

Freedom of Speech and Sedition in Post-Colonial Democracies: Lessons from Kenya, Ghana and South Africa for India

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Freedom of speech is a fundamental right in India, but colonial-era sedition laws and anti-terror laws, which challenge the core ethos of an independent democratic nation such as India have become a major challenge for the Indian society and question the existence, value and possible misuse of such laws. Since 2014, cases under the sedition law have increased by 28%, challenging the guarantees of human rights in India. With activists and legal experts questioning the value and misuse potential of such laws in India, the country should look up to the examples set by various post-colonial African states such as Kenya, Ghana and South Africa, which have favoured robust democratic standards and constitutional freedoms over colonial and apartheid-era sedition laws.

Keywords: post-colonial democracies, freedom of speech, the Sedition Law and UAPA, India, human rights

Introduction

India is the largest democracy in the world and has long considered itself as the “Mother of Democracy”.² The documented history of human rights in India can be traced back to the 3rd century BCE, during the reign of Emperor Ashoka of the Mauryan Empire. The documents, known as the Edicts of Ashoka are inscriptions across the Indian subcontinent. These documents discuss ideas of universal welfare, non-violence, religious tolerance, justice and accountability and public welfare initiatives.³

In the modern era, born out of a struggle for independence, the fathers and mothers of the new nation were deeply idealistic in their view on human rights, as during the time of British colonialism in India, human rights in India were

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2 BAJPAEE 2024.

3 BHARGAVA 2015.

restricted and the colonial government mainly prioritised its interests over the rights and welfare of the Indian citizens.⁴ The first, recorded demand for Human Rights for the Indian citizens under the British rule came in the Constitution of India Bill of 1895. Although Indian leaders advocated for the bill in the colonial era, it was never passed then, but it did influence the 1950 Constitution of independent India.⁵

The newly empowered leaders of a free India saw human rights as the cornerstone of building a democratic and just society. India's first Prime Minister, Jawaharlal Nehru firmly believed in human rights as an essential element in a free, independent India. Beyond the newly independent India, Prime Minister Nehru also advocated for the rights of Africans in various domestic and international forums, and linked the African struggle for independence as a human rights issue, especially the institutional racism under apartheid in South Africa.⁶

Prime Minister Nehru's ideas were shared by B.R. Ambedkar, the architect of the Indian constitution. Ambedkar focused on eliminating all forms of discrimination in society, especially caste-based discrimination, which had plagued Indian society for centuries. He viewed the constitution to be a social contract and a legal safeguard, which could ensure justice for marginalised groups and individuals.⁷

Human rights in India

The Indian constitution is a comprehensive human rights document and emphasises dignity, liberty, equality and justice. India is a signatory to various international human rights agreements such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸

Some of the major rights guaranteed in the Indian constitution include the Right to Equality (Articles 14–18), where the individual is equal before the law, irrespective of his/her religion, colour, race, sex, caste or place of birth. Right to Freedom (Articles 19–22), where the individual or group of individuals have the right to freedom of speech, expression, assembly, association, movement, residency or occupation. These rights also include protection against arbitrary arrest, right to life and personal liberty and right to free and compulsory education for children between the age 6–14. Right Against Exploitation (Articles 23–24), where the individual is protected against child labour, forced labour or human trafficking, Right to Freedom

4 MADAN 2017.

5 Constitution of India.

6 SRIVASTAVA 1996.

7 See: www.constitutionofindia.net/members/b-r-ambedkar/#:~:text=On%2025%20November%201949%2C%20a,as%20the%20principles%20of%20life

8 See: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=IND&Lang=EN

of Religion (Articles 25–28), Cultural and Educational Rights (Articles 29–30) and Right to Constitutional Remedies (Article 32), where the individual holds the right to approach the courts in case of rights violations.⁹

Furthermore, India has enacted various legislative frameworks such as the Child Labour (Prohibition and Regulation) Act, 1986,¹⁰ the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989,¹¹ the Protection of Human Rights Act, 1993 which establishes the National Human Rights Commission (NHRC)¹² and the Domestic Violence Act, 2005¹³ to operationalise the constitution protections.

Despite these guaranteed rights and the legal framework protecting these fundamental rights, Indian society is plagued with improper implementation of these laws and often fails to protect the human rights of its citizens. Reports of extrajudicial killings by the state or its agents, torture and inhuman behaviour by the police, harsh and life-threatening prison conditions, interference in privacy by the state and various unjustified arrests of political opponents, activities and journalists etc. have brought to light the dismal state of human rights in India.¹⁴

Furthermore, the Indian state has created legislation and guidelines to restrict the rights guaranteed in the Indian constitution, and among those laws the two main laws are the Section 124A of the Indian Penal Code (IPC) and the Unlawful Activities (Prevention) Act (UAPA), both of which are broadly used in cases of sedition.

The Sedition Law and UAPA

According to Section 124A of the IPC, sedition is defined as an act involving words (spoken or written), signs, visible representations, or any other means that bring or attempt to bring hatred, contempt or dissatisfaction towards the Government of India. According to the law, sedition under Section 124A is a non-bailable offense and the individual could be punished with life imprisonment.¹⁵

The sedition act was created by the British colonial government in 1870 to suppress the Indian freedom struggle. Some major individuals who were punished under this act include Bal Gangadhar Tilak (1908)¹⁶ who was among the prominent freedom fighters against British colonialism and was charged by the British colonial authorities for criticising their policies, and Mahatma Gandhi (1922), the father of the Indian nation who was charged for his writings published in his newspaper, *Young India*.¹⁷

9 See: <https://legislative.gov.in/constitution-of-india/>

10 Government of India 1986.

11 Parliament of India 1989.

12 The Protection of Human Rights Act, 1993.

13 The Protection of Women from Domestic Violence Rules, 2006.

14 United States Department of State 2023.

15 BASU–SEN 2023.

16 MUKHERJEE 2017.

17 Indian Culture [s. a.].

Although the law was created by the British authorities, the independent Indian government in the post-independence era continued using this act to curb opposition and suppress freedom of speech and limit constitutional rights. Various student activists such as Kanhaiya Kumar, a student at the Jawaharlal Nehru University, charged for allegedly raising anti-national slogans during a protest in 2016 and environment activist Disha Ravi charged in 2021 for her involvement in the farmers' protest¹⁸ faced the burden of sedition laws while expressing their freedom of speech in India.

Since 2014, under the new government, cases under the sedition law have increased by 28%, challenging the guarantees of human rights in India. Over 500 cases of sedition have been filed in India since 2014 involving more than 7,000 individuals. While courts eventually dismiss most of the cases under sedition laws, the stringent punishment and challenges with bail and the threat of arbitrary arrests and detention brings to light the abuse of sedition laws in India.¹⁹

Furthermore, a 2021 report by the National Crime Records Bureau (NCRB) revealed that while sedition cases have risen, actual convictions remain low, indicating the possible misuse and overuse of the sedition law.²⁰

Although, since 2022, under the directives of the Supreme Court, Section 124A of the IPC, i.e., the sedition law is officially suspended in India for fear of misuse and abuse by the government, the law is yet to be repealed and remains a point of contention between freedom of speech activists and the Government of India.²¹

Beyond Section 124A of the IPC, the sedition Law, the Unlawful Activities (Prevention) Act (UAPA) is another such law enacted in 1967 in post-independence India to prevent unlawful activities and associations that threaten the sovereignty, territorial integrity and security of India. Although, the law was created to counter organisations and individuals involved in activities that harm the public good, such as terrorist activities, etc., critics argue that the law has been used to target political opponents, curb dissidents and target journalists, activists and social workers.²²

Under the UAPA, bail provisions are extremely stringent due to the presumption of guilt, and the accused can be detained for over 180 days without a charge sheet filed. Furthermore, the broad definition of terms such as “unlawful activity” and “terrorism” opens room for wide misuse of the laws.²³

Writers such as Arundhati Roy who was charged in 2010 for her comments on Kashmir and various other journalists, academics, writers and political opponents have brought to light the abuse of sedition laws by the Indian state.²⁴

18 India News 2022.

19 LAKHDHIR 2022.

20 HARI 2022.

21 BASU–SEN 2023.

22 BASU–SEN 2023.

23 BASU–SEN 2023.

24 RAJGURU 2024.

The UAPA, however, is different from sedition laws as it focuses on terrorism and national security-related challenges, critics argue that the UAPA has been used similarly to sedition laws in India to curb dissent and suppress democratic freedoms.

The Supreme Court of India has also contested the law and raised concerns about the misuse, stringent provisions and potential impact on civil liberties. Although the Supreme Court agrees that national security is paramount, the court emphasises the need to protect constitutional rights such as freedom of speech and personal liberty.²⁵

In 2023, the Indian government brought in a new set of criminal code, known as the *Bhartiya Nyaya Sanhita* (BNS). The new code came into effect on 1 July 2024 and abolished the Sedition Law, Section 124A of the erstwhile Indian Penal Code but created new sedition laws, namely Section 150 and Section 152 under the new BNS. Critics argue that the new laws are similar to the old sedition laws and have the potential for abuse and misuse by the state. In the BNS, the UAPA is not repealed, and another anti-terrorism law is added, Section 113 of the BNS, which has also drawn criticism from the legal fraternity and civil society organisations.²⁶

Comparison with some post-colonial African states

Across the developing world, various countries have their own history and experiences with sedition laws and constitutional safeguards, and comparing India with other post-colonial democracies, such as Kenya, Ghana and South Africa, present an ideal point of comparison.

Similar to India, the British colonial governments implemented the sedition laws in Kenya. As a British colony between 1920–1963, the colonial government enacted sedition laws, under which anything that might challenge the legitimacy of the colonial rule and anything that might incite hatred, discontent or contempt towards the colonial government were considered seditious.²⁷

The act was used against the individuals in the Mau-Mau Uprising (1952–1960) and various other instances.²⁸ Post-independence in 1963, the sedition laws were retained by the Jomo Kenyatta government and actively used under the authoritarian rule of Daniel arap Moi (1978–2002). Following criticism and pressures from civil society and human rights activists, in 1997 Kenya repealed the sedition laws and in 2017, the Supreme Court of Kenya declared criminal defamation to be unconstitutional.²⁹

Beyond Kenya, Ghana, which was also a British colony, had similar colonial era sedition laws as India. Under the Criminal Code of Ordinance of 1892, sedition was defined in the Section 183. Section 183 explicitly defined sedition as any act inciting

25 NEOG 2023.

26 CHANDRA 2024.

27 Kenya Law 2023.

28 MUNENE 2002: 135–136.

29 SMITH et al. 2022.

dissatisfaction against the colonial government and the publication of seditious material such as pamphlets, books, news articles or giving seditious speeches.³⁰ The punishment under the sedition act was strict similar to India to prevent and deter anti-colonial sentiments and activities.

The first Prime Minister of Ghana, Kwame Nkrumah and several members of his newly formed CPP (Convention People's Party) were charged with sedition in 1950 by the colonial government due to their activities and protests against the colonial rule.³¹

After its independence in 1957, under Prime Minister Kwame Nkrumah, Ghana retained the sedition laws, and criticism arose of their misuse in free Ghana to suppress opposition of the government. In 2001, under the administration of John Agyekum Kufuor, through a reform of the Criminal Code, Section 183 was officially repealed, ending the legacy of colonial era sedition laws in Ghana.³²

South Africa is another post-colonial African state, which is a complex multi-cultural society similar to India with a long history of challenges with human rights during the colonial administration and the post-apartheid era.

In the colonial and apartheid eras, laws such as the Suppression of Communism Act and Terrorism Act³³ were used to suppress political dissent and silence activities, similar to the sedition laws in colonial India. Many South African activists and politicians especially from the African National Congress (ANC) were charged with sedition laws in Africa, including Nelson Mandela, and 155 other activists were arrested and charged with treason in 1956.³⁴

In the post-1994 transition to democracy, South Africa actively worked to dismantle repressive legislations and focused on uplifting the human rights standards for the region and the world. In the words of Nelson Mandela: "To deny people their human rights is to challenge their very humanity."³⁵ South Africa aimed to be a champion of human rights and one of the most progressive and inclusive nations in the world, and in 1996, the country adopted a new constitution, which safeguarded the citizens' rights and liberty with strong protections of freedom of speech.

The 1996 South African constitution guarantees freedom of speech and robust protections for political and social expressions under its Bill of Rights and is acknowledged as one of the most progressive and transformative constitution in the world.³⁶

Although, similar to India, South Africa still has its apartheid-era sedition laws, these are used much less frequently compared to India.³⁷ South Africa does have anti-terrorism laws such as the Protection of Constitutional Democracy Against Terrorist

30 LARYEA – KWANSAH-AIDOO 2005.

31 D'ACQUISTO 2024.

32 LARYEA – KWANSAH-AIDOO 2005.

33 South African History Online 2012.

34 Nelson Mandela's Testimony at the Treason Trial, 1956–60.

35 United Nations [s. a.].

36 25th Anniversary of the Constitution 2021.

37 Helen Suzman Foundation [s. a.].

and Related Activities Act (POCDATARA) (2004),³⁸ which, similar to India, poses a challenge in potential misuse.

It can be argued that compared to India, South Africa has a more robust constitutional court framework, which works to preserve the rights of individuals. While the Indian constitution was an elitist project and was drafted over 70 years ago, the South African constitution was a participatory process, adopted much later, in 1996, at the peak of the modern international human rights movement.³⁹

Furthermore, according to various international human rights indexes such as the Freedom House, report in 2024, India scored 66/100 in overall freedom score, with 33/40 in political rights and 33/60 in civil liberties and is rated a partial free democracy.⁴⁰ In comparison, South Africa scored 79/100 in overall freedom score, with 33/40 in political rights and 46/60 in civil liberties, and is rated a free democracy.⁴¹

Conclusion

To conclude, although India has retained its democracy since its independence and continued as one of the few democracies in the global East and the global South, it faces challenges in maintaining the fundamental rights to speech for its citizens and promoting a free liberal society due to its sedition laws.

In this aspect, the examples of Kenya and Ghana, by completely repealing its sedition laws, and South Africa, with the provision of strong legal structures to protect citizens' right to freedom of speech, serve as an example of empowering a complex multicultural society.

As pointed out by the High Court of Delhi during the hearing of a sedition case in 2022, "the 5000 years old civilization of India has never been averse to ideas from various quarters", and "In my considered opinion, Citizens are conscience keepers of government in any democratic Nation. They cannot be put behind the bars simply because they choose to disagree with the State policies. The offence of sedition cannot be invoked to minister to the wounded vanity of the governments."⁴²

India, with its democratic and pluralistic credentials, has the opportunity to stand as an example for the developing world and in light of challenges faced by the developed world as well, India could take the lead by raising standards of human rights and societal freedoms.

38 Republic of South Africa 2005.

39 SRIPATI 2006.

40 Freedom House, [s. a.a].

41 Freedom House, [s. a.b].

42 PTI 2021.

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