

Judicial Interpretation of Sedition Law in Pre-Independent India

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Introduction

When the offence of sedition was inserted in the Indian Penal Code in 1870, the British government took the plea that the said provision was meant to be invoked only against the persons who, directly or indirectly, incite the use of force against the government, rather than curbing any legitimate dissent.¹ The second reason forwarded by the British government for inserting the said provision was to curb the preaching of jihad or holy war against the Christians living in India, popularly known as Wahabi Conspiracy.² On the contrary, the law of sedition was initially used by the British government against the Hindu leaders to curb any voice of legitimate dissent. The first such case was of Jogendra Chunder Bose, which is popularly known as Bangobasi case.

*Queen Empress v. Jogendra Chunder Bose*³

There was one weekly newspaper by the name of 'Bangobasi' (meaning 'Citizen of Bengal') having wide circulation in Bengal. The said newspaper published five articles in March 1891 attacking 'The Age of Consent Act', which was passed by the British Government on 19th March 1891. The said act amended Section 375 of the Indian Penal Code and held the sexual intercourse with a girl up to 12 years of age as rape. The said act was being considered as opposed to the ancient Hindu practice of 'garbhadaan', wherein the girl children below the age of ten were married to older men and were obligated to get impregnated within sixteen days of the marriage.

The language of these articles was considered as seditious by the British government, and consequently, the proprietor, editor, manager and printer of the said newspaper were all charged under Section 124A for sedition before the Calcutta High Court.

¹ Justice Deepak Gupta, "The Law of Sedition in India and Freedom of Expression" available at: <https://thewire.in/law/justice-deepak-gupta-supreme-court-sedition.html> (last visited on Jan. 18, 2020)

² *Ibid.*

³ (1892) ILR 19 Cal 35

The then Chief Justice of the Calcutta High Court, Comer Petheram, explained to the jury that any word conveys the meaning opposite to what it generally conveys when the prefix 'dis' is added to it. Therefore, the term disaffection means a feeling opposite to affection, and the term disapprobation means a feeling opposite to approbation (approval). He elaborated further, in the sense, that if any person uses the words, whether written or spoken, intended to create the feeling of disobeying the lawful authority of the Government he will be held guilty for the offence of sedition, even though no disturbance of any sort is produced as the result of such words.⁴

Chief Justice Comer Petheram further told the jury that the ultimate object of the writer had to be distinguished from the means employed by the writer for achieving such an object. If the writer used the means by which the feelings of enmity were aroused against the government, he would be held guilty under Section 124A for exciting disaffection against the government.

An analysis of the aforesaid address of the Chief Justice Comer Petheram to the jury puts forth the following points with regard to the law of sedition as interpreted by him at that time:

1. The word 'disaffection' used in the main body of the section, and 'the word 'disapprobation' used in the explanation of the section are not synonymous words. If these words were considered to be synonyms, then it would be almost impossible to convict any person under this section, as every act would fall within the explanation.
2. The word 'disaffection' simply means a feeling contrary to affection which would amount to dislike or hatred. On the other hand, the word 'disapprobation' simply means disapproval.
3. Disturbance of public order, as advocated by Justice Fitzgerald in 1868, is not the sine qua non of the offence of sedition.
4. In fact, the spoken or written words would amount to sedition, if such words are used against the Government.

⁴ "Whenever the prefix 'dis' is added to a word, the word formed conveys an idea the opposite to that conveyed by the word without the prefix. Disaffection means a feeling contrary to affection; in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him... if a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. 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 the intention to create such feeling."

5. The ultimate object of using such words, whether spoken or written, has no bearing on the offence of sedition. The object may be lawful, but, if in achieving such lawful object, the words used excite or attempt to excite the feeling of disaffection against the Government, it would amount to sedition.

Queen Empress v. Bal Gangadhar Tilak⁵

Bal Gangadhar Tilak is considered as one of the tallest personalities in modern Indian history. He had started two weekly periodicals in 1881 – ‘Kesari’ which was a Marathi vernacular, and ‘Mahratta’ which was published in English. He had published one article in Kesari on 15th June 1896, which carried his speech delivered on the occasion of festival, which was held over 12-13th June 1896 to commemorate the anniversary of the coronation of Shivaji Maharaj. In the said speech, Tilak justified the killing of Afzal Khan by Shivaji Maharaj, an act described as ‘murder’ by the British historians, by referring to the Lord Krishna’s advice given to Arjuna in the Gita to kill even our teachers and our kinsmen, if the said act is done without being actuated by a desire to reap the fruit of that act personally.⁶

The language of the aforesaid article was considered as seditious by the British government, and consequently, Bal Gangadhar Tilak was charged under Section 124A for sedition.

He somewhat assigned the same meaning to the term ‘disaffection’ as given by Justice Fitzgerald in the *Alexander Martin Sullivan* case, to mean ‘disloyalty in action’. He further stressed that the intensity of the disaffection is immaterial to constitute the offence of sedition, however, it would be taken in consideration for deciding the quantum of punishment.⁷

Justice Strachey drew the attention of the jury members to the point that the offence of sedition as incorporated in Section 124A of the Indian Penal Code does not mean to excite or attempt to excite mutiny or rebellion against the government. In fact, it includes exciting or attempt to excite bad feelings towards the government. He further elaborated this point by pointing that any person would be undoubtedly covered under the offence of sedition if such person excites or attempts to excite mutiny or rebellions against the government; but, such person would also be covered under the said offence if he excites or attempts to excite any sort of bad feelings towards the government.⁸

⁵ (1898) ILR 22 Bom 112

⁶ *Ibid.*

⁷ “It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. “Disloyalty” is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment; if a man excites or attempt to excite feelings of disaffection, great or small, he is guilty under this section.”

⁸ “Again, it is important that you should fully realize another point. *The 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,*

An analysis of the aforesaid address of the Justice Strachey to the jury puts forth the following points with regard to the law of sedition as interpreted by him then:

1. The unsuccessful attempt to excite disaffection towards the Government was placed on equal footing with the successful attempt to excite disaffection.
2. The word 'disaffection' was given a very wide meaning to the extent that it would mean mere lack of affection, by following the definition as laid down by Justice Petheram in the Bangobasi case.
3. It is sufficient for an act to be termed as seditious if the said act excites or attempts to excite any feeling of enmity towards the Government.
4. Explanation to Section 124A was given a very restricted meaning. Consequently, the Explanation applied only to those writings which consisted of mere criticism of specific measures or actions of the Government like an enactment, tax or social schemes, and not to any writings which went beyond such criticism and incited or attempted to incite disaffection against the government.⁹

For a better understanding of the interpretation of sedition law in India about that time, it is pertinent to mention here, though in brief, the interpretation given to sedition, about the same time, in England.

In *Rex v. Aldred*¹⁰, the English Court expressly pointed out that the ordinary meaning of the term 'sedition' is any rebellion, uprising, revolt, or violent agitation, which in itself implies violence in some form or another. It was further held in the said case that a person can be held guilty of publishing 'seditious libel', if such person by using either spoken or written language incite other(s) to use physical force or violence against any public institution or functionary of the State.

A bare perusal of the aforementioned case-laws clearly shows the stark difference in the interpretation of the offence of sedition between the Englishmen and the subjects of the British Empire.¹¹ If there was any criticism of

great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which is plainly as possible make the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course or action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to the complete misreading of the explanation attached to the section, and to the misapplication of the explanation beyond its true scope."

⁹ Chitranshul Sinha, *The Great Repression: The Story of Sedition in India* 69 (Penguin Random House India Pvt. Ltd., Gurgaon, 2019)

¹⁰ (1909) 22 CCLC 1

¹¹ *Supra* note 8

the government sans encouragement or incitement to use physical force or violence, it would constitute the offence of sedition in the colonies of the British Empire, while the same was not the case in their own homeland.¹²

Unfortunately, the position of the law regarding sedition remained consistent until 1942, when the Federal Court of India struck a different note in the following case.

Niharendu Dutt Majumdar v. King Emperor¹³

It was a period of Second World War. The Viceroy had issued a proclamation of emergency as the government feared that the security of India was threatened, both externally and internally. The Defence of India Act was in place since 1939 granting emergency powers to the government, similar to what existed during the First World War.¹⁴ According to the Rules promulgated under the Act, all the persons were prohibited from bringing into hatred or contempt, or to excite disaffection towards the British Crown or any of its representatives or the Government established by law in British India.¹⁵

A three-judge bench led by Chief Justice Maurice Gwyer of the Federal Court noted that the above-mentioned prohibition contained language identical to Section 124A of the Indian Penal Code. Sir Maurice Gwyer CJ, held that it is incorrect to interpret the said section along with the explanations attached to it in the literal sense. It would unnecessarily make a lot of people guilty of the offence of sedition if interpreted in such literal sense. He further stressed that the criticism of the government, even strongly worded, is a sign of healthy community.¹⁶

Chief Justice Maurice Gwyer, however, also held that it is the sovereign obligation of every government to maintain peace and order in the society, for which certain laws have to be enacted. Such laws must be there to prevent certain persons, who intend to disturb public peace, or attack or subvert the government established by law. It is for this purpose only that the offence of sedition has been enacted. It has not been enacted to pacify the feeling of excess pride of any government. He further remarked that any person would be held guilty of the offence of sedition only when the words used by such person, whether oral or written, has the tendency to create public disorder, or there is reasonable anticipation or likelihood of that happening.¹⁷

¹² *Ibid.*

¹³ AIR 1942 FC 22

¹⁴ *Supra* note 16 at 156

¹⁵ The Defence of India Rules, 1939, rule 34(6)

¹⁶ “The time is long past when mere criticism of governments was sufficient to constitute sedition, for it is recognized that the right to utter honest and reasonable criticism is a source of strength to a community than a weakness. Criticism of an existing system of government is not excluded, nor even the expression for desire for a different system altogether. The language of the Section 124A of the Penal Code, if read literally even with the explanations attached to it, would suffice to make a surprising number of persons in this country guilty of sedition; but no one supposes that it is to be read in this literal sense.”

¹⁷ “The first and foremost fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy

An analysis of the aforesaid observation of the Federal Court clearly shows that the Federal Court relied upon the findings of Justice Fitzgerald in *Sullivan* case, wherein he advocated that ‘disturbance of public order’, is the sine qua non of the offence of sedition.

Thus, according to the Federal Court, which is the predecessor of the Supreme Court of India, incitement to violence or disturbance of public order, or reasonable anticipation or likelihood of that happening constitute the offence of sedition; mere abusive words are not enough.

However, the position of law with regard to the term ‘sedition’, as enunciated by the Federal Court in 1942 was short-lived, as it was called into question in 1947 in the under-mentioned appeal to the Privy Council in England.

King Emperor v. Sadashiv Narayan Bhalerao¹⁸

The respondent was charged under Defence of India Rules for having, in 1943, made, published and distributed copies of a leaflet which contained prejudicial reports in contravention of said Rules. He had been acquitted by the Magistrate of the First Class, which was confirmed by the Bombay High Court. The appeal was preferred before the Privy Council in England before a bench of five councilors led by Lord William Thankerton.

The Privy Council, in its judgment, clearly held that the term ‘sedition’ does not appear in the entire wording of Section 124A. Instead, the word ‘sedition’ can be found only in the marginal note to Section 124A, which merely lends the name to the crime defined in the said section. It is incorrect to take the aid of marginal note in interpreting the contents of the said section.¹⁹

worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of the Government that in our opinion, the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek... to disturb its tranquility, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds, or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. *This is not made an offence in order to minister to the wounded vanity of Governments*, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. *Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency.*”

¹⁸ AIR 1947 PC 82

¹⁹ “The word ‘sedition’ does not occur either in Section 124A or in the rule; it is found as a marginal note to Section 124A, and is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known. There can be no justification for restricting the contents of the section by the marginal note. In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, some of which are referred by the Chief Justice, but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case.”

The Privy Council further held that the Federal Court has wrongly applied the interpretation given to the offence of sedition by the English Courts to Section 124A, for the law of sedition is expressly defined in the Indian Penal Code, whereas there is no statutory definition of sedition in English law.²⁰

The Privy Council further held that the language of the Section 124A does not suggest that the impugned acts or words must incite violence or disorder, or there is any reasonable anticipation or likelihood of that happening. The Privy Council expressly referred to the wording of Explanation 1 appended to Section 124A to point out the inconsistency in the suggestion that exciting or attempting to excite disaffection also includes exciting disorder, apart from exciting the feelings of disloyalty or enmity.

Thus, the Privy Council, by setting aside the judgment of the Federal Court in *Niharendu Dutt Majumdar* case, reinstated the principle that ‘incitement to violence’ or ‘disturbance of public order’ was not an important element for the offence of sedition, as laid down by the different High Courts hitherto.

²⁰ “Their Lordships are unable to find anything in the language of either Section 124A or the rule which could suggest that “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.” The first explanation to Section 124A provides, “The expression ‘disaffection’ includes disloyalty and all feelings of enmity.” This is quite inconsistent with any suggestion that “excites or attempts to excite disaffection” involves not only excitation of the feelings of disaffection, but also exciting disorder. Their Lordships are therefore of the opinion that the decision of the Federal Court in *Niharendu’s* case proceeded on a wrong construction of Section 124A of the Indian Penal Code.”