A Moment of Reckoning for the Sedition Offense in India

Abhinav Sekhri*

The Indian Supreme Court is set to revisit the legality[1] of the sedition offense as defined within Section 124-A of the Penal Code of 1860.[2] It is not an issue of first impression — a bench of Five Justices had considered the validity of the offense and held in 1962 that it could be reconciled with the new Republic's constitutional protections for free speech, if only by placing certain extra-textual fetters upon the offense.[3]

A fresh round of petitions came to be filed in 2021 and 2022, arguing that this balancing act of 1962 warranted reconsideration, citing the evolution of jurisprudence as well as rampant misuse of the offense.[4] The Court was convinced enough to place the offense in cold storage back in May 2022, while agreeing to the government's request for deferring the substantive hearing because it claimed that the offense was under active reconsideration. This situation played out for over a year. When the petitions were heard by the Court on September 12, 2023, it no longer acceded to the deferral request and directed that the legality of sedition must be reconsidered by a Bench of "at least" five Justices.[5]

It will be some time before the hearing for this reconsideration exercise takes place, probably not before early 2024. Whenever it does occur, it will give the Supreme Court an opportunity to confront troubling questions and contradictions that have defined the exercise of political speech in the Indian republic. My aim here is to lay out these issues to explain what is at stake.

A Brief History of the Sedition Offense in India

The formulation of the sedition offense in Section 124-A of the Indian Penal Code (which, as it so happens, does not refer to "sedition" explicitly within the clause) was borrowed heavily from existing positions in England at the time. It punishes speech, whether written or not, which brings into "hatred or contempt," or excites "disaffection" towards, the government established by law. It clarifies that the act of criticizing government measures to bring about change is not an offense where it does not excite such feelings within persons.[6]

Section 124-A did not prescribe any requirement linking the speech act to harmful consequences and, in a sense, was a pure speech offense. This

absence of any requirement to examine whether the speech *actually managed* to excite any measure of disaffection amongst the audience was an issue raised multiple times before courts in British India, often at trials involving nationalists. The absence of such a requirement in the text settled the issue for the Courts, barring some notable exceptions, and made it rather easy to achieve successful prosecutions for what was labelled the "prince" amongst the political offenses of the Code.[7]

If the years between India's independence and adoption of the constitution were anything to go by, the new nationalist government did not see things that way and was hardly averse to the idea of pursuing sedition prosecutions in the face of uncomfortable political speech. The task of drawing a line on censorship continued to fall to High Courts which were often scathing in their displeasure and set aside prosecutions.[8]

The recognition of a guarantee for freedoms of speech, expression, and association under Article 19 of the Indian Constitution offered a new paradigm to courts which were no longer constrained in expressing their displeasure by quashing prosecutions but could declare the offense itself *unconstitutional*. This is precisely what they were asked to do by petitioners. By the end of the first decade of the Indian Constitution, a conflict had emerged across High Courts on whether the sedition offense was a permissible limit on the exercise of free speech.[9]

This conflict reached the Supreme Court and led to the first review of sedition's legal validity by that Court in *Kedar Nath Singh*. Its answer I have already previewed: The Court upheld the validity of the offense, but only after inserting extra-textual safeguards into the clause, which would bring it within the fold of limitations in the Constitution itself that the freedom of speech could be reasonably restricted in the interests of maintaining public order. This was nothing other than the requirement to establish a link between the offending speech and some real-world harm.

Reconsidering Sedition in the 21st Century

The scepter of disorder, disharmony, and potential national disintegration by problematic speech is what has propelled retention of sedition, or similar offenses, amidst all countries. It is no surprise for governments in India since 1950 to not have sponsored its repeal, and if anything, to have taken steps to somehow broaden the powers to clamp down on problematic political speech.[10] It is this fear that convinced the Supreme Court of a nascent Indian republic to ignore the history of oppression carried by sedition under colonial rule and somehow make the offense suitable for a democratic, republican state.

Yet, the evidence of the past fifty years suggests that the judicial re-writing of the sedition offense to somehow screw a tight lid on top of that Pandora's box and keep it within the bounds of the constitution has not

prevented it from casting a pervasive chilling effect on the exercise of free speech.[11] How does a court imagine the problem now, fifty years later? Do we need tighter screws to keep the monsters at bay?

Perhaps, but such an approach would continue to ignore the symptom for the disease. Asking the government to punish speech exciting disaffection in the minds of people where it tends to cause disorder, is a proxy for handing unbridled discretion to stymie any kind of problematic speech. In this formulation sedition retains the charm it had for the kings, by conferring broad discretion to stifle speech in real time to send a clear message of authority.

Not having any links with real-world harms was considered palatable for a colonial setup, but not for long, and was seen as completely antithetical to a setup with constitutionally guaranteed civil liberties. But how significant a restraint do we place with the threshold of proscribing speech with a *tendency* to cause disorder, or even a notionally stricter test of requiring *proximity* to violence, while retaining a distressingly antiquated notion of the kind of speech that is problematic in the first place?

India's experience with the sedition offense forces us to reckon with an age-old dilemma — literally spanning centuries, considering the pedigree of this specific crime. Is it possible to ever engage in meaningful line-drawing when it comes to proscribing political speech, or are we just drawing lines in the sand which can be conveniently washed away by the powerful tides of state power?

Without confronting the vagueness of the sedition offense head on, which was integral to its very conception as a catch-all offense to stifle dissent, there cannot be a real reckoning with the many varieties of problems that this offense has come to symbolize over time.

---

* Abhinav Sekhri is a legal writer and lawyer practicing in New Delhi, India. He specializes in criminal law, evidence, and procedure.

[1] Order dated 12.09.2023 in W.P. (Civil) No. 682 of 2021 (Supreme Court of India, Three Justices' Bench).

[2] It was inserted by an amending act (Act 27 of 1870), helmed by James Fitzjames Stephen (more famous for having drafted another colonial code, the Indian Evidence Act of 1872).

[3] *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769 (Supreme Court of India, Five Justices' Bench).

[4] See, e.g., Brief for the Petitioner in *S.G. Vombatkere* v. *Union of India* [W.P. (Civil) No. 682 of 2021] (https://www.scobserver.in/wp-

content/uploads/2021/09/Sedition_WritPetition_SGVombatkere.pdf) (last accessed Sept. 23, 2023).

[5] Order dated 12.09.2023 in W.P. (Civil) No. 682 of 2021 (Supreme Court of India, Three Justices' Bench).

[6] See, e.g., Anushka Singh, *Sedition in Liberal Democracies* (Oxford University Press 2018).

[7] This history is concisely spelt out in many places. See, e.g., Siddharth Narrain, "'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India," 46(8) *Economic & Political Weekly* 33 (2011). The "prince" remark is reported to have been made by M.K. Gandhi in a trial where he, along with others, was accused of sedition.

[8] The prosecutions were not only under Section 124-A, but other offenses which carried the same ingredients such as Section 4 of the Press (Emergency Powers) Act, 1931. See, e.g., 1949 CriLJ 813.

[9] The Patna High Court upheld the validity of the clause, finding that it placed permissible limits upon the freedom of speech [*Debi Soren*,1954 CriLJ 758] whereas the Allahabad High Court held that the offense could not be construed as a valid limitation [*Ram Nandan*, 1959 CriLJ 1].

[10] Sedition was made a cognizable offense after independence, thus conferring upon police powers to arrest without warrant on suspicion of this offense. More recently, the current government has sponsored a draft legislation which, while claiming to "repeal" sedition, actually replaces it with a broader offense with a similarly rotten core.

[11] A tracker is being maintained in respect of prosecutions over the past ten years. See A Decade of Darkness: The Story of Sedition in India (https://sedition.article-14.com) (last accessed Sept. 23, 2023).Perhaps that is why no government since 1962 has found any problems with the judicial formulation, and the current government has sought to incorporate it into the statute itself.

Suggested Citation: Abhinav Sekhri, "A Moment of Reckoning for the Sedition Offense in India," MCLR+ (crimlrev.net) (Sept. 24, 2023) (https://crimlrev.net/2023/09/24/a-moment-of-reckoning-for-the-sedition-offense-in-india-abhinav-sekhri/).