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FROM SEDITION TO SUBVERSION: A CRITICAL SOCIO-LEGAL ANALYSIS OF SECTION 152 OF THE BHARATIYA NYAYA SANHITA, 2023

AUTHORED BY - BAKSHDEEP SINGH

Abstract

This paper presents a critical socio-legal analysis of the legislative transition from Section 124A of the Indian Penal Code, 1860 (IPC), which criminalized sedition, to Section 152 of the Bharatiya Nyaya Sanhita, 2023 (BNS), which penalizes "Acts endangering sovereignty, unity and integrity of India." This legislative overhaul, part of a broader decolonization narrative advanced by the Indian government, marks a pivotal moment in the country's free speech jurisprudence. The central thesis of this paper is that this substitution, far from being a progressive reform, constitutes a strategic repackaging and potential expansion of state power over political speech. Through a detailed textual comparison, an examination of historical jurisprudence, and a comparative legal analysis, this paper argues that Section 152 BNS, by replacing the judicially-circumscribed offense of sedition with novel, undefined, and expansive terms such as "subversive activities," while simultaneously increasing the minimum punishment and conspicuously omitting the Supreme Court's long-standing "incitement to violence" safeguard, creates a more ambiguous and potent instrument for the suppression of dissent. This legislative choice not only regresses from decades of constitutional interpretation but also places India at odds with the global democratic trend of repealing such archaic laws. The paper concludes that Section 152 BNS poses a graver, more insidious threat to constitutional freedoms and the democratic fabric of India than its colonial predecessor.

Introduction

In late 2023, the Indian Parliament enacted a new suite of criminal laws, fundamentally reshaping the country's justice system. The Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and the Bharatiya Sakshya Adhiniyam, 2023 (BSA) replaced the colonial-era Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC), and the Indian Evidence Act, 1872.[1] This reform, effective from July 1, 2024, was presented as a necessary step to decolonize India's legal architecture, replacing a

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system of colonial subjugation with one focused on justice (*nyaya*) over mere punishment.[2]

At the epicenter of this project is the repeal of the sedition law, Section 124A of the IPC, and its substitution with Section 152 of the BNS, titled "Acts endangering sovereignty, unity and integrity of India".[3] This paper critically scrutinizes this legislative substitution. The core research question is: Does the replacement of Section 124A IPC with Section 152 BNS constitute a progressive reform that expands free expression, or is it a cosmetic rebranding that enhances the potential for arbitrary state action?

This paper argues for the latter. The thesis is that the deliberate choice to replace the judicially-defined concept of "sedition" with amorphous terms like "subversive activities" in Section 152 BNS, while increasing the punishment, signals an intent to create a more formidable instrument for controlling political speech. This maneuver unmoors the offense from constitutional safeguards crafted by the judiciary over six decades, representing not a departure from colonial logic but its modernization.

Section I: The Colonial Ghost – A Jurisprudential History of Sedition in India

To comprehend the implications of Section 152 BNS, one must understand the legacy of Section 124A IPC. Its history is a narrative of the tension between state security and individual liberty, marked by a consistent judicial endeavor to tame a colonial law by tethering it to the constitutional requirement of public order and violence.

The offense of sedition was inserted into the IPC in 1870 to suppress the Indian independence movement.[4] Early prosecutions targeted nationalist leaders like Bal Gangadhar Tilak and, most famously, Mahatma Gandhi, who in 1922 described Section 124A as the "prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen".[5]

Post-independence, the Constituent Assembly deliberately omitted "sedition" from the permissible restrictions on free speech under Article 19(2) of the Constitution.[6] Despite this, the provision remained, leading to a constitutional challenge in the landmark 1962 case of ***Kedar Nath Singh v. State of Bihar***. The Supreme Court upheld the validity of Section 124A but critically "read it down," establishing a vital safeguard: its application must be limited to acts involving an "intention or tendency to create disorder, or disturbance of law and order, or

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incitement to violence".[7] This *Kedar Nath* doctrine became the constitutional bedrock for interpreting sedition.

Subsequent judgments reinforced this safeguard. In ***Balwant Singh v. State of Punjab*** (1995), the Supreme Court held that the casual raising of a few slogans without any public disturbance could not be punished as sedition.[8] More recently, in ***Vinod Dua v. Union of India*** (2021), the Court quashed a sedition FIR against a journalist, reaffirming that criticism of the government does not constitute sedition unless it incites violence.[9]

Despite these precedents, misuse of the law continued, leading the Supreme Court in ***S.G. Vombatkere v. Union of India*** (May 2022) to place Section 124A in abeyance. The Court directed governments to refrain from registering new cases under the section, acknowledging its rampant misuse.[10] This judicial freeze set a clear constitutional baseline: any law replacing sedition must meet and exceed the safeguards of the *Kedar Nath* doctrine.

Section II: The Legislative Overhaul – Deconstructing Section 152 of the Bharatiya Nyaya Sanhita

The legislative response to the judicial freeze was not repeal, but replacement with Section 152 of the BNS. An analysis of its text reveals a series of choices aimed not at liberalizing the law, but at recasting it in a more expansive and less judicially constrained form.

2.1 A Textual Comparison

A textual comparison between the repealed Section 124A IPC and the new Section 152 BNS reveals several critical shifts. The title of the offense changes from "Sedition" to "Acts endangering sovereignty, unity and integrity of India," broadening its symbolic scope from an act against the "Government" to one against "India" itself.[11] The prohibited act (*actus reus*) moves from exciting "hatred or contempt" towards the government to exciting "secession or armed rebellion or subversive activities," or encouraging "feelings of separatist activities." This introduces dangerously vague terms not present in the old law.

The new law modernizes the means of commission to include "electronic communication" and "use of financial mean," expanding its reach into the digital and financial realms.[12] The punishment is also made more severe, increasing the alternative term of imprisonment from a

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maximum of three years to seven years and removing the option of a fine-only punishment.[13] Finally, the new explanation protecting criticism is circular; it protects disapprobation of government measures as long as it does not excite the very activities the section criminalizes, without incorporating the crucial judicial safeguard of requiring a tendency to cause public disorder or violence.[14]

2.2 The Peril of Vagueness: "Subversive Activities"

The most alarming feature of Section 152 is its introduction of new, undefined terminology. The term **"subversive activities"** is not defined anywhere in the BNS.[15] This legislative vacuum creates a significant risk of arbitrary application, potentially encompassing a vast range of activities from peaceful protests to academic critique. This ambiguity contravenes the principle of legal certainty, which requires criminal laws to be formulated with sufficient precision.

Even more troubling is the phrase **"encourages feelings of separatist activities"**.[16] This marks a regressive departure from established jurisprudence. The *Kedar Nath* doctrine anchored the offense to its consequences—the tendency to cause violence. Section 152, however, shifts the focus from conduct to emotion, criminalizing the act of "encouraging feelings," a subjective and intangible concept. This could potentially criminalize academic discussions on self-determination or political advocacy for greater autonomy, without any connection to violence.

2.3 The Law Commission's Shadow: Selective Adoption

The drafting of Section 152 cannot be seen in isolation from the 279th Report of the Law Commission of India, which recommended retaining Section 124A.[17] Recognizing the problem of misuse, the Commission made a crucial recommendation: to amend Section 124A to include the words "with a tendency to incite violence or cause public disorder," thereby codifying the *Kedar Nath* doctrine.[18] Simultaneously, it recommended enhancing the alternative punishment to seven years.[19]

The final text of Section 152 BNS reveals a telling choice. Parliament adopted the recommendation for a harsher punishment but conspicuously omitted the primary recommendation to incorporate the *Kedar Nath* safeguard.[20] This selective adoption is compelling evidence of a legislative intent to create a more stringent law, unburdened by the constitutional limitations that the judiciary had painstakingly constructed.

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Section III: Subversion in a Global Context – A Comparative and International Law Perspective

India's decision to replace its sedition law with Section 152 BNS positions the country in stark contrast to prevailing trends in other mature common law democracies and raises questions about its adherence to international human rights standards.

3.1 The Global Retreat from Sedition

In democratic societies, sedition laws are increasingly viewed as anachronistic. The overwhelming international trend is towards repeal. The **United Kingdom**, the source of India's sedition law, abolished the offense in 2009, with the Justice Minister stating that its existence had been "used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent".[21] This trend is mirrored across the Commonwealth, with countries like **New Zealand** repealing their laws and others like **Australia** and **Canada** facing calls for repeal or seeing the law fall into disuse.[22] India's path of strengthening a sedition-like offense is an act of legal and democratic isolationism.

3.2 Benchmarking Against International Human Rights Law

India is a signatory to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR protects freedom of expression, allowing restrictions only if they are (1) **provided by law**, (2) for a **legitimate aim**, and (3) **necessary and proportionate**.[23]

Section 152 raises serious concerns on at least two grounds. First, its vague terms like "subversive activities" fail the "provided by law" test, which requires legal certainty and precision to prevent arbitrary application.[24] Second, by criminalizing speech without a direct nexus to violence—for instance, by penalizing the encouragement of "feelings"—Section 152 imposes a disproportionate burden on free expression and fails the "necessary" in a democratic society test.[25] International human rights bodies have consistently warned that such vague laws are incompatible with this standard.[26]

Section IV: The Socio-Legal Fallout – Dissent, Democracy, and the New Legal Regime

The transition from Section 124A to Section 152 will have profound consequences for the social and political life of the nation. The new provision, by virtue of its ambiguity and punitive

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force, is poised to become a more effective instrument of social and political control.

4.1 The Amplified Chilling Effect

A "chilling effect" occurs when individuals refrain from exercising free speech for fear of legal sanction. The uncertainty in Section 152 is likely to cast a long shadow over public discourse, leading to self-censorship. Political activists, investigative journalists, academics, and artists may find their work labeled as "subversive" or as "encouraging feelings of separatist activities," particularly if it challenges dominant political narratives.[27] The risk of facing a non-bailable charge with a potential seven-year prison term is a powerful deterrent to the critical inquiry and expression vital for a healthy democracy.

4.2 Old Wine in a New, More Potent Bottle

A central argument for reforming Section 124A was to prevent its misuse, where the "process itself becomes the punishment".[28] Section 152 is structured to exacerbate this problem. By jettisoning the *Kedar Nath* framework from the statutory text, the new law grants law enforcement wider latitude to register an FIR and make an arrest based on a subjective interpretation of speech.[29] Since the offense is cognizable and non-bailable, an accused person can be arrested without a warrant and faces an uphill battle for pre-trial release.[30] This empowers the state to use the legal process as a tool of incapacitation, silencing critics by entangling them in the criminal justice system for years.

4.3 The Broader Political Context

The enactment of Section 152 cannot be divorced from the broader socio-political context in India, which has been characterized by a shrinking civic space.[31] There is a discernible pattern of using various laws to restrict the activities of civil society organizations, human rights defenders, and media outlets. Viewed within this context, Section 152 appears as a key component of a broader strategy aimed at consolidating state control over public discourse. It provides the state with a modernized and powerful tool to define the boundaries of acceptable speech, reinforcing a political climate where dissent is increasingly equated with disloyalty.

Conclusion: Recasting the Colonial Yoke?

The transition from Section 124A IPC to Section 152 BNS is not a decolonization of India's law on political speech. It is, instead, a strategic **recasting of the colonial yoke**. The government's narrative is belied by the substantive content of the new law.

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The jurisprudential history of sedition shows a sixty-year judicial effort to infuse a colonial provision with constitutional values, culminating in the *Kedar Nath* doctrine's "incitement to violence" test. Section 152 BNS fails this test. A textual analysis reveals that it introduces dangerously vague terms and deliberately omits the *Kedar Nath* safeguard while increasing the punishment, crafting a law that is more ambiguous and draconian than its predecessor.

Viewed globally, this move is a regression. While other democracies are repealing their sedition laws, India has chosen to reinforce its own version, placing it at odds with international best practices and human rights law. The foreseeable socio-legal fallout is an amplified chilling effect on dissent, where the ambiguity of the law will be weaponized to make the "process the punishment." In its current form, Section 152 BNS represents a grave threat to the health and vibrancy of Indian democracy.

Forward-Looking Recommendations

1. **For the Judiciary:** The Supreme Court should, at the earliest opportunity, take up a constitutional challenge to Section 152 and unequivocally rule that the "incitement to violence or public disorder" test is a non-derogable constitutional minimum for any prosecution under it.
2. **For the Legislature:** Parliament should urgently amend Section 152 to: (a) provide clear statutory definitions for ambiguous terms; (b) explicitly incorporate the *Kedar Nath* test as a necessary ingredient of the offense; and (c) reconsider the enhanced punishment.
3. **For Civil Society:** There must be a concerted effort to rigorously monitor the application of Section 152, provide legal aid to the accused, and engage in strategic litigation to challenge its misuse, with the ultimate aim of persuading the legislature to repeal this fundamentally anti-democratic offense.

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