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OLD SWORD IN NEW SHEATH: AN ANALYSIS OF SECTION 152 OF BHARATIYA NYAYA SANHITA

Shraddha Mall[±] & Shantanu Singh [±]

Abstract: *The new sedition law, Section 152 of the Bharatiya Nyaya Sanhita (BNS), ostensibly enacted to rid Indian criminal law of colonial vestiges, has merely perpetuated and expanded the sedition framework of its predecessor, Section 124A of the Indian Penal Code (IPC). The imprecise and sweeping language of Section 152 BNS not only retains the core repressive spirit of the sedition law but also broadens its interpretative scope, increasing its potential for misuse. This paper asserts that the broader ambit of Section 152 BNS represents a regressive step, intensifying the risk of abuse. It also critiques the Kedar Nath Singh judgment, which upheld the constitutionality of sedition laws, as outdated and incompatible with contemporary constitutional standards such as the Test of Proportionality and the New Doctrine under Article 14. This judgment is increasingly irrelevant in the face of modern legal principles. In response, it offers reformative suggestions tailored to current Indian realities, aiming to balance national security with fundamental freedoms.*

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I. Introduction

The Rajasthan High Court in *Tajender Pal Singh v. State of Rajasthan*[1] made an insightful observation, stating, "*Section 152 BNS has its genesis to section 124A (sedition) of repealed IPC*." To the court it *prima facie* appears a reintroduction of section 124A (sedition) under a different name. Most striking is the court's cautionary note: "*one must stay mindful that the provision is used as a shield for national security and not a sword against legitimate dissent*."

"*The laws in their current form will be used as a pretext to violate the rights of all those who dare speak truth to power*" was the bold statement given by Amnesty International India's chair, Aakar Patel, while commenting on the implementation of new Criminal Laws. Patel, apprehensive of the newer form of Sedition Law, stated that the new Indian laws reintroduce and expand on previous sedition regulations, despite claims of their removal, criminalizing acts that endanger the nation's sovereignty, unity, and integrity. He hints that the new laws are not in line with international human rights standards and fears that they could be used to curb dissent in the country.[2]

Home Minister Amit Shah, on the other hand, stated in the Lok Sabha that the new Bill was such that the sedition law *"will be completely repealed.*"[3] Further, Shah hailed "*[its aim to] provide justice, not to punish*."[4] However, former Supreme Court Justice Madan B. Lokur said that Section 152 of Bharatiya Nyaya Sanhita (BNS)[5] is no different than

[1] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].
[2] Amnesty International, (2024, July 01), *India: Authorities must immediately repeal repressive new criminal laws,* https://www.amnesty.org/en/latest/news/2024/07/the-laws-in-their-current-form-will-be-used-as-pretext-to-violate-the-rights-of-all-those-who-dare-speak-truth-to-power/.
[3] India Today, (2023, August 11), *Sedition law to be scrapped, says Amit Shah, punishment enhanced in new provisions* https://www.indiatoday.in/law-today/story/sedition-law-repeal-amit-shah-parliament-indian-criminal-laws-overhaul-2419568-2023-08-11.
[4] Ministry of Home Affairs, (2024, July 01), *Press Release*, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2030088.
[5] Bharatiya Nyaya Sanhita, 2023, §152.

earlier sedition laws under repealed Indian Penal Code (IPC).[6] The new criminal laws are old wine in new bottles, doing little to separate India from its colonial past.[7] It persists to be retributive and perpetrator centric. Hence, the government's claim of upending the colonial inheritance within the criminal legal framework through these acts lacks merit.

The Supreme Court of India, in *Shreya Singhal v. Union of India,*[8] itself concluded that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme. Following the same principle, Supreme Court, in *S.G. Vombatkere v. Union of India,*[9] put an indefinite stay on the usage of Section 124A of IPC.[10] It was decided to keep all the trials, appeals and proceedings under Section 124A in abeyance until such time as further directions are issued in this regard. The government on one hand claims that the sedition law has been repealed. However, in reality, even in the reference tables provided to police forces, there exists no Section adjacent to 124A IPC, which purports that the law has not been retained.[11] Section 152 of BNS is in pith and substance same as section 124A IPC.[12] The names are different, but they are the same and one.

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[6] Srishti Lakhotia, *Sedition Law has not changed with BNS: Justice Lokur*, (August 13, 2024) https://timesofindia.indiatimes.com/city/kolkata/justice-lokur-highlights-sedition-law-and-prison-reform-in-india/articleshow/112478780.cms#:~:text=Section%20150%20of%20Bharatiya%20Nyaya%20Sanhita%20was%20no%20different%20from%20the%20earlier%20sedition%20law%2C%20retired%20Supreme%20Court%20judge%20Justice%20Madan%20B%20Lokur%20said%20on%20Monday.

[7] Mira Patel, *The colonial history of the Indian Penal Code and how its influence extends to the BNS, (*July 12, 2024) https://indianexpress.com/article/research/the-colonial-history-of-the-indian-penal-code-and-how-its-influence-extends-to-the-bns-9448954/.

[8] Shreya Singhal v. Union of India, (2015) 5 SCC 1, at 8.

[9] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.

[10] Indian Penal Code, 1860, § 124A.

[11]UP Police, *Corresponding Section Table Of Bharatiya Nyaya Sanhita 2023, (BNS),* https://uppolice.gov.in/site/writereaddata/siteContent/Three%20New%20Major%20Acts/202406281710564823BNS_IPC_Comparative.pdf.

[12] Shrushti Taori & Tatva Damania, (2024, June 02), *Balancing Free Speech And National Security: A Critical Analysis Of Section 152 Of The Bhartiya Nyaya Sanhita And Section 124-A Of The IPC*, https://www.livelaw.in/lawschool/articles/balancing-free-speech-national-security-critical-analysis-section-152-bhartiya-nyaya-sanhita-section-124-a-ipc-259465#:~:text=Even%20though%20the,the%20different%20name.

This paper focuses on how sedition laws used by the government of democratic India are similar to those used by colonial rulers i.e., to suppress dissenting opinions of individuals. The literature review section of the paper deals with different viewpoints with regard to sedition law. We then trace the origin and aim of sedition law, identify the main issue with the newly enacted Section 152 of BNS, and argue that the sedition law does not survive the newfound tests of constitutionality, and make recommendations in light of recent developments.

II. Literature Review

The law of sedition has been a subject of controversy for centuries.[13] There exist three viewpoints with regards to the fate of Sedition. First, the pro sedition outlook that supports the existence of the law in its pure form. Second viewpoint rallies for the abolition of the law. Third one provides for the existence of the law, but with a very narrow scope for enforcement. It is indispensable for us to deal with the flaws and virtues of each of these viewpoints.

In a piece titled "*A Case in Support of Retaining Section 124A*"[14] author Prabhat Singh argues that the law against sedition is requisite for a government to safeguard itself from subversion. The author further argues that the law is a reasonable restriction that prevents speeches that have serious implications on the security of the state. Similar was the dissenting opinion of Justice Fazl Ali in the case of *Brij Bhushan & Ors v. State of Delhi,*[15] where he held sedition to be an offence against the public tranquillity[16], and hence a viable restriction under article 19(2). In this paper, we argue that sedition is not the sole tool with the government to curb violence against the state,[17] and though it is

[13] Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (WW Norton, 2004).
[14] Prabhat Singh, *A Case in Support of Retaining Section 124A*, RMLNLU Law Review Blog https://rmlnlulawreview.com/2022/07/24/needforseditionlaw/.
[15] Brij Bhushan v. State of Delhi, 1950 SCC 449
[16] Brij Bhushan v. State of Delhi, 1950 SCC 449, at 460.
[17] Law Commission of England and Wales, Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), 41.

purported to be a shield against a greater evil,[18] it is a broadsword used for the massacre of dissenting opinions.

Nivedita Saksena and Siddhartha Srivastava in their paper titled "*An Analysis of the Modern Offence of Sedition*" argue that a law against sedition could not be brought out of the pit of vagueness, and due to its undefinable boundaries, it has a chilling effect on freedom of expression.[19] They further argue that the provision is unnecessary given the availability of other laws which could be efficiently employed for curbing acts that constitute sedition. This paper finds merit in the argument, and holds Section 152 BNS, to be violative of fundamental rights due to its arbitrariness and vagueness.

Gautam Bhatia, in his book, "*Offend, Shock, or Disturb: Free Speech under the Indian Constitution*"[20] calls for narrowing of the scope of sedition, restricting it to cases where the threat of incitement to violence is imminent, as postulated in the case of *Brandenburg v. Ohio*.[21] As the subjectivity of the word 'imminent' could still leave space for ungenuine application, this paper, in an attempt to alleviate the same, suggests the requirement of a well-reasoned permission from the Government for registering FIR, along with the application being limited to cases of incitement of imminent violence.

III. Origin and Aim of Sedition

Rulers of England saw the printing press as a threat to their authority in the 13th century. Series of measures were used to control the press, which included acts considered *Scandalum Magnatus* and the offence of Treason. *Scandalum Magnatus* created the offence of defamation, making it illegal to spread 'false news,' either spoken or written, about the monarch. In addition, a person would become guilty of the offence of Treason

[18] 65th Cong, 2d Sess, in 56 Cong Rec S 4783 (Apr 8, 1918).
[19] Nivedita Saksena & Siddhartha Srivastava, *'An Analysis of the Modern Offence of Sedition'* (2014) 7 NUJS L Rev 121.
[20] Gautam Bhatia, Offend, Shock, or Disturb: Free Speech under the Indian Constitution (OUP India, 2016).
[21] Brandenburg v. Ohio, 395 U.S. 444 (1969).

if they committed an act that was detrimental to the interests of the rulers. The scope of this offence was expanded from requiring only *overt act* to including speech as constituting treason. This was known as constructive treason.[22]

The rulers failed to curb expressions of undesirable opinion despite implementing the above-mentioned measures. The offence of *Scandalum Magnatum* acknowledged 'expression of fact' and truth as valid defences. Moreover, the offence of treason had several safeguards, including exclusive jurisdiction by common law courts. Further, a procedure was required for securing an indictment before a trial by the jury. In the beginning, it was difficult to secure conviction due to the prerequisite of an *overt act.* However, after the scope of the offence was widened, by including speech to crime, this defence was unavailable. Hence, the offence of seditious libel was developed in court of Star Chamber to overcome such procedural and substantive obstacles.[23]

Sedition law or section 124A IPC was first included in Macaulay's Draft under Section 113 of Penal Code 1837. It was due to an oversight that Sedition was omitted from the IPC, as noted by James Stephens.[24] However, it was not on whim that the British decided to bring Sedition in India. The need was felt during the revolt of 1857. During the Revolt, the British Government in India enacted the State Offence Act,[25] to counter any offence against the state, without clearly stating what these offences were. The need for the law against offence of Sedition was again felt during the Wahabi Movement,[26] which aimed at establishing an Islamic state. The British Treason Felony Act of 1848[27] was deemed to be excessively harsh for dealing with seditious activities, as it provided for

[22] William T. Mayton, Seditious Libel and a Lost Guarantee of a Freedom of expression, 84 Column. L. Rev. 92 (1984).
[23] Mayton, Seditious Libel and a Lost Guarantee of a Freedom of expression (1984).
[24] Walter Russell Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India*, Thacker, Spink & Co., (1911).
[25] State Offence Act, 1857.
[26] Tariq Ahmad, *Sedition Law in India*, Library of Congress (October 1, 2012) https://blogs.loc.gov/law/2012/10/sedition-law-in-india/.
[27] Treason Felony Act, 1848.

punishment of transportation for life for the mere thought of seditious activity against the British Crown. The inadequacy of the laws to properly curb acts against the state aimed at bringing it into contempt proved to be the final push towards enactment of section 124A.[28]

Sedition law had been liberally put to use during Indian National Movement, claiming as its victims the stalwarts like Mahatma Gandhi and Bal Gangadhar Tilak.[29] Even after attaining independence in 1947, Section 124A IPC continued to be in operation. The right of freedom of speech and expression was rampantly curbed by means of this provision, despite Constituent Assembly expressly rejecting it as a ground for limiting such fundamental right.[30]

The Supreme Court gave guidelines for proper implementation of the law in the case of *Kedar Nath Singh v. State of Bihar,*[31] while holding it to be constitutional. The rationale for upholding erstwhile section 124A valid does not stand with the newfound standards of civil liberties in India, as discussed later in the paper. While learning the background of sedition law it becomes clear that it was introduced in India to suppress any dissenting opinion against the colonial government which had the potential to threaten their rule in India.[32]

IV. Contemporary Issue

Section 152 BNS primarily targets the criminalisation of **"***acts endangering sovereignty unity and integrity of India,***"** specifically addressing *secessionism, separatism, and a*

[28] Chitranshul Sinha, *The Great Repression: The Story of Sedition in India* 47 (Penguin Random House, India, 2019).
[29] EPW Engage, *Sedition in India: Colonial Legacy, Misuse and Effect on Free Speech,* available at /engage/article/sedition-india-colonial-legacy-misuse-and-effect.
[30] Constitutional Assembly Debates, December 7, 1948, speech by S.H. Singh, available at http://164.100.47.132/LssNew/constituent/vol7p21.pdf.
[31] Kedar Nath Singh v. State of Bihar, 1962 SCC OnLine SC 6, at 26.
[32] Tanu Kapoor, *Sedition Law: A comparative view in India with other countries,* 6 International Journal of Law 61-65 (2020).

call for armed rebellion. Though terms like "*contempt*" or "*hatred*" against the Government of India have been omitted, it still retains the essence of the previous sedition law i.e., Section 124A of IPC.

Gist of section 124A IPC is '*that the offence of "sedition" is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State.*[33] Numerous instances mentioned further in this article show the rampant misuse of vague terms like *disaffection*, *hatred*, or *contempt* for pruning freedom of speech and expression. The law was sent into abeyance by the Supreme Court of India in the case of, *S.G. Vombatkere v. Union of India,*[34] in which it considered the misuse of sedition law.

In *Tajinder Pal Singh v. State of Rajasthan,*[35] the High court rightly pointed out that though the offence of sedition under section 124A of IPC has been abolished, but lawmakers in the Parliament have reintroduced it as a new provision under Section 152 BNS, which is similarly worded. It seems like a strategic rebranding of an outdated and controversial law. Furthermore, the reliance of court on the jurisprudence of the repealed Section 124A to interpret Section 152 BNS suggests that, despite the legal changes, the essence of sedition law remains intact.

Section 152 BNS retains the traditional methods of committing sedition, such as through "*words, either spoken or written, or by signs, or by visual representation*" while introducing new methods like "*electronic communication*" and "*financial means*." In contrast, the IPC Section 152 does not provide clarifications on the scope of financial

[33] Kapoor, *Sedition Law: A comparative view in India with other countries* 25 (2020).
[34] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.
[35] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].

assistance that would be considered while utilizing "*financial means*" to commit the offense.[36]

Moreover, insertion of the phrase **"***endangering sovereignty, unity and integrity of India***"** under this section has further widened the ambit of interpretation and created a fertile ground for its misuse. The absence of a clear list of activities or illustrations that fall within its purview grant significant discretion to authorities in determining what may constitute sedition under this provision. This could lead to the abuse of charges.[37] Further, Section 124A IPC considers the government as a separate entity while Section 152 BNS broadens the offense by considering nation which is an abstract idea, difficult to define affecting the threshold of harm required to constitute sedition.[38] Furthermore, instead of requiring incitement to violence or disruption to public order as prerequisites for invoking the charges, the proposed Section 152 continues to criminalise any act that **"***excites or attempts to excite***"** secessionist activities or "*encourages feelings of separatist activities*." The law has been given a new face, but in truth, it is an upgraded version of section 124A IPC.

In *Tajinder Pal Singh*, the court highlighted its dilemma regarding which of these two provisions i.e., the one repealed (sedition) or the one reintroduced is more stringent. Punishment for Sedition under IPC was either life imprisonment or imprisonment which could extend up to 3 years. BNS has increased the range of punishment to life imprisonment or imprisonment which could extend up to 7 years. While Shah stated

[36] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, P39A Criminal Law Blog.
[37] Chandni Chandel, *Old Sedition law Vs new Bharatiya Nyaya Sanhita (Bill), 2023 –What's the difference?* The Statesman (August 12, 2023) https://www.thestatesman.com/india/old-sedition-law-vs-new-bharatiya-nyaya-sanhita-bill-2023-whats-the-difference-1503211007.html.
[38] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, P39A Criminal Law Blog.

that the aim will be to provide justice and not to punish[39], this Section not only gives an expansive scope to the erstwhile "*Sedition*" law but also an enhanced punishment.[40]

V. Ungenuine Application of Sedition Law

Jayshree Bajoria, co-writer of a Human Rights Watch Report on **"**Stifling Dissent**"**[41] in India says, "*The charges of sedition have rarely stuck in most of the cases, but the process itself becomes the punishment*."[42] Genuine use of provision is not to be expected but enforced and regulated by legislature and judiciary. While *Kedar Nath Singh* judgement provided guidelines for using the law, it still left room for misuse. Further paragraphs deal with instances of sedition law being used against the constitutional spirit.

According to a NCRB study, sedition charges increased by 160% between 2016 and 2019. However, the conviction rate fell dramatically, from 33.3% in 2016 to only 3.3% in 2019. Twenty-one cases were closed owing to "*insufficient evidence*" or "*lack of clues*," while two were considered "*false*." Also, six cases were identified as legal conflicts based on the final police reports[43]. The NCRB report clearly depicts that the popular transient state authorities throw dissenters under the teeth of 124A.

Protests are the most important means of expressing dissatisfaction with the government's policies. It is a right protected by the Constitution under Article 19. Anything that restricts or even discourages the freedom to protest must be carefully

[39] Press Release, Press Information Bureau (July 01, 2024) pib.gov.in/PressReleaseIframePage.aspx?PRID=2030088

[40] Ashima Obhan & Manasi Singh, *Changes In Law Pertaining To Sedition, Defamation And Inciting Religious And Communal Disharmony,* Mondaq, *(*July 18, 2024) available at https://www.mondaq.com/india/libel-defamation/1494090/

[41]Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, (May 2016), available at india0516.pdf (hrw.org)

[42] *Why India needs to get rid of its sedition law, (*August 29, 2016) BBC, https://www.bbc.com/news/world-asia-india-37182206#:~:text=%22The%20charges%20have,in%20India.

[43] Rahul Tripathi, *Arrests under sedition charges rise but conviction falls to 3%,* Economic Times, (February 17, 2021) https://economictimes.indiatimes.com/news/politics-and-nation/arrests-under-sedition-charges-rise-but-conviction-falls-to-3/articleshow/81028501.cms?from=mdr.

scrutinized in the light of constitutional standards. Unfortunately, this is not the case. During the anti-CAA protests, police filed 25 sedition cases against 3,754 people, of which only 96 were identified and the remainder were "*unidentified.*[44]

In India, there have been instances[45] which show people being charged with sedition without its essential ingredients being fulfilled and their convictions being consequently set aside, bail granted, or acquittal rendered. Instances such as persons convicted for listening to cassettes inculcating speeches of seditious nature,[46] seven youth charged with sedition in Kerala for refusing to stand up during national anthem at movie theatre,[47] 60 Kashmiri students charged for cheering for Pakistan in a cricket match against India,[48] cartoonist Aseem Trivedi charged with sedition by accusing his cartoons of mocking the Indian Parliament and the National Emblem,[49] S.A.R. Geelani charged with sedition for organizing an event where anti-national slogans were made including calls for independence of Kashmir state,[50] folk singer S. Kovan arrested under the sedition law for two songs that criticized the state government for allegedly profiting from state-run liquor shops at the expense of the poor,[51] thousands of protestors campaigning against construction of Kudankulam Nuclear Plant held for "*waging war*

[44]Abhishek Hari, *Explainer: How the Sedition Law Has Been Used in the Modi Era,* The Wire, (May 11 2022) https://thewire.in/law/explainer-how-the-sedition-law-has-been-used-in-the-modi-era#google_vignette.
[45] Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, (May 2016), available at india0516.pdf (hrw.org).
[46] Balbir Singh v. State of U.P., (1999) 5 SCC 682.
[47] *High Court bail to youth facing sedition,* Times of India (September 23, 2014) http://timesofindia.indiatimes.com/city/kochi/High-court-bail-to-youth-held-for-sedition/articleshow/43189878.cms.
[48] Sandeep Rai, *Kashmiri students charged with sedition, freed after controversy erupts,* Times of India (March 07, 2014) https://timesofindia.indiatimes.com/india/kashmiri-students-charged-with-sedition-freed-after-controversy-erupts/articleshow/31553407.cms.
[49] Saurabh Gupta*, Aseem Trivedi's Cartoons Didn't Incite Violence, Says Bombay High Court on Sedition Charges*, NDTV (March 18, 2015) available at https://www.ndtv.com/india-news/aseem-trivedis-cartoons-didnt-incite-violence-says-bombay-high-court-on-sedition-charges-747471.
[50] Kaunain Sheriff M, *DU professor Geelani gets bail: 'Keeping him in Tihar has no fruitful purpose*, IndianExpress (March 20, 2016) http://indianexpress.com/article/india/india-news-india/sar-geelani-bail-sedition-delhi-university-afzal-guru event/.
[51] The Hindu, SC dismisses TN govt's plea for police custody of Kovan, The Hindu (November 30, 2015) http://www.thehindu.com/news/national/sc-dismisses-tn-govts-plea-for-police-custody-of-kovan/article7932967.ece.

against the state" and sedition,[52] student leader Kanhaiya Kumararrested and charged with sedition for allegedly shouting anti-India slogans, etc. are a common occurrence in the country.

In the recent case of *Vinod Dua v. Union of India,*[53] the Petitioner was a journalist who was charged with Sedition for speaking against Prime Minister Narendra Modi and the Central Government on his YouTube show. However, the Supreme Court quashed the FIR lodged against the Petitioner. It upheld the right of citizens to criticize the government. In the case of *State v. Disha A. Ravi,*[54] the accused was a climate change activist who was charged with sedition for her involvement with an online toolkit related to Greta Thunberg during Indian farmers protest. However, she was released by the court on the ground of lack of evidence to prove that she was connected to the Khalistani separatists. Sedition law has no clear boundaries, and it suffers from the vice of vagueness,[55] leaving room for interpretation.[56] Due to its vague meaning, sedition law is used bogusly by the police to unjustly charge people.[57] Shockingly, the vagueness is so preposterous that it is used as tool to further caste discrimination.[58] The law is used at the whim of the authorities, and the charges seldom stick.[59]

[52] "*Report of the Fact-Finding team's visit to Idinthakarai and other villages on September 20-21, 2012,"* September 26, 2012, http://www.countercurrents.org/koodankulam260912.pdf.
[53] Vinod Dua v. Union of India, 2021 W.P. (Crl.) 154/2020.
[54] State v. Disha A. Ravi, 2021 W.P. (Cri.) 2297/2021.
[55] Project 39A, (2023, September), *Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023*, ,P39A Criminal Law Blog.
[56] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).
[57] Observer Research Foundation, *Sedition law: A threat to Indian democracy*? (July, 2021), available at https://www.orfonline.org/expert-speak/sedition-law-threat-indian-democracy.
[58] EPW Engage, Sedition in India: Colonial Legacy, Misuse and Effect on Free Speech, (February, 2021) https://www.epw.in/engage/article/sedition-india-colonial-legacy-misuse-and-effect.
[59] Rahul Tripathi, *Arrests under sedition charges rise but conviction falls to 3%,* Economic Times (February 17, 2021) https://economictimes.indiatimes.com/news/politics-and-nation/arrests-under-sedition-charges-rise-but-conviction-falls-to-3/articleshow/81028501.cms?from=mdr.

Such instances lead us to conclude that despite attempts at narrowing the scope of sedition laws, the same are ignored to silence dissenting voices. The broad scope[60] of terms used in Section 152 of the BNS could lead to an even greater potential for misuse, creating fertile ground for wrongful or ingenuine application of the sedition law.

VI. Sedition Law and Constitutional Conundrums

Debate over the validity of sedition laws in presence of the constitutional sieve has been around since the dawn of independence[61] and even before the trumpets of freedom were rung, there was constant criticism of this abhorrent and manifestly arbitrary law.[62] This law both passively[63] and actively limits the right to freedom of speech and expression of citizens in the "*Democratic Republic*" of India. Active Limitations are the prosecutions and charges of sedition being pressed on those criticizing the government or their policies. Passive limitations include engendering avoidance of speech and expression by the public, which would have been otherwise made but for the fear of being swept under the law of sedition. The court of law might absolve those charged with sedition, but the initial prosecution creates enough deterrence for others.

[60] Chandni Chandel, *Old Sedition law Vs new Bharatiya Nyaya Sanhita (Bill), 2023 –What's the difference?,* The Statesman (August 12, 2023) https://www.thestatesman.com/india/old-sedition-law-vs-new-bharatiya-nyaya-sanhita-bill-2023-whats-the-difference-1503211007.html.

[61] Ankesh, *The origins and validity of Sedition Law in India*, Manupatra (Apr 16, 2024), https://articles.manupatra.com/article-details/The-origins-and-validity-of-Sedition-Law-in-India#:~:text=This%20moment%20was,speech%20and%20expression.

[62] Shariq Us Sabah, *Sedition Law: Crushing Dissent in India since 1833*, Citizens for Justice and Peace (September 07, 2018) https://cjp.org.in/sedition-law-crushing-dissent-in-india-since1833/#:~:text=Various%20leaders%20like%C2%A0Mahatma%20Gandhi%2C%20B.G.%20Tilak%20were%20charged%20with%20sedition.%20In%20the%20response%20of%20the%20charges%2C%20Mahatma%20Gandhi%20had%20said%2C%C2%A0%E2%80%9CSection%20124A%20under%20which%20I%20am%20happily%20charged%20is%20perhaps%20the%20prince%20among%20the%20political%20sections%20of%20the%20IPC%20designed%20to%20suppress%20the%20liberty%20of%20the%20citizen.%E2%80%9D.

[63] Human Rights Watch, *Stifling Dissent The Criminalization of Peaceful Expression in India*, 01, (May 2016), available at india0516.pdf (hrw.org).

The law has been misused rampantly, violating India's commitments to International Covenant on Civil and Political Rights (ICCPR),[64] Article 19 of which stipulates that freedom of expression is an innate right of every human being which should not be interfered with. It provides conditions necessary for curbing the right of free speech and expression. Article 19(3) of ICCPR holds that for limiting freedom of expression, the restriction should "(*a) be provided by law*; and (b) *satisfy the test of necessity in art 19(3)."*[65] The necessity of sedition, with such manifest prohibition, and existence of other penal laws, which efficiently counter offences constituting sedition, is a question much pondered upon. Alas, this pondering has not resulted in much change in the Indian scenario.

The mother of our state machinery, the Constitution of India itself provides for the Fundamental Right of Freedom of Speech and Expression under article 19(1)(a). There also exist conditions entitling the state to restrict free speech, but it is a balanced equation, and the right must not be curbed at the whim of the state. The law is justified citing article 19(2) of Constitution,[66] where it is stipulated that reasonable restrictions on freedom of speech and expression might be put *in interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence*.

The Supreme Court, in Kedarnath Singh[67], held the law to be constitutional and protected by the reasonable restriction under clause (2) of article 19, opining that it '*strikes the correct balance between individual fundamental rights and the interest of*

[64] *Sedition Law in India*, Free Law (September 14, 2022) available at https://www.freelaw.in/legalarticles/Sedition--Law-in--India#:~:text=The%20International%20Covenant%20on%20Civil%20and%20Political%20Rights%20(ICCPR)%2C%20which%20establishes,provisions%20that%20penalize%20%E2%80%9Cdisrupting%20the%20public%20order%E2%80%9D%20or%20%E2%80%9Coverthrowing%20the%20government.
[65] Australian Law Reform Commission, *Review of Sedition Laws,* Discussion Paper 71, 88 (May 2006).
[66] The Constitution of India, 1950, Art. 19(2).
[67] Kedar Nath Singh v. State of Bihar, 1962 SCC OnLine SC 6, at 26.

public order.' They also restricted it to instances where individuals through their speech and expression disrupt the law or provoke and incite violence. As apparent from the above instances of ungenuine use, not much has changed.[68] This continuous misuse was finally halted by the Supreme Court, in the *S.G. Vombatkere*[69] case, which put a stay on all Sedition proceedings and use of sedition law. Further, the Union of India was asked to issue directions to prevent misuse of the sedition law[70].

Although Section 124A of the Indian Penal Code is not reproduced verbatim as Section 152 of Bharatiya Nyaya Sanhita, the essence of the law, as discussed above remains the same. In *Tajinder Pal,*[71] even the Rajasthan High Court highlighted that section 152 of BNS finds origin in the erstwhile Sedition provision and that it is similarly worded. The court also utilised precedents on Section 124A to decide the case at hand but failed to consider that Sedition was sent into abeyance by the Supreme Court vide *SG Vombatkere*.

In *Bengal Immunity Co. v State of Bihar,*[72] it was held that if a law is re-enacted in the same words, the judicial precedents of the original provision remain binding. The legislature has overruled the order of the Apex Court in *SG Vombatkere* which necessitated issuance of guidelines to prevent misuse of Sedition, by enacting Section 152 of BNS. The vices of Section 124A have only been aggravated, which amount to overruling the judgment by a legislative fiat which is invalid.[73] Hence, the scope of *Bengal Immunity* case should be broadened to make binding precedents of original provision on similarly re-enacted law. This would prevent the legislature from invalidly

[68] Ananya Kuthiala, *Sedition and the Right to Freedom of Speech and Expression,* SCC OnLine (December 12, 2017) https://www.scconline.com/blog/post/2017/12/12/sedition-right-freedom-speech-expression/#_ftn7:~:text=Thus%2C%20prevailing%20present%20day%20practices%20are%20not%20in%20accordance%20with%20the%20judicial%20intention%20at%20the%20time%20of%20articulation%20of%20the%20Kedar%20Nath%20judgment.
[69] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433.
[70] S.G. Vombatkere v. Union of India, (2022) 7 SCC 433, at 5.
[71] Tajinder Pal Singh v. State of Rajasthan, [2024:RJ-JD:34845].
[72] Bengal Immunity Co. v. State of Bihar, 1955 INSC 36.
[73] Baharul Islam v. Indian Medical Association, 2023 LiveLaw (SC) 57.

overruling the decisions of the court by re-enacting provisions and simply rephrasing them. Thus, the order putting a stay on all Sedition proceedings in *SG Vombatkere* should be made applicable on Section 152 of BNS.

The standard threshold of constitutionality of laws curbing Fundamental Rights have, since *Kedarnath Singh*, been raised so as to broaden the scope of these rights. The test of proportionality propounded in *Puttaswamy* judgement and test of arbitrariness are two major developments countering legislations against Fundamental rights. These newfound standards call for a reconsideration of the Sedition law.

VII. Test of Proportionality

The Test of Proportionality lays down the essentials which limit the discretion of State in hedging Fundamentals rights. These essentials state that the law so brought 'must be necessary in a democratic society for a legitimate aim, it must be proportionate to the need for such interference and there must be procedural guarantees against the abuse of such interference.'[74]

Sedition law is not necessary in a democratic society because other laws, not prone to rampant misuse, exist which are sufficient for dealing with seditious activities. The British Law Commission in its 1977 Working Paper[75] suggested repealing Sedition law as it could encroach upon the political rights of the citizens. It also stated that common law offences of Conspiracy, Abetment, Attempt, Unlawful Assembly, and Incitement would suffice in penalising acts constituting the offence of Sedition. In India, allowing the blatant misuse and arbitrary implementation of Sedition law, when we have other laws to deal with seditious acts, is an unaccountable exercise.

The law is disproportionate as its aim is now redundant while it still puts a spear through the shield of Fundamental rights. Sedition was brought in colonial India to silence

[74] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC, 638.
[75] Law Commission of England and Wales, Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), 41.

voices against the Imperial government, so that their authority remains unchallenged. Independence rid us of such autocratic rulers and established efficient democracy, where questioning the government is of vital importance. The question of proportionality presumes advantages and disadvantages of a certain law. Advantageousness of a law could only be measured if it has a valid purpose to which it actually contributes. But the law of Sedition or the re-enactment of the same under Section 152, BNS, serves no real purpose in India, other than being a tool of oppression. Thus, the disadvantages of this law are far heavier than the vacuum of advantages that it provides, thereby rendering it disproportionate.

Sedition is put to misuse, more often than not.[76] This clearly means that enough safeguards are lacking. Even the Law Commission of India, in its 279th report titled 'Usage of The Law of Sedition', primarily recommended that there should be procedural safeguards against abuse of Sedition Law before filing of FIR.[77]

Further, in *Gujarat Mazdoor Sabha v State of Gujarat,*[78] court added the fifth prong to the test of proportionality which stipulates that '*the State should provide sufficient safeguards against the abuse of such interference.'* This fifth prong was used in the case of *Ramesh Chandra Sharma v State of Uttar Pradesh,*[79] where it was held that wide and vague provisions that pose a threat to Fundamental Rights must be enacted through guidelines brought into the delicate balance of constitutionality. There exists a vast potential of abuse under Section 152 due to its broad worded provisions, and with no guidelines in this regard, the law is violative of the fifth prong as well. Hence, sedition fails the test of proportionality and legitimacy and is, thereby unconstitutional.

[76] Prasanna S, *Why sedition law has lost meaning,* IndianExpress *(*September 14, 2019) https://indianexpress.com/article/opinion/columns/why-sedition-law-has-lost-meaning-supreme-court-democracy-5993643/.
[77] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).
[78] Gujarat Mazdoor Sabha v. State of Gujarat, (2020) 10 SCC 459.
[79] Ramesh Chandra Sharma & Ors. v. State of UP & Ors., [2023] 2 S.C.R. 422, 51.

VIII. Test of Arbitrariness

Further, the arbitrary nature of Sedition law was not considered by the Supreme Court in 1962[80] as the new doctrine[81] under Article 14 had not yet been postulated. Arbitrariness of sedition is manifest in the rampant use it is put to by transient governments.

In *Sharma Transport v. Govt. of A.P.*,[82] the Supreme Court discussed at length the application of the doctrine of arbitrariness. As to what would render a provision arbitrary, they held that '*in order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.'* In *Shayara Bano* case[83], the Apex court held that a legislation is liable to be struck down if it is manifestly arbitrary, i.e., *'when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.'*

As discussed above, the law is used unreasonably to silence dissenters. Its vagueness allows it to be used capriciously, at pleasure and will, to bolster caste domination. The provision is not guided by public interest and is against the tenets of democracy. Hence, the law is manifestly arbitrary. It is thereby violative of Article 14, rendering it unconstitutional.

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[80] Padmakshi Sharma, *Sedition Law Challenge | Supreme Court Says 1962 Kedar Nath Singh Decision Didn't Consider Article 14 Aspect*, LiveLaw (September 16, 2023) https://livelaw-nlul.refread.com/top-stories/sedition-law-challenge-supreme-court-says-1962-kedar-nath-singh-decision-didnt-consider-article-14-aspect-237945?fromIpLogin=80504.76339186497.
[81] E.P. Royappa v. State of T.N., (1974) 4 SCC 3, 85.
[82] Sharma Transport v. Govt. of A.P., [2001] Supp. (5) S.C.R. 390.
[83] Shayara Bano v. Union of India and Ors., AIR 2017 SC 4609.

Instances of the ungenuine application of the above-mentioned law demonstrate that it is discriminatory, as it causes apprehension among, and is used against, people who protest, or are critical towards, government or their policies. This is called viewpoint discrimination.[84] Hence, the very existence of sedition is against the principles of equality under Article 14, which makes it unconstitutional. Sedition has been used at the whims of the state authorities to tread on dissenters. The possibility of future misuse of this law, now that it has been brought back with bigger teeth and sharper fangs, is palpable to the feeblest of minds. Hence, sedition, in its new attire, is in violation of the supreme law of the land and it should not be retained in the newly implemented criminal laws.

IX. Suggestions

Sedition should be read down from the Bhartiya Nyaya Sanhita as it is arbitrary and unconstitutional. Existence of the law which was used against those laying the foundation of independent India is a blemish on their legacy and the principles they stood for. The true aim of sedition law is safeguarding the unity and integrity of the nation, which could be efficiently guarded using other statutory provisions, as discussed above.

Even if the law is not abolished, it should be given a very narrow interpretation by the Constitutional Courts, so that it is only used in genuine cases, and not to bully citizens into silence. This has been done in the USA.[85] India should adopt the ratio of *Brandenburg v Ohio,*[86] where it was held that for laws criminalising advocacy of illegal conduct, there should be express advocacy of law violation, the advocacy must call for immediate law violation, and the law violation must be likely to occur. If sedition is

[84] Ivan Hare*, Method and Objectivity in Free Speech Adjudication: Lessons from America*, International and Comparative Law Quarterly, 54(1), 49–87 (2008). https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/method-and-objectivity-in-free-speech-adjudication-lessons-from-america/0F5DAE25751ECFBC66ED265ACB4890B1.
[85] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[86] Brandenburg v. Ohio, 395 U.S. 444 (1969).

interpreted in this light, the misuse will cease. Keeping the law narrow and creating accountability for its ungenuine use would deter authorities from misusing the law.

Following the Law Commission's recommendation,[87] amendments should be made to Section 173 of BNSS, which relates to the registration of FIR, so that the preliminary investigation is conducted to ensure the genuineness of the complaint. Based on the report submitted on such preliminary investigation, the Central Government, or the State Government, would sanction registration of FIR. This would ensure two things: firstly, that *prima facie* bogus cases of sedition are not made and secondly, that the State or Central Government would be held accountable, if they sanction cases not befitting the charge without applying their mind.

X. Conclusion

While the world moves towards a more liberal society, Bharat is circling around the abyss of repression and arbitrariness. Sedition is violative of Constitutional Rights and a weak link in the democracy of our nation. It should have been done away with, instead of giving it a wider ambit. It has no role to play in a democratic society and is antithesis to freedom of speech and expression. It is high time that the menace of this law be stopped, by abolishing it or giving it a narrow interpretation and putting in place necessary procedural safeguards. The sword of sedition falls on those who dare oppose the government and its policies and deters others. There is no need for such law in the "*Democratic Republic*" of Bharat, and this sword must be sheathed for ever.

[87] Law Commission of India, Usage of the Law of Sedition, Report No.279, 77 (April, 2023).

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