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RIGHT TO FREEDOM OF SPEECH AND EXPRESSION AND SEDITION

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Abstract:-The Indian Constitution's preamble guarantees its citizens the right to freedom of opinion and expression. Article 19(1) of the Indian Constitution consequently guarantees everyone else the same rights. (a). The freedom to choose one's lifestyle, political beliefs, and social conduct is what is meant by the phrase "liberty." While one can act whichever one likes within the bounds of the law, liberty does not imply unlimited freedom. Thus, the freedom of speech and expression is not an unrestricted right; rather, it is subject to possible legal limitations. Freedom of speech has some appropriate limitations even if it is a fundamental right. Indian Penal Code has many provisions which restrict freedom of speech and expression.

Keywords:- reasonable restrictions, sedition, political Rights, incitement, Federal Court, disaffection, national security

1. INTRODUCTION

"Amid the clash of arms, the laws are not silent."

Lord Atkin

Even though the right to free speech is a fundamental right, it also has certain reasonable restrictions that go with it. The International Covenant on Civil and Political Rights (ICCPR) states in Article 19(3) that restrictions on the right to free expression may be necessary to protect the rights of others as well as for the sake of morality, public health, or public order. According to Article 20(2) of the ICCPR, it is illegal to promote hatred towards someone based on their nationality, race, or religion if doing so will induce them to act violently, discriminatorily, or with hostility. Comparably, reasonable obligations and limitations are stipulated in Article 10(2) of the European Convention on Human Rights when someone exercises their fundamental right to free speech. The preamble of the Indian Constitution promises the citizens of India liberty of thought and expression and based on this principle the Constitution of India guarantees to all citizens the Freedom of speech and Expression under Article 19(1) (a). The freedom to choose one's lifestyle, political beliefs, and social conduct is what is meant by the phrase "liberty." So the

Right to freedom of Speech and Expression is not absolute, it envisages restrictions that may be placed on this right by law. Article 19(2) enabled the State to make laws to restrict speech relating to libel, slander, defamation, contempt of court, any matter which offends against decency or morality, and laws restricting any speech which either undermined the security of the State or had the tendency to overthrow the State. Despite the limitation put by Article 19(2) many laws restrict freedom which derives their legitimacy from Article 19(2). Various laws are passed from time to time to curb this right of free speech for political purposes. Some of them have their origin in colonial India and many laws were passed post-independence. India's Parliament could enact any law, no matter how unreasonable it may be as long as it fell within the enumerated exceptions in Article 19(2) of the Constitution. What type of legislation is passed always depends on the circumstances prevailing in the society for example, in colonial India, it was the rise of the Wahhabi movement that led to the passage of the law of sedition, and the rise of the organized nationalist movement propelled the British Government into passing a series of restrictive press laws and speech restricting provisions.There are various provisions scattered throughout the Indian Penal Code which curb free speech.

2 Sedition

The crime of sedition was originally a concept of Monarchical England. It was used to insulate the king, and a largely unelected Parliament, from public criticism. India was a British Colony so unsurprisingly the law of sedition found its way into our criminal law. The Indian Penal Code was drafted by a law commission which was composed of four members and the most influential member among these was Thomas Babington Macaulay who prepared a draft of theIndian Penal Code. In his draft section 113 consisted of provisions relating to sedition. It made it an offence for any person to 'excite feelings of disaffection to the government', though making critical yet 'obedient' and 'respectful' comments on government measures did not attract any penalties. Macaulay's draft of section 113 was different from the actual law of sedition, which was practised in England. For instance, prosecutions for sedition were only restricted to those cases where there had been a direct provocation to disorders, it was only seditious libel. It was a mere misdemeanour in England but in India, it extended to the cases of indirect provocation and carried a maximum sentence of banishment of life. However, in his notes on Indian Penal Code Macaulay wrote that the offence of sedition did not include merely bringing the government into hatred or contempt. Macaulay's draft of the Indian Penal Code took several decades to become law in British India. He prepared a draft in 1837, but the Indian Penal Code was enacted in 1860 and in the meantime, Draft of

Macaulay was considered extensively. However, for some reason, section 113 of Macaulay's 1837 draft of the Indian Penal Code did not make it into the final version of the Indian Penal Code that was enacted in 1860. Ten years later in August 1870, the law member of the Viceroy's Execution Council Sir James Fitzjames Stephen, introduced a Bill to amend the Indian Penal Code and to bring Macaulay's section 113 into the code's fold and in doing so, Stephen said that sedition had been left out of the IPC due to 'some unaccountable mistake'. Now it was brought more in line with the English law of sedition Treason Felony Act of 1948 that penalized all the seditious expressions. Section 113 of Macaulay's was introduced as Section 124-A of the Indian Penal Code. It was a response to the rising Wahabi political movement section 124-A as originally 'enacted', it defined the offence of sedition as:

Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites feelings of disaffection against the Government established by law in British India shall be punished with imprisonment for life, to which fine may be added or with the imprisonment which may extend to three years to which fine may be added, or with fine .[1]

The offence of sedition was made non-bailable and non-cognizable. Section 124-A of the Indian Penal Code remained dormant for two decades. The first known case on the law of sedition in India was reported in 1891 was *Queen Empress v. JogendraChander Bose*[2], in which the editors of a Bengali magazine were charged for the criticism of the British Government policies, specifically regarding the Age of Consent Act, 1891. In this case, the Calcutta High Court's Chief Justice W. Comer Petheram emphasized the distinction between the terms 'disapprobation' (that is legitimate criticism) and 'disaffection' (which refers to 'any feeling contrary to affection'). The next landmark case on this matter was that of *Queen Emperor v. BalGangadharTilak and KesarMahadevBal*,[3] In this case, BalGangadharTilak was tried for sedition for alleged incitement through speech that led to the killing of British officials. In this case, a single judge bench of the Bombay High Court agreed with the definition of 'disaffection' as propound in *JogendraChander Bose's* case and opined that any 'bad feelings' towards the government is criminal, irrespective of the level of bad feeling and in this way the High Court disallowed any legitimate criticism. It added that there need not be any material consequence at all to qualify the offence of sedition. The court held that in sedition matters, it is the intention of the offender

[1]Anushka Singh**,** *SeditionIn liberal Democracies*134-136(Oxford University Press, New Delhi,2018)
[2](1892) 19 ILR Cal 35.
[3](1897) 22 ILR Bom 112.

which is primary, and could be presumed based on the content, audience and circumstances of their seditious speech.

Tilak was again tried for sedition in the case of *Emperor v. BalGangadharTilak*,[4]for an article he wrote in which he advocated the attainment of sawrajya (self-rule) for Indians. In the article, Tilak explicitly admitted his loyalty to the British Crown and criticized the civil services arguing in court that the civil services and the British government were different entities. But the court rejected the contentions of Tilak, holding that the civil services derived their authority from the state itself, and no such ground existed. The Bombay High Court, however, classified that only such criticism of the civil service that can be attributed to the state should be considered sedition.

Apart from the Calcutta and Bombay High Courts, the Allahabad High Court had the opportunity of considering the law of sedition in *Queen Emperor v. Amba Prasad*.[5] The accused, Amba Prasad, was the proprietor, editor and publisher of a newspaper called Jami-ul-ulam. The paper had carried an article called 'Azadi band hone se kamalnamuna'. It was held that sedition was any excitement of or attempt to excite 'feelings of hatred, dislike, ill will, enmity or hostility towards the government established by law in British India. 'Disaffection' and 'Disloyalty' are held to be synonymous.

In short the judgments of the Calcutta, Bombay and Allahabad High Court incorporated English law of sedition, as it existed before 1832 and this all led to the amendment of Section 124-A in 1898. While Macaulay's draft had merely used the word 'disaffection' words like hatred, contempt, disloyalty and enmity were now used to define the law of sedition. The Act IV of 1898 amended section 124-A as:

"Wherever by words, either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which five may be added, or with imprisonment for a team which may extend to three years to which fine may be added, or with fine."[6]

[4](1908) 10 Bom LR 848.
[5](1898) 20 ILR 55.
[6]AbinavChandrachud, *Republic of Rhetoric:Free Speech and the Constitution of India* 32-339(Penguin Random House,Gurgaon,2017)

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The test laid down by Justice Strachey in the *BalGangadharTilak* case was followed in India and the following were the key ingredients of sedition

1.Presumed Intent: A person committed sedition if he intended to commit sedition this was even though the words of section 124-A did not speak of intent. However, what a person intended was largely a question of law. A speaker was presumed to have intended the natural results of the words to be used.

2. Bad Feelings: Sedition could be committed even if the writer or speaker did not refer to the government directly, but made 'covert allusions' to it. The words 'government established by law in British India in section 124-A meant not merely the government itself but also agencies of the government like the civil service, the police or even Englishmen in India. In the case *Sat Parkash v.Emperor*[7]A person criticized General Dyer, the notorious perpetrator of the JallianwalaBagh massacre, and said that Dyer had played 'Holi' with the blood of Indians; this too was considered an act of exciting disaffection against the government.

3. Incitement Not Necessary: Unlike the English law of sedition, the speaker didn't need to incite others to commit acts of insurrection, rebellion or public disorder to commit sedition.

4. Impact Inconsequential: It did not matter what the actual impact of the speech or writing was. It didn't matter that no person developed ill feelings towards the government as a consequence of his speech.

5. Class of Readers: The class of readers was likely to read the work in question was relevant.[8]

Tilak was found guilty of sedition once again in 1908 for writing articles in his Marathi newspaper Kesari and was sentenced to six years of transportation to Burma. Under the law in British India, only Indians could be sentenced to transportation, white Europeans and Americans would yet sentenced to imprisonment instead 1907, the Prevention of Seditious Meetings Act was passed by the British Parliament to stop public gatherings that could incite sedition or cause unrest. At the time, anti-British meetings were taking place across India, with the primary goal being the overthrow of the government. In 1911, the Act was repealed by the Prevention of Seditious Meeting Act, 1911 which enabled statutory authorities to prohibit public meetings in case such meetings were likely to provide

[7] AIR 1941Lah 165
[8] *Supra note 6 at 37.*

disaffection or to cause disturbance in public tranquillity. The violation of the provisions of the Act was made punishable with imprisonment for a term which could extend to six months or five or both. However, the act now stood Repealing and Amending (Second) Act. In 1922, Gandhi pleaded guilty to a charge of sedition and was sentenced to six years imprisonment by the District and Session Court of Ahmedabad. Commenting on section 124-A Gandhi said "Section 124-A under which I am happily charged is perhaps the prince among the political section of the Indian Penal Code designed to suppress the liberty of the citizens. Affection cannot be manufactured or regulated by law." In the pages of this newspaper Young India, Gandhi repeatedly wrote against sedition. In an article published in July 1929, Gandhi compounded 124-A of the Indian Penal Code to the 'sword of Damocles' and called for its repeal. In 1922, Gandhi said "I considered it my business, as it was the business of every Indian, to promote disaffection against the present system of Government India."[9]

So the definition of the sedition was incredibly extensive and the British Governor was justifying its liberal ambit. It defined sedition as "A person who merely engendered feelings of hatred, enmity or disloyalty, even the absence of affection, against the colonial Government, without actually inciting any kind of insurrection, rebellion, or disorder under the Indian Penal Code". It was also irrelevant that the words used had no tendency or likelihood to produce disorder or did not otherwise bear any imminent causal connection with it. But all this changed in 1941 when the federal court in *NihrenduDuttMajumdar v. the King Emperor*[10], where the court tried to apply the post-1832 English test to the law of sedition in India. Chief Justice Maurice Gwyer wrote the judgment of the court and for the first time in British India's legal history, the post 1832 English test of direct incitement was applied to the law of sedition. Gwyer opined that the meaning of sedition must change with time and it was held that 'mere criticism' of 'an existing system of government' or even 'the expression of a desire for a different system altogether' was not prohibited under the law of sedition. But the Federal Court judgement was short-lived and it was overruled by the Privy Council in *King Emperor v. Sadashiv Narayan Bhalerao*[11] it refused the test laid down by Gwyer in Majumdar's case and held that the English law test of sedition was inapplicable in India because India had a statutory provision of for sedition and the words of section 124-A did not impose the requirement that there must be incitement to disorder for the offence of sedition to have been constituted.

[9] *Id.* at 39.
[10] AIR 1942 FC 22.
[11] (1944) 46 BOM LR 456.

Sedition was acceptable to the framers of the Constitution as a restriction on the freedom of speech and expression but it remained as a part of the penal statute post-independence. After independence, the section came up for consideration for the first time in the landmark case of *RomeshThapar v. State of Madras*[12], in this case, the court examined the relationship between the term 'public safety' and 'public order' on the one hand and 'undermining the security of, or 'tending to overthrow the state' on the other hand In the seminal case of RomeshThapar v. State of Madras, which took place after independence, the court first considered the section by analysing the connection between the terms "public safety" and "public order" and the concepts of "undermining the security of" or "tending to overthrow the state." The Supreme Court ruled that laws restricting freedom of speech and expression would not be covered by Article 19(2) of the Indian Constitution unless they pose a threat to the "security of or tend to overthrow the state." the court held that 'freedom of speech and expression lies at the foundation of all democratic organization and without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. Section 9(1-A) of the Madras Maintenance of Public Order Act was held unconstitutional as it imposed prior restraint. A similar observation was given in *BrijBhushan v. State of Delhi*[13] where section 7(1) (C) of the East Punjab Safety Act was challenged. The apex court followed its decision and reasoning held in *RomeshThappar*case and held the section to be void as it imposed a prior restraint upon publication. But Justice Fazal dissented in both cases and gave his reasons in BrijBhushan. He contended that "undermining the security of the State," "public order," "public safety," and "sedition" were all the same. His opinion was echoed in the first amendment in the Constitution and two additional restrictions namely, 'friendly relation with foreign states' and 'republic order 'were added to Article 19(2), for the reason that in the *RomeshThappar* case, the Court held that freedom of speech and expression could be restricted on the grounds of threat to national security and for serious aggravated forms of public disorder that endanger national security and not relatively minor breaches of peace which were of a purely local significance.The court attempted to strike a balance between the rights to free speech and expression, noting that "A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder." However, the constitutional bench upheld the validity of section 124-A, which kept it at a different pedestal. Following this ruling, "public

[12][1950] 1 SCR 594.
[13][1950] 1SCR Supp.245.

disorder" has come to be seen as a prerequisite under section 124-A. In the famous *Kanhaiya Kumar v State of Nct Of Delhi*,[14]Delhi High Court observed that while exercising the Right to Freedom of Speech and Expression under Article 19(1) (a) of the Constitution, one has to remember Part IV, Article 51A of the Indian Constitution. In light thereof, it could be stated that unless the words used or the actions in question do not threaten the state or public or lead to any sort of public disorder which is grave, the act would not fall within the ambit of 124-A of Indian Public Code. In *Balwant Singh v. State Punjab*[15] the court refused to penalize casual raising of slogans (KhalistanZindabad, Raj KaregaKhalsa etc.) and observed that every criticism does not amount to sedition. In P*ankajButaliav.Central Board of Film Certification and Ors*,[16]held that while judging the cases of sedition it is extremely important to take into consideration the intention. In *SanskarMaratheAseemTrivedi v. State of Maharashtra*[17]cartoonist AseemTrivedi was booked under section 124A for defaming the Parliament. The Apex Court in the present case distinguished between strong criticisms and disloyalty to the Government established by law observing that disloyalty implies excitement of public disorder or the use of violence. In *ShreyaSinghal v. Union of India*[18] striking down section 66A of the Information Technology Act, 2000 the court observed that no one can be prosecuted for sedition unless they have a direct connection to the commission of violence or public disorder.

The Indian Penal Code (Amendment) Bill, a private member's bill, was introduced in 2011 and stated that section 124-A of the Indian Penal Code ought to be repealed since it is a colonial statute that the British used to stifle criticism and speech critical of them. Another bill titled the India Penal Code (Amendment) Bill, 2015 was introduced in LokSabha by MrShashiTharoor to amend the original section and suggested that only those words/actions that directly result in the use of violence or incitement of violence should be treated as sedition. Further, the data provided by the National Crime Records Bureau indicates that sedition cases have risen from 47 in 2014 to 93 in 2019, a massive 163 per cent jump. However, the commission rate from cases to communication is more than 3 per cent. This shows that the police and related state authorities are using the sedition laws indiscriminately to create fear among the citizens and silence any criticism or dissent against the regime. The Supreme Court on 11 May 2022

[14](2016) 227 DLT 612.
[15](1995) 3 SCC 214.
[16](2015) 151 DRJ 37

[17] (2015) SCC BOM 587
[18] AIR 2015 SC 1523

stayed section 124A of the Indian Penal Code until the government completes its promised exercise "to examine and re-consider the provision of section 124-A of the Indian Penal Code" dealing with the offence of sedition.

3. Conclusion

The Parliament of India, however, repealed the law of sedition in BhartiyaNayay Sanhita,2023(replacing the Indian Penal Code,1860)but section 152(Acts against the Sovereignty and Integrity of India) of BhartiyaNayay Sanhita,2023 will be like putting old wine in a new bottle. Moreover, there are draconian laws like UAPA(Unlawful Activities and Prevention Act) which have an even wider definition of sedition which needs reconsideration.