituted, consciously or unconsciously, for the benefit of the exploiter.

...The greater misfortune is that the Englishmen and their Indian associates in the administration of the country do not know that they are engaged in the crime I have attempted to describe.... 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 to violence. But the section under which mere promotion of disaffection is a crime. I have studied some of the cases tried under it; I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavored to give in their briefest outline the reasons for my disaffection. I have no personal ill-will against any single 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 has done more harm to India than any previous system. India is less manly under the British rule than she ever was before. Holding such a belief, I consider it to be a sin to have affection for the system. And it has been a precious privilege for me to be able to write what I have in the various articles tendered in evidence against me.

In fact, I believe that I have rendered a service to India and England by showing in non-co-operation the way out of the unnatural state in which both are living...I am endeavoring to show to my countrymen that violent non-co-operation only multiplies evil, and that as evil can only be sustained by violence, withdrawal of support of evil requires complete abstention from violence. Non-violence implies voluntary submission to the penalty for non-co-operation with evil. I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is deliberate crime, and what appears to me to be the highest duty of a citizen. The only course open to you, the Judge and the assessors, is either to resign your posts and thus dissociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common weal.

Gandhi described the room as “like a family, not a law court.” As the Judge pronounced the sentence, friends and supporters of Gandhi wept, but he smiled as he bade them goodbye.

In 1922, Mohandas Gandhi in was tried under Section 124A, along with Shankerlal Banker. They were charged with the writing and publication of three articles “Tampering with Loyalty”, “The Puzzle and its Solution” and “Shaking the Manes”, which were published in the newspaper, *Young India*. According to Noorani, the trial “failed to deflect Gandhi from the course he had decided upon. It succeeded only in highlighting his qualities – dignity and felicity of expression”.<sup>24</sup> Gandhi pled guilty and demanded that the judge give him the maximum punishment possible. He said that “to preach disaffection towards the existing system of Government has become almost a passion with me,”<sup>25</sup> that he was morally obliged to disobey the law and that he was proud to follow in the tradition of Tilak. Judge Strangeman sentenced him to Six years imprisonment. However, rather than stemming the tide of opposition, his imprisonment worked to increase his popularity.<sup>26</sup>

What these cases illustrate, is that far from moral condemnation of seditionists, their convictions in fact worked to increase the popularity of these figures and the struggle for Indian independence. The contemporary collective imagination has cast Tilak, Besant and Gandhi (though not uncontestedly) in the roles of national heroes, as brave and uncompromising advocates of home rule, not as criminals. One recalls the prophetic words of Tilak, after his conviction in 1908:

In spite of the verdict of the jury, I maintain that I am innocent. There are higher powers that rule the destiny of mankind and it may be the will of providence that the cause which I represent may prosper more by the suffering than by my remaining free.

The language works to link heroism and sedition. No doubt this also effects the formulation of the identities of current “seditionist.” Media presentations often represent them as fearless and persecuted crusaders for freedom at the same time as legal discourses paint them as criminally dangerous proponents of rebellion. Surely, the historical context plays a foundational role in such constructions today.

#### Readings:

\* A G Noorani, “Tilak’s Trials (1897 and 1980),” *Indian Political Trials; 1775-1947*, Oxford University Press, New Delhi, 2005, pp. 114-136 and AG Noorani “Gandhi’s

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<sup>24</sup> A G Noorani, op. cit. 15, p. 227.

<sup>25</sup> Cited in A G Noorani, op. cit. 15, p. 232.

Trial (1922),” *Indian Political Trials; 1775-1947*, Oxford University Press, New Delhi, 2005, pp. 223-237.

\* Peter Robb, “The Government of India and Annie Besant,” *Modern Asian Studies*, vol. 10, 1976, pp. 107-130.

\* V. Ramasubramanian, “When Annie Besant Came to Court,” *The Hindu*, 08/02/2012.

\* W R Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventative*, ThackerSpink and Co., Calcutta, 1911.

\* Gandhian Institute Bombay SarvodayaMandai and Gandhi Research Foundation, “Famous Speeches by Mahatma Gandhi; Great Trial of 1922,” 18/03/1922 [www.mkgandhi.org/speeches](http://www.mkgandhi.org/speeches), accessed on 16/04/2012.

\* Stephen Morton, “Terrorism, Literature and Sedition in Colonial India,” EllekeBoehmer and Stephen Morton eds., *Terror and the Post-colonial*, Blackwells, 2010.

\* Tripathi, *The Law of Sedition in India*, M.P. Jain (Research Director), The Indian Law Institute, New Delhi, 1964, pp. 11-12.

\* *Gandhi*, Dir. Richard Attenborough, Goldcrest Films, 1982.

\* *The Legend of Bhagat Singh*, Dir. RajkumarSantoshi, Tips Films Pvt. Ltd., 2002.

### **3. DOCTRINAL DEVELOPMENTS (EVOLUTION OF THE LAW)**

There are two ways in which one may be guilty of sedition. One must either actually incite the disaffection or have attempted to incite the disaffection. Either are sufficient for guilt. In the later case, it is not of any relevance that the audience did not feel any disaffection.

Pre-Independence, 124A remained much the same as at its inception, with minor amendments, which were predominantly for the sake of clarifying and unifying the way that it had been interpreted at common law.

Much discussion has centred on the meaning of the term “disaffection.” In the *Bose Case*, the judges interpreted it as merely the opposite to affection. But later it was held to be a positive feeling, not just the absence of affection<sup>27</sup>

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<sup>27</sup> *Emperor v Bal Gangadhar Tilak* (1908) 10 BOMLR 848.

Justice Strachey took a particularly broad approach in his definition of disaffection as “hatred, enmity, dislike, hostility, contempt and every form of ill-will” to the Government.<sup>28</sup> In *BashkirBalavantBopatkar1906*, disaffection was interpreted not as a feeling for another individual, but a feeling one had for a ruler.

Disaffection is however distinguished from disapprobation. The second and third explanation of S124A says that comments expressing disapprobation of “the measures” or of the “administrative or other actions” of the Government which do not excite disaffection are not seditious under the act.

### Disaffection or Violent Consequences

There is a distinct difference between someone who incites disaffection and one who incites violence. The latter is a consequentialist approach, which shifts the focus away from the feeling of the audience, to what they will do or what they might do.

In 1942, the Federal Court in *NiharenduDuttMajumar* held that “the acts or words complained of must either **incite to disorder** or must be such to satisfy reasonable men that that is there intention,” (My emphasis).<sup>29</sup> This was a break from the emphasis on the feeling incited, to the potential consequence of that feeling; that is disorder. In effect, this is (can be read as) an acknowledgement that the domain of the courts is not “the thoughts of the heart.”

However, this rendering of sedition was overturned by the Privy Council in the *Sadashiv Case*, marking a return to the traditional interpretation.<sup>30</sup> They returned to Justice Strachey’s interpretation in the first Tilak case. Here he said, “(t)he offence consists in exciting or attempting to excite in others **certain bad feelings** towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small,” (My emphasis).<sup>31</sup> Clearly, the issue was not incitement to violence but incitement to feelings of disaffection.

Intending to excite bad feelings and intending to excite rebellion are not always co-extensive. One may incite disaffection with the intention of bringing about peaceful change. Likewise one may incite disorder with no intention as to the audience’s state of mind. If we take seriously the liberalist “harm principle,” as posited by the philosopher John Stuart Mill, then it is only the harm of violence, which can justify the curtailment of free speech.<sup>32</sup>

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<sup>28</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventive*, Thakker, Spink and Co. Calcutta, 1911, p 47.

<sup>29</sup> *Niharendu Dutt Majumdar v. The King Emperor*, AIR, 1942 FC 22.

<sup>30</sup> *King Emperor v Sadashiv Narayan Bhalerao*, (1947) LR 74, IA 89.

<sup>31</sup> *Queen-Empress v. Bal Gangadhar Tilak* (1892) I.L.R. 22 Bom, 135.

<sup>32</sup> For a good discussion of Mill’s harm principle in relation to freedom of speech see, “Freedom of Speech”, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/freedom-speech/>.

### Omission from the Constitution

During the drafting of the Constitution, much discussion occurred over whether the term “sedition” should be included as a restriction upon the right to free speech, (finally article 19 (2).) K.M Munshi, a lawyer and activist for the Indian Independence Movement, argued that it should not be included because of the way in which sedition has been used as a mechanism of state oppression; its “curious fortune.” “Our notorious Section 124A of the Penal Code,” he explained “was sometimes construed so widely that I remember in a case a criticism of the District Magistrate was urged to be covered by Section 124A.”

Several years later, the decision not to include the term “sedition” was discussed by Justice Fazl Ali:

The framers of the constitution must have therefore found themselves face to face with the dilemma as to whether the word “sedition” should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way with public disorder; and on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word “sedition” in clause (2) but used the more general words, which cover sedition and everything else which make sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the State usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore, it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State.<sup>33</sup>

Thus, because of the connotational baggage of the term “sedition,” it was finally omitted from Art 19(1)(a) of the Indian Constitution. This marks both the condemnation for the way in which the sedition laws had hitherto been employed and expressed a desire to break with the oppressive colonialist means of managing dissent and disobedience.

However, his break was largely symbolic because the laws under which sedition operated were still firmly in place.

### Unconstitutional and Inappropriate

Article 13 (1) of the *Indian Constitution* renders void any law which is incompatible with the Constitution. The sedition law, if in conflict with Art 19 of

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<sup>33</sup> *Bri Bhushan and Anr. v. The State of Delhi*, 1950 Supp SCR 245.

the Constitution would be invalid. A number of cases in the 1950 probe the question of constitutional compatibility. This question remained even after the constitutional amendment in 1951, which added public order to the list of factors that could legitimately restrict freedom of speech.

In the case of *Tara Singh GopiChand v The State*,<sup>34</sup> Chief Justice Eric Weston explained the irrelevance of 124A, in the contemporary political setting.

India is now a sovereign democratic state. Governments may go and be caused to go without the foundations of the state being impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change, which has come about.<sup>35</sup>

The flexibility and resilience of an independent democracy meant that it should not only withstand but should thrive upon fervent critique and disagreement, which is the fruit of a plurality of voices. Eric Weston CJ concluded that, “the section then must be held void.” Such sentiment is reflective of K.M Munshi.

As a matter of fact the essence of democracy is criticism of Government. The party system which necessarily involves an advocacy of the replacement of one Government by another is its only bulwark; the advocacy of a different system of Government should be welcome because that gives vitality to a democracy.

Eight years later, this position was again furthered in two cases. One was that of *Sabir Raza*, whereby criticisms of the Chief Minister of Uttar Pradesh was held not to amount to sedition.<sup>36</sup> In *Ram Nandan's case*, the High Court of Allahabad overturned the conviction of Ram Nandan for a speech he made to a group of villagers. Section 124A was again held to be unconstitutional. Justice Gurtu explained that it was possible for people who legitimately and peaceably criticise the government to be caught in “the mischief of Section 124A of the Indian Penal Code.” For this reason he said it should be invalidated.<sup>37</sup>

These progressive decisions were overturned by the Supreme Court in *Kedar Nath Singh v State of Bihar*.<sup>38</sup> Whilst the court upheld the constitutionality of the law of sedition they reinterpreted its meaning, as discussed above.

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<sup>34</sup> *Tara Singh Gopi Chand v The State* 1951 CriLJ 449

<sup>35</sup> *Tara Singh Gopi Chand v The State* 1951 CriLJ 449

<sup>36</sup> *Sabir Raza v The State*, Cri App No. 1434 of 1955, D/ - 11-2-1958 (All) cited in *Ram Nandan v. The State*, AIR 1959 All 101.

<sup>37</sup> *Ram Nandan v. The State*, AIR 1959, All 101.

<sup>38</sup> *Kedar Nath Singh v State of Bihar*, 1962, AIR 955.

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#### 4. COMPARATIVE LAW

Whilst there are many countries that still have sedition laws, the general trend is certainly away from such laws, which are often remnants of colonial era political landscapes. In some jurisdictions, sedition has been repelled altogether. Where they remain these laws are not uncontroversial or uncontested, brushing up against national constitutions and human rights frameworks. In some cases, the scope of the law has been narrowed to a minimalist construction, prosecutions are rare, and punishments are often nominal. This next section is a brief outline of some of the contemporary approaches internationally to sedition.

##### United Kingdom

In the UK, Seditious libel was abolished under the *Coroners and Justice Act 2010*. This abolition the consequence of the laws contravention of the UK's *Human Rights Act 1998* and the underlying rights of the *European Convention on Human Rights* which the *HRA* upheld. Prior to this however, the law was rarely engaged and the rule under *ex parte Choudhury* restricted the application of seditious libel to cases where there was a provocation to violence.<sup>39</sup>

However, the protection awarded by the ECHR does not extend to non-European nationals. In addition, the *Terrorism Act of 2000* includes offenses such as "inciting terrorist acts" and "providing training for terrorist purposes at home or overseas."

##### New Zealand

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<sup>39</sup> *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, [1991] 1 All ER 313.

In New Zealand sedition was abolished in 2007, under the *Crimes (Repeal of Seditious Offences) Amendment Act 2007*. It was understood that the criminalisation of dissenting views was not a useful or appropriate response, that it contravened the *New Zealand Bill of Rights* and that sedition in New Zealand bore a “tainted history”.<sup>40</sup> The New Zealand parliament also noted the vagueness of sedition, its irrelevance in the contemporary context, the appropriateness of other criminal law provisions to deal with cases of incitement to violence and importantly, the “chilling effect” that such laws have upon free speech.

### USA

In the USA, under *Brandenburg v Ohio*, the court said that advocating a doctrine of violence in abstract terms was not considered sedition, whereas advocating immediate violence was.<sup>41</sup> The prior, it was held was protected by the *First Amendment* and the distinction was the immediacy of the threat. This law operates under civil jurisdiction and there is a separate code governing military justice where both sedition and failure to suppress sedition is punishable under a court marshal.

### Nigeria

In *Choke Obi*, the Nigerian laws on sedition were found to be constitutional. Criticism of the Government, insofar as it was a “malignant matter,” was seditious.<sup>42</sup> Subsequent cases such as *Nwankwo* have challenged this ruling on the grounds that sedition is incompatible with free speech.<sup>43</sup> The matter is not finally settled but some scholars, such as F.C. Nwoke, suggest that as the former was decided under colonial rule, the latter is more authoritative.<sup>44</sup>

### Australia

In Australia, Sedition laws are codified under some states criminal codes and the federal *Anti-Terrorism Act 2005*, which replaced the references to sedition in *the Federal Crimes Act 1914*. Prior to 2005, the last conviction of sedition had been in 1961.<sup>45</sup>

### Malaysia

In Malaysia, sedition is governed under the *Sedition Act 1948*, which criminalises one who “does or attempts to do, or makes any preparation to do, or conspires with any person to do”, acts or speaks or prints words which have a seditious tendency. In addition, the act covers any person who has seditious material in their possession, without lawful excuse. The stringency of these laws are

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<sup>40</sup> Crimes (Repeal of Seditious Offences) Amendment Bill, 2007, available at <http://parliament.nz/nr/rdonlyres/ob8ad487-c576-4bce-9a31-fd96362817f7/56750/1523crimesedition3.pdf>

<sup>41</sup> *Brandenburg v Ohio* 395 US 298 (1957).

<sup>42</sup> *DPP v Chike Obi*, [1961] 1 All NLR, 186.

<sup>43</sup> *State v Arthur Nwankwo*, (1985) 6CLR 228.

<sup>44</sup> F.C. Nwoke, “The Law of Sedition and the Concept of Press Freedom in Nigeria,” available at <http://dspace.unijos.edu.ng/handle/10485/633>.

<sup>45</sup> *Cooper v The Queen*, [1961] HCA 16, (1961) 105 CLR 177, 35 ALJR 32, [1961] ALR 725.

considered reasonable restrictions on Art 10(1) of the *Malaysian Constitution* dealing with free speech.

The sedition laws in Malaysia are currently undergoing a process of governmental review.<sup>46</sup>

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\* "Sedition Act to be Comprehensively Reviewed: Najb", 17/04/2012, [www.mysinchew.com](http://www.mysinchew.com) accessed on 18/04/2012.

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## **5. THE AFFECTIVE TURN - THE AFFECT OF THE LAW**

In this section, we will be examining the affect of the law and of media constructions of the law. Our concern here is how the laws, the rhetoric that judges and writers employ and the implementation of the law impacts upon the wider society. This can be divided into three sections.

- A). The legal mechanisms of fear of persecution and prosecution.
- B). The moral panic created by the institutions of law and the media.
- C). Manufacturing patriotism and affection

We shall see how, these three points are used to thematise sites of struggle, which gravitate around the law of sedition.

### a. Law as a mechanism for generating the fear of prosecution and persecution.

There are a plethora of mechanisms that governments can take advantage of to silence resistance amongst the population. Traditional forms of censorship, prohibition of publications, confiscation of printing presses, punishment of violators such as imprisonment, fines or deportation are some of the more obvious legal means. Limitations over the avenues through which dissent and alternate voices can be legitimately issued are another way. According to Dhavan, this approach as traditionally employed in India,

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<sup>46</sup> "Sedition Act to be Comprehensively Reviewed: Najb", 17/04/2012, [www.mysinchew.com](http://www.mysinchew.com) accessed on 18/04/2012.

helped to steer the emerging polity towards a “government by institution” by insisting that only acceptable form of influence on governments had to come through the properly designated institutional and social channels.<sup>47</sup>

However, the more covert means is the psychological pressure - the threat of sanctions and indeed of the trial itself - which encourages self-censorship amongst the population. The over use (and misuse) of S 124A in recent times can perhaps be viewed as means of reinforcing this threat, a method of silencing not just the transgressor, but signalling to the wider population the very real possibility of prosecution. The former Attorney-General, Soli Sorabjee, touches upon this fear when he suggested that the spate of arrests have invited “an atmosphere of paranoia.”<sup>48</sup>

Justice Holmes in his dissenting judgement in *Gitlow v People of New York* said that, “(e)very idea is an incitement. The only difference between the expression of opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”<sup>49</sup> If this is the case also in Indian law, then those with opinions which run counter to the dominate discourse, should be careful about how much enthusiasm they speak with.

#### b. The law and the media as generating moral panics.

Lord Mansfield drew an analogy in 1784 when he said that a licentious press was like a Pandora’s box and that it was “the source of every evil.”<sup>50</sup> In India, the law also uses the fear of the consequences of free speech to justify restrictions. The courts utilise the fear of rebellion, of social unrest and of the dire consequence to national order that permitting seditious material would unleash. This moral panic is predominantly directed against various political and religious organisations.

The “threat” that such associations pose to the Indian government is real, even if it is wholly manufactured. If the dreaded eventuality comes to pass, then this substantiates the threat; if it does not, then it is because the enemy “would have if they could have” but the countermeasures proved effective.<sup>51</sup> Once generated, the threat to society is existent in its potentiality. The threat is real insofar as its affect is felt in us beings. It breathes through the fear of the public. It is thus embodied, not abstract.

But this paradigm can be reversed. The higher courts, liberally inclined political orators, human rights advocates and the sections of the English speaking press

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<sup>47</sup> R. Dhavan, “Obtaining Moral Consensus in a Law and Order Society,” *Only the Good News; On the Law of the Press in India*, Manohar Publications, 1987, p. 276.

<sup>48</sup> Staff Reporter, “Binayak’s Work is Great, His Conviction is Unjust: Amartya Sen,” *The Hindu*, Online Edition, 09/01/2011, [www.hindu.com](http://www.hindu.com), accessed 10/04/2012.

<sup>49</sup> *Gitlow v People of New York*, No. 19 Supreme Court 268 US 652; 45 S. Ct 625; 1925 US.

<sup>50</sup> *King v Shipley* (1784), 3 Douglas’s Rep. 170.

<sup>51</sup> Brian Massumi, “The Future Birth of the Affective Fact”, *The Affect Theory Reader*, Melissa Gregg and Gregory J. Seigworth (eds.), Duke University Press, 2010, p 76.

employ a similar discourse of threat *against* the law of sedition. According to them, it is the law itself that poses the greatest threat to our society and our way of life, by chipping away at fundamental freedoms and encroaching on democratic rights.<sup>52</sup> This converts tolerance into a positive ideology in itself. When Evelyn Beatrice Hall paraphrased Voltaire as saying, “I disapprove of what you say, but I will defend to the death your right to say it,” she articulated concisely this liberalist position.<sup>53</sup>

### c. Manufacturing patriotism

Affection can not be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence. (*Mahatma Gandhi, March 18, 1922.*)<sup>54</sup>

However, affection can be manufactured. A good way to do it is through institutionalised protection of fundamental freedoms that people value. Another is to present the government in the role of defender of those freedoms, rather than a force which steals them in the night. The Government can better generate affection by using the carrot, rather than the stick.

Justice Holmes and Justice Brandeis were both proponents of the “marketplace of ideas.”<sup>55</sup> The “marketplace of ideas” is an economic metaphor by which more free speech can never be a bad thing. In the same way that minimal state intervention into market forces is to be valued, so is minimal state obstruction of the *First Amendment* rights. They advocated their staunch application of the right to free speech on the grounds that it was essential to the maintenance of government, and not a threat to it.

Such sentiment is echoed in the Nigerian case of *State v Ivory Trumpet Publishing Company Limited* where the court held that, in fact, a thick culture of free speech was, rather than detrimental to the stability of the state, essential to it.<sup>56</sup>

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsible to the will of the people and that changes, if desired, may

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<sup>52</sup> Vidya Subrahmaniam, “Mounting Outrage Against Binayak Conviction”, *The Hindu*, 28/12/2010, Chandrasekar Bhattacharjee, “Fighting the Sedition law is every Indian’s sacred duty,” *The Sunday Indian*, 19/04/2012, Human Rights Watch, “India: Repeal Sedition Law,” 05/01/2011.

<sup>53</sup> Evelyn Beatrice Hall, “Helvetius: The Contradiction,” *The Friends of Voltaire*, Smith, London, 1906, p. 199.

<sup>54</sup> Mohandas Gandhi, op. cit 1.

<sup>55</sup> From Justice Holmes dissenting Judgement in *Abrams v United States*, 250 US 616, 630 (1919).

<sup>56</sup> *State v Ivory Trumpet Publishing Company Limited*, [1984] 5 NCLR 736, 748.

be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of Constitutional Government.

If ones aim is to nurture patriotism, such rhetoric seems to be a far more effective tool than the implementation of oppressive laws.

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## **6. TWO CASE STUDIES**

### a. BinayakSen

In the well-published case of Dr. BinayakSen, the General Secretary of the Peoples Union for Civil Liberties, was arrested under Section 124A of the IPC, under Section 121A of the IPC and under state law, *The Chhattisgarh Special Public Security Act 2005*. Binayak was charged with conspiring with NarayanSanyal and PiyushGuha against the Indian Government. It was claimed that he passed letters onto NarayanSanyal, who was himself arrested in possession of Naxalite literature.

Dr Sen provided healthcare to the Adivasis in remote areas of Chhattisgarh. He was also involved in organising fact-finding campaigns into human rights violations in the region, including murders, deaths in custody and deaths from malnutrition. Civil rights organisations have presented the arrest (and later conviction) as an articulated retaliation for Sen's human rights work, in particular the uncovering of the atrocities of the SalwaJudum in Dantewada and the

police's involvement in this.<sup>57</sup> Sen is vocal critic of the Government programme of arming villagers to suppress the Naxal insurgency in the state.

Most of the reports in the English media frame the conviction as politically motivated. Some reports have said that the arrest, as a government strategy for silencing dissent has backfired; that it has worked to draw attention to the draconian sedition and state level laws.<sup>58</sup> This is particularly so since Dr Sen won the prestigious Jonathan Mann Award for Global Health and Human Rights, and after a letter was delivered to the Prime-Minister calling for Sen's release and signed by twenty-two Nobel Prize Winners.

#### b. Koondankulam protests

Another application of the sedition laws has been mass arrests of protesters in Idinthakarai and Koodankulam in Tamil Nadu. Amidst protests over the safety of the Koondankulam power plant, the police have arrested up to 6000 people in the months from September to December 2011 alone.<sup>59</sup> They have been charged with sedition (under Section 124A) and waging war against the Government (under Section 121) of the *Indian Penal Code*. Police officials say that the figures are inflated and that there is no doctrine of harassment.

The arrested include political activists including those from The Peoples Movement Against Nuclear Energy (PMANE), and large numbers local villagers and fishermen who will be affected by the plant's opening.

Some media reports have said that the use of sedition laws, rather than for example, terrorism laws, is a strategic practice to impose sanction and an atmosphere of fear in the region, without drawing unwanted media attention to the protests.<sup>60</sup>

Dr. Udayakumar, a representative of the PMANE has made claims that the power plant is unsafe, challenging the lack of consultation with the public and lack of transparency of the process. He was reported as saying that "It's an authoritarian project that has been imposed on the people."<sup>61</sup> Udayakumar also said that he

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<sup>57</sup> Peoples Union for Democratic Rights, "Conviction of Binayak Sen, Piyush Guha and Narayan Sanyal," 6/19/2011, [www.pudr.org](http://www.pudr.org), accessed 16/04/2012; Amnesty International, "India: Human Rights Defenders Need Effective Protection; Amnesty International's written statement to the 19<sup>th</sup> session of the UN Human Rights Council (27 February – 23 March 2012)," 13/02/2012, [www.amnesty.org](http://www.amnesty.org) accessed 16/04/2012; Democracy Now!, "India's Most Famous Political Prisoner Dr Binayak Sen Sentenced to Life in Prison," 27/12/2010, [www.democracynow.org](http://www.democracynow.org).

<sup>58</sup> "Sentence First Verdict Afterwards; India's Anti-Maoist Laws Become an International Embarrassment," *The Economist*, 29/05/2008, [www.economist.com/world/asia](http://www.economist.com/world/asia).

<sup>59</sup> Pallavi Polanki, "More Sedition Cases Against Anti-Nuke Protestors than Maoist Militants," *First Post*, 21/04/2012, [www.firstpost.com/politics](http://www.firstpost.com/politics).

<sup>60</sup> Pallavi Polanki, *Ibid*.

<sup>61</sup> Rahul Bedi, "Indian Activists Fear Nuclear Plant Accident," *New Zealand Herald*, 28/10/2011, [www.nzherald.co.nz](http://www.nzherald.co.nz).

has declined to participate in some further talks, for the fear that he may be arrested. This is illustrative of the use of fear to silence protesters voices and to stop the open discussion of issues regarding the health of the local population and environmental welfare.

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