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A REVIEW OF ANTI-DISSENT LAWS IN INDIA, PAKISTAN AND BANGLADESH

Abstract. India, Pakistan and Bangladesh were united during the era of British colonialism before they separated into new nations in the post-1947 developments. As a result, several laws in these countries find genesis in colonial times. One set of them are the anti-dissent laws which were framed by the erstwhile colonizers to scuttle any voice or movement that may snowball into a threat for the British raj. Interestingly, these penal provisions, especially the ones relating to sedition, continue to be administered in the same colonial form and spirit in all three countries even today. In fact, with the influx of technology and increasing avenues of public expression, these anti-dissent laws have got what we can call an upgrade' in the form of information technology related regulations.

This paper attempts a broad overview of these developments in the light of the judicial discourse in the countries under examination.

Keywords: *dissent, sedition, freedom of speech, technology*

Introduction. *Nothing strengthens authority so much as silence*, said Leonardo da Vinci. While the proposition (of right and duty to dissent where necessary) is politically attractive and potentially radical, its pith and substance is yet to attain maturity. Especially, in the erstwhile unified British colonies – India, Pakistan and Bangladesh (IPB), the post-independence constitutionalism vis-à-vis dissent seems to have fallen short of accommodating what Upendra Baxi calls "citizen interpretation". British era penal code of 1862 continues to operate as the principal substantive law of crime, with very limited modifications in either of the three. Procedurally also Pakistan and Bangladesh continue to administer the 1898 Code of Criminal Procedure. It is only paradoxical that leaders of the anti-colonial freedom movement in IPB, ranging from Sardar Patel to Jawaharlal Nehru and Muhammad Ali Jinnah passionately wrote and spoke against the provisions in these laws that were abused to cut down freedom of speech and expression [henceforth "free speech"].

Analysis of recent research and publications. In addition to these ante-dated laws, free speech facilitated through technology has brought in a new range of the 21st century legislations; Information Technology Act, 2000 (IT Act) in India, Digital Security Act, 2018 (DSA) in Bangladesh and Prevention of Electronic Crimes Act, 2016 (PECA) in Pakistan. As sub-trickle of the colonial psyche, these legislations have drawn flak by Amnesty International that sees them as tools against free speech. Similar concerns have been raised by the UN's Special Rapporteur on Freedom of Opinion and Expression who finds them against the promises made under the International Covenant on Civil and Political Rights, 1966.

Civil society and adjudicators in IPB have struggled to contain the repression

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of dissent by the power-wielding political dispensations. Judges in the superior courts have supplied observations only to address the ostensive symptom that they faced in an individual case. For instance, striking down of Section 66 A of the IT Act in India and acquittal of Asia Bibi in Pakistan. This approach, although laudable in spirit, is deficient in the diagnosis and treatment of the larger *problématique*, which is the nature of biopolitics itself. Consequently, the culture of intimidation through arrests or ban continues to manifest. More often relating (but not limited to) the content shared on social media.

The purpose of this work is to evoluate and applicate of anti-free speech laws in the three jurisdictions in their own tailored forms.

Formulation of the main material.

Shared History

IPB have a shared pre-1947 history as far as the criminal laws in these nations are concerned. It was a single British colony where resistance against the colonisers started brewing after the 19th century had half passed. First mutiny happened in 1857 and the last Mughal emperor – Bahadur Shah was declared the ruling authority by the rebels. The mutiny was squelched with brute force and the powers of the day realized that they have to do something radical with the criminal laws so as to ensure that the "natives' remained policed and controlled. The structure was supposed to be applied equally to all, but this equality was more driven by market forces than any real consideration for social hierarchies prevalent in the then united India". And thus, came the Indian Penal Code of 1960 along with Section 124-A, notorious and tilted in its conception of what constitutes the Sedition in the first place. The cases of *Bangobasi*, Bal Gangadhar Tilak, *Pratod* and Amba Prasad were critical in bringing out varied facets of sedition. Chitranshul Sinha's expositions on sedition in his book about Justice Strachey's and Justice Ranade's take on "disaffection" (a ground under Section 124A) as "disloyalty" while interpreting Section 124A in Tilak's case is particularly interesting. It brings out the binary in approaches of British and Indian judges of those times. While Justice Strachey's understanding of "disloyalty" includes "every possible form of bad feeling for the government", Justice Ranade restricted its scope to "*a defiant* insubordination of authority" or the secret alienation of the people.

Post Rowlatt Act and Jallianwala Bagh massacre, sedition charges could hardly scare people. Nehru, Gandhi, Jinnah, Tilak and many other leaders who were integral to the freedom movement made sure that sedition does not stop their mission of a free India. Gandhi, in his own trial for writings in Young India termed sedition as the "highest duty of the citizen". In the same stride, Abul Kalam Azad in his trial and conviction felt privileged to belong to that "band of pioneers [which] sowed the seed of such agitation... [and]... holy discontent". Nehru declared laws like sedition as manifestations of "extraordinary vulgarity of imperialism" that demanded preaching of nothing less than disloyalty. It is another matter that Jinnah's politics led to the creation of Pakistan later on, but his defence of Tilak in his third sedition case is a coveted memory of the collective Indian struggle against the British.

The IPB Free Speech Trajectories – Post 1947

India

The Constituent Assembly of India removed Sedition as one of the constitutionally imposed restrictions on the right to free speech. In essence, this ousting made sedition an alien idea to the democratic ethos of India. But the law survived in the Indian Penal Code and till date continues to haunt anyone who dares to dissent.

The Supreme Court of India (SC) did hint at the possible unconstitutionality of Section 124A but fell short of explicitly striking it down. After a few flip-flops at the High Court level, the provision did come up for an assessment by

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the constitutional bench in *Kedarnath Singh v. State of Bihar*. The court declared that Section 124A can be considered within permissible limits of "reasonable restrictions" laid down in Article 19 (2) of the Constitution. It laid down the "public order" test that would make it convenient for the Supreme Court to arrive at a conclusion siding with a limited and rare application of Section 124 A. Sinha does a fair job by contextualising the *Kedarnath Case* with its geopolitical background (proximity of the communist thought with Sino-Indian war) and hence creates space for a possibility of an even more liberal application of Article 19 (1), when no such political exigencies exist. However, he could have better explained the deviations in the rulings of lower courts (like in cases relating to Binayak Sen and P. Hemlatha), despite the *Kedarnath Case*. It was mainly because of the subjectivity and undefined scope of the term "public order" itself.

Justice Fazal Ali in his dissenting opinions upheld the restriction on free speech in *Brij Bhushan v. State of Delhi and Romesh Thapar v. State of Madras*. He stated that the constituent assembly "decided not to use the word "sedition' in clause (2) but used more general words which cover sedition and everything else which makes sedition such a serious offence". A necessary implication of this is, even when sedition was dropped by the constituent assembly from the draft on fundamental rights, semantics of other subjective grounds (such as "public order" or "incitement to an offence") paved way for harsher interpretations in future.

Most of the cases where Section 124A appears to have been misapplied, the problem lies in the loophole of the procedure. That is the reason why, as mentioned in the book, *Common Cause* NGO approached the court in 2016; seeking a mechanism that makes it mandatory for the director general of police to give a reasoned order certifying "that any alleged seditious act either led to violence or had tendency to incite violence" before an FIR is registered in a particular case. But the Supreme Court missed an opportunity of dealing with very important issues raised in the petition and settled with reiterating the *Kedarnath* standard. Till date, sanction from the government is required only before trial and not before arrest under Section 124A. Once arrested, the accused "will have to obtain bail, attend proceedings, make themselves present for investigations".

One cannot also ignore the close association of dissent stifling Sedition with that of the offence under the Unlawful Activities (Prevention) Act, 1967 (UAPA). This is a heavily criticised terror law with a vague definition of what constitutes a "terrorist act'". It has a history of abuse with more recent examples being those of the booking of the student leaders from the Indian Universities' campuses, which have emerged as citadels of dissent against the rising authoritarianism of the present dispensation. The law was also amended in 2019 making it legal for the government to declare an individual a terrorist even before a trial is completed.

As far as online speech on social media platform is concerned, the Supreme Court of India in *Shreya Singhal v. Union of India* struck down Section 66A of the Information Technology Act, 2000. It read: any person who sends by any means of a computer resource any information that is grossly offensive or has a menacing character; or any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult shall be punishable with imprisonment for a term which may extend to three years and with fine.

Despite striking down Section 66A the state persecution for social media posts has not stopped. Computer related offences continue to vaguely exist in the Information Technology law of the country and arrests are still very common. Interestingly, many of such arrests are also accompanied by the charges under Section 124-A of the IPC.

Pakistan

Recently in 2019, Pakistan charged hundreds with Sedition for taking part in Students Solidarity March that demanded restoration of student unions in the country. It was very similar to the action taken by the Indian state against the

students at the Jawaharlal Nehru University. The only silver lining, like the Shreya Singhal Case in India was the decision of the Pakistani Supreme Court in the Asia Bibi case who was acquitted of the charges of blasphemy. She was charged under Section 295-C of the Pakistan Penal Code which read as follows:

"Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine".

Without striking down the blasphemy law, the Supreme Court of Pakistan through Justice Khosa freed Asia Bibi on account of lack of evidence and doubtful witnesses.

On the digital front Pakistan has its own legal equivalence of the Indian IT Act called the Prevention of Electronic Crimes Act, 2016. Section 37 of this Act gives sweeping powers to the Pakistan Telecommunications Authority (PTA') regarding the removal of the unlawful online content. It reads as follows:

"The Authority shall have the power to remove or block or issue directions for removal or blocking of access to an information through any information system if it considers it necessary in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, public order, decency or morality, or in relation to contempt of court or commission or incitement to an offence under this Act".

This law has received criticism from the United Nations' Special Rapporteur on Freedom of Opinion and Expression and has generated significant anxiety among the common citizens of Pakistan.

Bangladesh

Sedition laws are often invoked in Bangladesh to scuttle free speech. The legislature in Bangladesh enacted Information and Communication Technology Act in 2006 which had the controversial Section 57 that authorised the prosecution of any person who publishes, in electronic form, material that is fake and obscene; defamatory; "tends to deprave and corrupt' its audience; causes, or may cause, "deterioration in law and order"; prejudices the image of the state or a person; or causes or may cause hurt to religious belief.

Because of grave criticism of this provision the law was replaced with a new Digital Security Act in 2018. Unfortunately, the new law did not just retain many of the previous provisions but included new provisions with a potential to criminalise free speech. The arrest/remand of the dissenters under the new Act continues even in the COVID times.

Conclusions. The IPB nation-states borne out of the labour of decolonisation are yet to get out of the policing hangover of their erstwhile colonial masters. The British have substantially removed the sedition law since the assertion by Justice Minister Claire Ward's that marked an end to the sedition laws in England. She declared, offences related to sedition "are arcane offences- from a bygone era when freedom of expression wasn't seen as the right it is today [i.e.] the touchstone of democracy. The IPB should pick up clues and try to assess whether the new gagging laws should really be framed in a way to suppress the political dissent? Or, should they be a source of confidence building amongst the citizens with mind without fear and heads held high.

Conflict of Interest and other Ethics Statements

The author declare no conflict of interest.

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Мохаммад Умар

ОГЛЯД ЗАКОНІВ ПРОТИ ІНАКОМИСЛЕННЯ В ІНДІЇ, ПАКИСТАН І БАНГЛАДЕШ

Анотація. Індія, Пакистан і Бангладеш були об'єднані в епоху британського колоніалізму, перш ніж вони розділилися на нові країни в результаті подій після 1947 року. В результаті кілька законів у цих країнах знаходять походження в колоніальні часи. Один із них – це закони проти інакомислення, які були створені колишніми колонізаторами, щоб знищити будь-який голос чи рух, який може загрожувати британській владі. Цікаво, що ці каральні положення, особливо ті, що стосуються заколотів, продовжують застосовуватися в тій же колоніальній формі й духу в усіх трьох країнах навіть сьогодні. Насправді, з впровадженням технологій та розширенням можливостей публічного вираження, ці закони про боротьбу з інакомисленням отримали те, що ми можемо назвати "оновленням" у формі нормативних актів, пов'язаних з інформаційними технологіями. У цій статті зроблено спробу широкого огляду цих подій у світлі судового дискурсу в досліджуваних країнах.

Державам, які виникли внаслідок праці деколонізації, ще не вийти з поліцейського насилля своїх колишніх колоніальних господарів. Британці скасували Закон про заколот внаслідок твердження міністра юстиції Клер Уорд, що поклало кінець законам про заколот в Англії. Вона заявила, що правопорушення, пов'язані з заколотами, "є таємними злочинами з минулої епохи, коли свобода вираження поглядів не вважалася правильною, вона є сьогодні каменем демократії". Держави мають оцінити, чи дійсно нові закони про заборону висловлення своїх думок громадянами мають бути сформульовані таким чином, щоб придушити політичне інакомислення? Або вони повинні стати джерелом довіри серед громадян.

Ключові слова: *інакомислення, крамола, свобода слова, технології*

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