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The Prisoners of Conscience: A Critical Analysis of the Restrictions upon Speech and Expression under Indian Laws

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This article explores the Indian laws which restrict freedom of speech and expression and tries to provide some pragmatic alternatives to these archaic and draconian laws. The advantages and disadvantages of these laws are also highlighted. The object of the study is to examine these laws and their impact on Indian society. It aims to critically analyze the legal jurisprudence developed on these issues. The freedom to criticize and protest is part of a broader right to freedom of expression, seen as fundamental to the functioning of a democracy. If the citizens of a country are not free to express themselves, their civil and other political rights are also at stake and hence in this article, these issues are specifically looked upon.

Keywords: *freedom of speech, draconian law, restrictions on fundamental rights, democracy, sedition law.*

INTRODUCTION

“Intolerance of dissent from the orthodoxy of the day has been the bane of Indian society for centuries. But it is precisely in the ready acceptance of the right to dissent, as distinct from its mere tolerance, that a free society distinguishes itself.”

- A G Noorani, 1999

Freedom of speech and expression and liberty of conscience is a fundamental rights guaranteed to all citizens under our constitution. However, the Constitution does not guarantee an individual's absolute right to freedom of speech. Instead, it considers reasonable restrictions that may be imposed by law on this right.¹ Many laws that restrict free speech, such as laws against blasphemy, sedition, or defamation, derive their legitimacy from Article 19(2).² Examining movies, books, paintings, etc. may also adopt this provision. Scholars note that censorship in India has been and still is historically rooted in the discourse of protecting Indian values from outside forces and building and maintaining national unity strong after independence. The researchers concluded that any abuse of the law can harm art and ideas. In the following article, we will discuss the victims of their conscience due to being censored at various levels which mainly consists of the restrictions imposed by religion, the state, and finally, by individuals against each other.

BLASPHEMY: AN APPEAL TO THE HEAVENS ABOVE

All human rights are universal, indivisible and interdependent, and interrelated. Yet nowhere is this interdependence more obvious than in the discussion of freedom of expression and incitement to racial or religious hatred.³ Blasphemy is the Irreverence toward something considered sacred or inviolable. It is contemptuous or profane speech or action concerning God or a sacred entity. It is the act of insulting or showing contempt or lack of reverence for any religion's deity. Blasphemy stands for whatever the society most abhors and has the power to prosecute. It is a form of religious vituperation against those who have transgressed the timeless truths that society cherishes. Blasphemy is always something else, intellectually, a by-product of heresy, sedition, or plain free thinking, and emotionally a sign of social dislocation and mental disturbance.⁴ Blackstone, in his commentaries, described the offence as, Denying the being of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule. Many religions consider blasphemy

¹ Constitution of India 1950, art.19(1) and art.19(2)

² *Ibid*

³ Philip Alston & Ryan Goodman, *International Human Rights* (1st Ed OUP 2012) 677

⁴ David Lawton, *Blasphemy* (1st ed 1993) 2

to be a religious or hate crime. In Judaism, blasphemy denotes ‘the cursing of God’s name’, expressed in Hebrew as “Birkat Hashem”. The Torah¹ states,

“And one who blasphemously pronounces the Name of the Lord shall be put to death; the entire community shall stone him; convert and resident alike if he pronounces the [Divine] Name, he shall be put to death.”

The most widely used punishment for blasphemers was death through hanging or stoning. Christianity condemns blasphemy. Major creeds and the church theologians considered it to be one of the gravest sins. Thomas Aquinas says that "[if] we compare murder and blasphemy as regards the objects of those sins, it is clear that blasphemy, which is a sin committed directly against God, is graver than murder, which is a sin against one's neighbour. On the other hand, if we compare them in respect of the harm wrought by them, murder is the graver sin, for murder does more harm to one's neighbour, than blasphemy does to God".⁵

Islam regards blasphemy against the Prophet as a very heinous crime and the Quran strongly forbids blasphemy at the conquest of Makkah, the Holy Prophet Muhammad announced general amnesty to all except those who were guilty of blasphemous acts and sacrilegious statements. The Holy Quran curses those who commit blasphemy but does not prescribe any worldly punishment. But Hadith, the second source of Islam and also known as one of the best interpretations of the Quran, prescribes punishments which may include death. Generally, the punishment of blasphemy in Islam varies between different schools.⁶

The other religions such as Hinduism, Buddhism, and Jainism have no recognition of the concept of Blasphemy. It is western to these religions. Hinduism has evolved so much that it never competed with other faiths. It always advised one to voice out a difference of opinion in a completely respectful manner and also respect others' opinions. Buddha has always preached moderation in all matters and whereas Jainism renounces violence of all kinds. These

⁵ St. Thomas Aquinas, *Summa Theological* (2nd Ed. and Vol. 3, Part-II, Cosimo, Inc. 2013) 1226

⁶ Mufti Obaidullah Qasmi, 'Blasphemy in Islam: The Quran curses and Hadith prescribe punishment' (*Deoband*) <<http://www.deoband.net/blogs/blasphemy-in-islam-the-quran-curses-and-hadith-prescribes-punishment>> accessed 16 July 2022

grounds did let issues of blasphemy arise. Hinduism also realises the idea of 'nastika' i.e., atheist. Hence constantly Hinduism has spoken only about respecting other people's opinions, rather than being offended by them.

While multiple countries have recognised blasphemy and more than 32 countries have blasphemy laws in their penal system, and about 80 countries protect it under defamation and religious laws. The concept was blasphemy as a crime arose in the west due to the state religions recognising it as a heinous offence. The Abrahamic religion condemns blasphemy to capital punishments. This has been used by the Abrahamic to their advantage in many cases. In some states, blasphemy laws are used to impose the religious beliefs of a majority, while in other countries, they are justified as putatively offering protection of the religious beliefs of minorities. The blasphemy laws have been used as a tool to suppress criticism of religion. Criticism comes under freedom of speech and expression, wherein people criticise based on logic and rationality. Whereas, blasphemy is insulting and defaming an entire religion or its deity.

The majority of Christian states have blasphemy laws that criminalise abusive or scurrilous speech about Christianity and oftentimes, other religions in a country which may lead to a breach of peace. In Islamic states or where Muslims are a majority, Islamic values and attitudes have influenced censorship laws that criminalize blasphemy often associated with heavy sentences.⁷ India deals with blasphemy under Section 295A of the Indian Penal Code, 1860 to prevent insulting Hinduism, Christianity, and Islam.⁸ Blasphemy law is one of the most abused laws in the world. In the name of blasphemy, people aren't even allowed fair criticism against any religion restricting their right to freedom of speech and expression enshrined under Article 19 (1) (a) of the Indian Constitution. Also, if an outrage occurs due to someone's profane speech, it disturbs the public order and peace. Section 295A was introduced during the British era in the aftermath of the 'Rangeela Rasool incident, to prevent hate speech that insults or attempts to insult the religion or the religious beliefs of any class of citizen with

⁷ Hashemi Kamran, *Religious Legal Traditions, International Human Rights Law and Muslim States* (1st edn., Brill Academic Publishers. 2008) 45

⁸ Indian Penal Code, 1860, s 295A

deliberate and malicious intention to outrage their religious feelings. The main aim was to maintain public order in a multi-religious and religiously sensitive society. It is debated in the case of 'rangeelarasool' the book was published 2 years back before the ban, but the problem arose only when it was mentioned by Mahatma Gandhi as offensive in his weekly. So, this tells a perception, that blaspheme depends on the beholder's eyes.⁹

In other perception, these blasphemers also escape from the virtue of law by using the protection given by law under the names of freedom of speech and expression, fair criticism, privileged people, parliamentarians, etc... Blasphemous libel cases arise in a lot of cases due to political interference and abuse of privileges. There are a lot of questions arising due to blasphemy laws, the basic one being whether India needs a blasphemy law or not. If yes, does it also makes the people feel suppressed and unable to express their views? And, blasphemy law may also make it feel that a religious belief is being imposed on them. India being a secularist state cannot allow such impositions. Hinduism, and other Indic religions, simply never developed a concept of blasphemy. India talks of respect and the Westerners speak of tolerance. While Christianity and Islam have always been more of in punishing approach, Hinduism and other dharmic religions have been about reformative and respectful approaches. This is instilled deeply in Indian culture, thus influencing Indian laws.

Blasphemy is much needed to protect the sacrosanctity of religions and reasonable restrictions for harmony.¹⁰ Nonetheless, it is also contentious to penalise blasphemy as an offence since the word religion itself lacks proper definition. In addition, freedom of speech and expression, and freedom of religion act as a tool of protection. Blasphemy laws can act as a tool of oppression and promote violence. Blasphemy is a hurdle in scientific development.

⁹ Kushal Mehra, 'The Case for Freedom Of Speech And Expression' (*You Tube*, 9 July 2022)

<<https://youtu.be/rT6NH7VzYJo>> accessed on 10 July 2022

¹⁰ Navjosh Singh Atwal, 'Blasphemy - Legal Status in India' (*SSRN E-Journal*, 9 March 2021)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3800192> accessed 16 July 2022

THE SEDITION LAW: THE GHOST OF OUR COLONIAL PAST THAT IS STILL HAUNTING US

Akar Patel, Chair of Amnesty International's India committee, responded to the recent order of the Supreme Court of India on 11 May in *S.G. Vombatkere v Union of India*¹¹ urging Indian authorities to temporarily stop the use of sedition laws and to suspend all pending trials, appeals, and proceedings, he said:

"We welcome the Supreme Court's order to suspend the sedition law until the Government of India re-examines the 152-year-old provision. For far too long, authorities have misused the sedition law to harass, intimidate, and persecute human rights defenders, activists, journalists, students, filmmakers, singers, actors, and writers for peacefully exercising their right to freedom of expression. Sedition has been used as a tool of political repression by successive governments."

The order, putting a hold on the registration of FIRs is a step in the right direction for the protection and promotion of the right to freedom of expression. As long as the sedition law remains in place, human rights defenders and others who speak out against repression will continue to be punished. The government should urgently repeal this pernicious legislation, and comply with its international human rights obligations.¹² The Sedition charge, which originated in Section 124 A of the Indian Penal Code in 1870, was used by the British Colonial government to suppress the writings and speeches of prominent Indian freedom fighters. The writings of leaders such as Mahatma Gandhi, Lokmanya Tilak, and Jogendra Chandra Bose were suppressed and were tried under the Sedition Act for comments on British rule.

WHAT IS THE SEDITION LAW OF INDIA?

Sedition is a non-bailable offence, punishable with imprisonment from three years up to life, along with a fine.¹³ The person charged under this law is also ineligible as a government employee and their passport is confiscated by the government. In 2010, the United Kingdom

¹¹ *S.G. Vombatkere v Union of India* (2022) Writ Petition (Civil) No. 682/2021

¹² 'India: Supreme Court's temporary suspension of sedition law a welcome step' (Amnesty International, 11 May 2021) <<https://www.amnesty.org/en/latest/news/2022/05/india-supreme-courts-temporary-suspension-of-sedition-law-a-welcome-step/>> accessed 18 July 2022

¹³ Indian Penal Code, 1860, s 124A

abolished the sedition charge. According to media reports, more than 800 cases of hate speech have been filed against 13,000 Indians since 2010.

CAN THE SEDITION LAW SURVIVE THESE CHANGING TIMES?

According to the 2018 Law Commission of India report:

The Commission proposes that Section 124A of the IPC (sedition) must be retained; however, it should be examined whether the word "sedition" could be appropriately replaced by another one. In addition, it must also be examined whether the "right to insult" qualifies as sedition, the report states. The document urges striking a balance between the right to freedom of speech and the need for safeguards against misuse of the sedition charge.¹⁴

WHETHER THE WORLD'S "OLDEST LIVING DEMOCRACY" CAN PROVIDE US WITH SOME GUIDANCE?

The Brandenburg Test was established in *Brandenburg v Ohio*, 395 US 444 (1969)¹⁵ to determine when inflammatory speech intended to promote illegal action can be restrained. After citing some derogatory racial slurs, he said "there may be some retaliation [sic] that will have to be done." The test found that speech that advocates the use of force or crime may be prohibited by the government if it is both likely to incite or produce imminent lawless action, and directed at that purpose. The speech is likely to incite or produce a violent reaction.

In *NAACP v Claiborne Hardware Co. (1982)*¹⁶, Charles Evers threatened violence against those who refused to boycott white businesses. The Supreme Court applied the Brandenburg test and found the speech was indeed protected the court also stated that strong and effective improvisational speech cannot be conveyed well in purely beautiful phrases. Advocates must be free to motivate with spontaneous and emotional appeals to their audience, to unite and act

¹⁴ Suchitra Karthikeyan, 'Explained | India's sedition law, its usage, and the opinions around it' (*The Hindu*, 3 May 2022) <<https://www.thehindu.com/news/national/explained-indias-colonial-sedition-law-origins-govt-abuse-courts-take-on-it/article65375097.ece>> accessed 18 July 2022

¹⁵ *Brandenburg v Ohio* [1969] 395 US 444

¹⁶ *NAACP v Claiborne Hardware Co.* [1982] 458 U.S. 886

in a common cause. When such appeals do not incite unlawful action, they should be taken as protected speech.”

For example: if someone shouts a slogan in which he says a certain country will break into pieces soon and if someone says we can cut off a part of a country from its other half by capturing and cutting off supply lines in some area; the second statement would be considered a hate speech and seditious because it qualifies both the conditions of The aforementioned Brandenburg test hence it can be defined as seditious.

DEFAMATION UNDER INDIAN LAW: IS IT UNCONSTITUTIONAL?

In India, Defamation is dealt with under both civil and criminal law. Defamation is nothing but injuring the repute or character of the person. The intention of the person also plays a major role to destroy the repute of the person. Defamation is broad into two categories i.e. Libel (written defamation) and Slander (verbal defamation). In the constitution there are certain exceptions to the right to freedom of speech and expression which are given under article 19(1) (a), they are acts relating to contempt of court, defamation, and others.

Civil laws in the country deal with civil defamation where monetary compensation can be claimed. The requisites for a victorious defamation suit are – firstly, the defamatory statement must be for a particular or a category of persons and it should be specific. Secondly, it must be published either orally or in writing. Thirdly, it should be conveyed to the 3rd party. If these conditions are satisfied the defendant will be held liable for defamation. Whereas criminal defamation which is dealt with under section 499 of IPC, 1860, gives a punishment of imprisonment. Sec. 499 defines defamation as "Whoever, by words either spoken or intended to be read, or by signs or by visible, representations make or publish any imputation concerning any other person intending to harm, or knowing or having reasons to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."¹⁷ Also, there are 10 exceptions provided under sec. 499 which exempts the person from imprisonment. Section 500 provides punishment for

¹⁷ Indian Penal Code, 1860, s 499

the offence of defamation when the act does not belong to the exceptions made thereunder in sec. 499. The punishment ranges from simple imprisonment which may extend to 2 years.¹⁸

In the case of *Ram Jethmalani v Subramanian Swamy*,¹⁹ the court held Subramanian Swamy liable for defaming Jethmalani as he made verbally unproven allegations against him which ultimately lowered his reputation. Internet defamation came into light in the famous case of *Shreya Singhal v Union of India*²⁰, which held section 66A of the IT Act, unconstitutional. Many controversies relating to defamation have emerged in the recent past, but the Supreme Court has deliberately held that the Right to life includes the Right to reputation and it is guaranteed under the constitution²¹. Therefore, the defamation law is not against fundamental rights. Every civilized society should have mechanisms to protect an individual's character from malicious attacks given that our character, sense of honour, and dignity is an essential parts of psychological wellbeing. Unlike other inflexible provisions of the IPC, Sections 499/500 have four explanations and 10 exceptions which do both: they add content and context to the offence and also chisel away at it substantially. They constitute a significant counterfactual to exclude frivolous complaints.

Section 199(1) of the CrPC ²²safeguards the freedom of speech by placing the burden on the complainant to pursue the criminal complaint without involving state machinery. This itself filters out many frivolous complainants who are not willing to bear the significant burdens – logistical, physical, and monetary – of pursuing the complaint.

ARGUMENTS AGAINST SECTION 499/500 OF THE INDIAN PENAL CODE²³

IPC Section 499-500, like many comments, does not constitute a "reasonable limit" of speech. First and foremost, the truth is no defence. Even those who tell the truth can be prosecuted for defamation. Under the first exception of Article 499, the truth is a defence only if the statement

¹⁸ Indian Penal Code, 1860, s 500

¹⁹ *Ram Jethmalani v Subramanian Swamy* (2006) 126 DLT 535

²⁰ *Shreya Singhal v Union of India* (2013) 12 SCC 73

²¹ *Subramanian Swamy v Union of India* (2016) 7 SCC 221

²² Code of Criminal Procedure, 1973, s 199(1)

²³ Indian Penal Code, 1860, ss 499 and 500

is made for the public good, which is a matter of fact that the court decides. This is an arbitrary and excessive rule that discourages people from speaking about politicians and political events, even if they know they are true. Second, even if you make no oral or written statement, you may be prosecuted under Section 499. A judge may file a criminal proceeding against a mere allegation that the defendant has colluded with the person who made the alleged defamation written statement. Third, even if you testify about the dead, you may be prosecuted. Article 19 (2) recognizes restrictions on speech to protect private interests in good reputation, but restrictions on speech to protect the reputation of the deceased are excessive and too broad. Fourth, even jokingly can lead to false accusations. Since Article 499 applies to "every claim by anyone," even the most protected speech in a democracy, political speech, can be prosecuted. This is an easily accessible tool that allows any alleged fraudster to be taken to courts across the country. Finally, it is unclear why defamation must be punished at all and why civil remedies are inadequate.

CONCLUSION

The freedom to criticize and protest is part of a broader right to freedom of expression, seen as fundamental to the functioning of a democracy. If the citizens of a country are not free to express themselves, their civil and other political rights are also at stake. However, free speech is central to the functioning of a democracy and includes the right to offend. For more than half a decade, the question of whether "hate speech" can be justified under the right of free speech has been raised by many segments of society, their positions often change from one case to another but in recent times it is being accepted by the government as a necessary evil except in some unforgivable circumstances. Press freedom is also vital to the functioning of participatory democracy. Without a free press, citizens lose the ability to make informed decisions in a free and fair electoral process.