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ABSTRACT

Throughout its history, the British imperial project was justified through the expansion of English law across the world. This justification led the colonial publics to investigate and compare the application of Britain's law and governance across the Empire and to critique disparities between the imperial metropole and its colonies. Supporters of the British Empire, on the other hand, pointed to supposed characteristics of "native" societies that required legislation which differed from that applied in Great Britain. This notion of "colonial difference" came to define colonial jurisprudence. This paper investigates charges of sedition, meaning the incitement to resistance against the established colonial order across the British Empire. I find that in interpreting sedition laws, colonial courtrooms placed great emphasis on the supposed "state" of the population and were unwilling to allow colonized subjects the right to criticize British rule as they would have in Britain. Instead, colonial courts came to meticulously examine supposed differences and tied their rulings closely to their assessments of the nature of colonized populations and their lands.

BY

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Introduction

> Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.[1]

Throughout the history of the British Empire, its rule was often tied to, and justified through the application of British colonial law. The creation and administration of the English "rule of law," liberal supporters of the Empire argued, improved the lives of the colonized and provided a mandate for British colonial power.[2] Liberal notions of colonial rule relied on assumptions about the nature of law that were, in principle, universal. The colonial subject, while described as inferior in development, was still assumed to be capable of eventually rising to the status of the British and endowed with the right to property, to due process, and to good governance. Britain's role, in this view, was to extend its law, political economy and administration across the globe to the alleged benefit of the colonized.[3] In India, prominent liberal legislators like Thomas Macaulay, Henry Maine, and James Fitzjames Stephen nevertheless emphasized the alleged particularities of "native" custom and society, which they claimed, complicated the application of English legal norms, and necessitated a deviation from the system of parliamentary representation that crown subjects enjoyed in Great Britain.[4] Liberal supporters of imperial expansion were keenly aware of the fact that sovereign power in the colonies was not subject to the consent of the governed and remained largely free from the limits that had been imposed on it in the metropole.[5] It was this "enlightened and paternal despotism," then-member of parliament Thomas Macaulay argued in 1833, that enabled Britain to further colonial "rule of law," and thus the colonial project in India altogether.[6]

1 James Fitzjames Stephen, "Legislation under Lord Mayo," in *The Life of the Earl of Mayo*, ed. William Wilson Hunter (London: Smith, Elder & Co, 1876), 169. See Sandra Den Otter, "Law, Authority, and Colonial Rule," in *India and the British Empire*, ed. Douglas M. Peers and Nandini Gooptu, The Oxford History of the British Empire (Oxford: Oxford University Press, 2012), 185.

2 Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23, no. 3 (2005): 631.

3 Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton, NJ: Princeton University Press, 2016), 56.

4 Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (New Delhi: Permanent Black, 2010), 30–38.

5 For the development of liberal thoughts on empire, see Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton University Press, 2005); Thomas Metcalf, *Ideologies of the Raj*, The New Cambridge History of India (Cambridge: Cambridge University Press, 1995); Mantena, *Alibis*.

6 Thomas Macaulay, "Government of India," 10 July 1833, 19 Parl. Deb. H.C. (3rd ser.) (1833).

An "absolute government" could raise India to adopt "our arts and our morals, our literature and our laws" until "having become instructed in European knowledge, they may, in some future age, demand European institutions."[7] Liberal rule in the colonies required the justification of authoritarian practices, like the suspension of due process or freedom of the press, within a framework of liberalism. Partha Chatterjee has described these justifications, which rejected the universality of liberal ideals and insisted that alleged historical, cultural, or racial characteristics made it impossible or impractical to extend some liberal practices and rights to the colonized, as the "rule of colonial difference."[8] One battleground for such discourses was the crime of "sedition," which described illegal incitement against the established order. Initially created to punish those that criticized the English king, by the late 18th century, its grip on public opinion in Great Britain had been drastically weakened.[9] Outside of Great Britain, however, the authoritarian character of the law lived on. In India, sedition first entered the Penal Code in 1870 as section 124A. After its first use in court in 1891, the definition of sedition was continuously broadened, both in court and through legislation.[10]

At the same time, prosecutions under the charge of sedition continued elsewhere. Rare trials in Ireland and Britain furnished judges, defendants, and observers with the ability to compare the treatment of sedition across the Empire. In negotiating the measures the colonial government took against alleged sedition, critics pointed to the contradictions between the Empire's legal norms at home and its rule in the colonies.[11] Sunny Kumar has argued that, while colonial legislation was shaped by "difference," its ideological roots were not confined to the colonial sphere but also present in the imperial metropole.[12] This paper seeks to examine and expand upon this theory by surveying discourses around the 1870 enactment of the sedition law in the British Raj and the application of sedition laws in colonial India, Ireland, and Great Britain. I argue that universalist narratives of imperial justice were a key strategy in the construction of sedition. Nevertheless, colonial difference came to define arguments around sedition in legislative proceedings as well as the courtroom through the deep-rooted link between sedition and colonial

7 Macaulay, "Government of India."

8 Partha Chatterjee, "The Colonial State," in *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton, New Jersey: Princeton University Press, 1993), 18.

9 Sunny Kumar, "Is Indian sedition law colonial? J.F. Stephen and the jurisprudence on free speech," *The Indian Economic & Social History Review* 58, no. 4 (2021): 488.

10 Stephen Morton, "Terrorism, Literature, and Sedition in Colonial India," in *Terror and the Postcolonial*, ed. Elleke Boehmer and Stephen Morton, Blackwell Concise Companions to Literature and Culture (Chichester: John Wiley & Sons, 2010), 203.

11 Giorgio Shani, "Empire, Liberalism and the Rule of Colonial Difference: Colonial Governmentality in South Asia," *Ritsumeikan Annual Review of International Studies* 5 (2006): 21.

12 Kumar, "Indian sedition law," 488.

anxiety. I further argue that trials across the Empire influenced one another and shaped the perception of rule and law in the "imperial public sphere."[13] To follow sedition across the Empire, I first study its implementation in India in 1869–1870 and turn to Ireland, where the 1868 trial of newspaper editors Sullivan and Pigott provides a crucial point of reference for the relation between colonial security anxieties and sedition. I then consider the 1886 trial of John Burns, accused of seditiously agitating crowds in London, and finally return to India, where the first Indian trials under section 124A in 1891 and 1897 are examined.

Making sedition

The term sedition first entered English law with the Sedition Act of 1661, which made it a crime to "imagine, invent, devise or intend" ill towards the king or his rule.[14] This also included, as stated in 1704 by English Lord Chief Justice John Holt, merely "possessing an ill opinion of the government."[15] This interpretation of sedition did not last in Great Britain however, and by the end of the 18th century, conviction of a defendant who had not explicitly called for insurrection, had become exceedingly unlikely.[16] In India, sedition was initially mentioned in Thomas Macaulay's 1837 draft for an Indian Penal Code, but was omitted from the final code when it came into force in 1860.[17] Section 113 of the draft would have criminalized "attempts to excite feelings of disaffection to the Government" with banishment, fine, and or imprisonment.[18] Nevertheless, criticism of colonial rule and governance in the press remained relatively free from legal persecution between 1835 and 1857,[19] when a widespread rebellion caught the British completely by surprise

13 Tanya Agathocleous, "Criticism on Trial: Colonizing Affect in the Late-Victorian Empire," *Victorian Studies* 60, no. 3 (2018): 436.

14 "Charles II, 1661: An Act for Safety and Preservation of His Majesties Person and Government against Treasonable and Seditious practices and attempts," in *Statutes of the Realm: Volume 5, 1628–80*, ed. John Raithby (s.l.: Great Britain Record Commission, 1819), 304–306. In English common law, seditious libel was first introduced in 1606 in *De Libellis Famosis.*

15 R v. Tutchin, [1704] 424 Holt, 90 Eng. Rep. 1133. See Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press, 2016), 84.

16 Walter Russell Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India: Penal and Preventive, With an Excerpt of the Acts in Force Relating to the Press the Stage and Public Meeting* (Calcutta: Thacker Spink, 1911), 14–15.

17 Aravind Ganachari, *Nationalism and Social Reform in the Colonial Situation* (New Delhi: Kalpaz Publications, 2005), 55.

18 C. H. Cameron and D. Elliot, eds., *The Indian penal code, as originally framed in 1837, with notes by T.B. Macaulay ... [and others] and the first and second reports there-on dated 23rd July 1846 and 24th June 1847* (Madras: Higginbotham, 1888), 22.

19 Ganachari, *Nationalism and Social Reform*, 54.

and shaped a new state of colonial anxiety.[20]

The failure to foresee a violent uprising against it caused the colonial government to rethink its instruments of control. Travellers, preachers, publishers, and others who might influence the colonized population were increasingly placed under suspicion and sometimes punished.[21] In the wake of the rebellion against British rule, the 1857 Act to Regulate the Establishment of Printing Presses (Act XV) introduced restrictions on the Indian press for the duration of one year.[22] The new act allowed the government to exercise, as Governor-General Lord Canning stated, "a more absolute and summary control of the press," which had been made necessary by "the extent to which sedition has been poured into the hearts of the native population in India."[23] In 1867, the Press and Registration of Books Act made the temporary restrictions passed in 1857 permanent.[24] It also required the registration of Indian books and publishers, as colonial officials produced an unprecedented vast collection of catalogued, translated, and commentated Indian literature.[25]

While sedition and incitement to sedition were evidently of chief importance for colonial officials, the crime of sedition did not receive its own section in the Indian Penal Code until 1870, after news of an alleged anti-British conspiracy gripped India. Throughout the 1860s, the colonial state had imprisoned and banished numerous alleged members of an Islamic anti-colonial movement, referred to by colonial officials as the *Wahhabis* or the "Great Wahhabi Conspiracy."[26] The ostensible threat of radicals preaching

20 See Kim Wagner, "'Treading Upon Fires': The 'Mutiny'-Motif and Colonial Anxieties in British India," *Past & present* 218, no. 1 (2013). Of course, it can also be argued that such a state existed well before 1857 and was, in fact, endemic to British rule. See Mark Condos, "Colonial Insecurity in Early British India, 1757–1857," in *The Insecurity State: Punjab and the Making of Colonial Power in British India* (Cambridge: Cambridge University Press, 2017), 25–66; Jon Wilson, *India Conquered: Britain's Raj and the Chaos of Empire* (London: Simon & Schuster, 2016). Nevertheless, the "mutiny" of 1857 represented a milestone in imperial anxieties.

21 For the colonial fear of itinerancy, see Chandra Mallampalli, *A Muslim Conspiracy in British India?: Politics and Paranoia in the Early Nineteenth-Century Deccan* (Cambridge: Cambridge University Press, 2017).

22 William Theobald, *The Acts of the Legislative Council of India in 1857* (Calcutta: D'Rozario, 1858), Act XV, 95.

23 "Speech of the Governor-General in the Legislative Council, regarding the Press Act," 13 June 1857, *Accounts and Papers of the House of Commons*, vol. 43 (London: House of Commons, 1858), 103–104.

24 The Act required the registration of all newspapers and printing presses with the government and made it mandatory to print the names of the editors on every issue of a newspaper. See The Press and Registration of Books Act of 1867, Part II (UK); Donogh, *A Treatise*, 183; Ganachari, *Nationalism and Social Reform*, 76.

25 Robert Darnton, "Books in the British Raj: The Contradictions of Liberal Imperialism," in *Gutenberg-Jahrbuch*, ed. Stefan Füssel (Mainz: Gutenberg-Gesellschaft, 2001), 140.

26 *Wahhabism*, a Sunni reform movement based on the teachings of Muhammad ibn Abd al-Wahhab (1703–1792), emerged in the 18th century in the Arabian Peninsula. In the early 19th century, the term became a derogatory label for heterodox believers among South Asian

insurgency to India's Muslim population, which was understood to be particularly vulnerable to incitement, was interpreted by colonial officials as a fundamental threat to colonial stability. To fight the "conspiracy," the British colonial government relied on a draconian mixture of torture, banishment, and detention that was often at the very edge of colonial law or in clear violation of it.[27] British and Indian critics of these measures pointed out the stark contradiction between the rule of law that liberal officials purported to establish in India and the actions of the government.[28] In the case against Amir and Hashmadad Khan, two merchants from Delhi who had been accused of financing insurgent fighters, the defendants were imprisoned without charge throughout 1869 and 1870.[29] They were held under the Bengal State Prisoners Regulation III of 1818, which allowed the state to detain individuals suspected of intending to commit a crime in the future indefinitely without trial. The Khan brothers' legal counsel, Thomas Anstey, claimed that the law amounted to a permanent suspension of Habeas Corpus, an alleged violation of the Magna Carta,[30] and could never be upheld in England, where only a temporary suspension of the principle could be enacted in times of crisis.[31] Thus, Anstey argued, the detention of his clients under Regulation III should be considered unconstitutional. The Calcutta High Court rejected the claim. In his ruling, Chief Justice Norman argued that "if the danger to be apprehended from the conspiracies [. . .] is not temporary, but from the condition of the country must be permanent," the possibility of a temporary suspension of the Habeas Corpus Act in England could justify its permanent suspension in India.[32] In rejecting Anstey's plea towards extending Habeas Corpus to Britain's colonial subjects, Norman embraced a narrative of difference and rejected the extension of English legal norms to India, ostensibly one of the core aims of

Muslims. At this point, colonial authorities drew on the term to describe itinerant preachers believed to spread rebellious thoughts. After the Indian Rebellion of 1857, *Wahhabi* became a catch-all term for Muslim anti-colonial conspirators. See Mallampalli, *A Muslim Conspiracy*; Rishad Choudhury, "Wahhabis without Religion; or, A Genealogy of Jihadis in Colonial Law, 1818 to 1857," *Comparative Studies of South Asia, Africa and the Middle East* 42, no. 2 (2022): 404–419; Julia Stephens, "The Phantom Wahhabi: Liberalism and the Muslim fanatic in mid-Victorian India," *Modern Asian Studies* 47, no. 1 (2013): 22–52.

27 Qeyamuddin Ahmad, *The Wahhabi Movement in India*, 2nd ed. (New Delhi: Manohar, 1994), 200.

28 Stephens, "The Phantom Wahhabi," 52.

29 Stephens, "The Phantom Wahhabi," 32.

30 The Magna Carta of 1215 stated, "No freeman shall be taken or imprisoned [. . .] except upon the lawful judgement of his peers or the law of the land." Starting in the 17th Century, this was understood to be the foundation of the principle of Habeas Corpus, which guaranteed prisoners the right to challenge the legality of their detention before a court. See Ralph V. Turner, *Magna Carta Through the Ages* (Harlow: Pearson Longman, 2003), 156.

31 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 89.

32 *A full and complete Report of the Proceedings and debates in the matters of Ameer Khan and Hashmadad Khan, in the Crown Side of the High Court of Judicature at Fort William in Bengal, in the year 1870, A.D.* (Calcutta: R. Cambray, 1899), 153.

liberal imperialism.[33]

In March of 1869, shortly before the Khan brothers were arrested, the Home Department in London suggested the "necessity of amending law with the object of enabling the government to deal more satisfactorily with seditious proceedings."[34] In the Legislative Council session on November 25, Stephen remarked about the "Wahhabi Conspiracy," that "if anyone thought that there was absolutely no occasion for any law of this kind [against sedition], he ought to look back to [these] incidents."[35] On August 2, 1870, Stephen petitioned the Legislative Council to introduce legislation that would reinstate draft section 113, which had been left out of the Penal Code when it passed in 1860.[36] He claimed that the section had only been left out by accident and moved to rectify this "mistake" by re-submitting the draft section for consideration as section 124A of the Indian Penal Code.[37] It remains unclear why section 113 was originally omitted, but Stephen's insistence that the new law had been reinstated out of due diligence and did not represent any desire to counter recent developments is certainly notable.[38]

In introducing the section, Stephen denied any desire "to check, in the least degree, any criticism of [government] measures, however severe and hostile," but cautioned that "persons seditiously disposed" could not avoid prosecution by "confining themselves to what, under other circumstances and in other persons, might be genuine criticism."[39] To test whether criticism of the government was seditious, Stephen proposed to distinguish between disaffection and disapprobation, as section 113 in the original draft would have done. "Disapprobation" would represent criticism of government regulations or persons that did not call into question colonial rule, while "disaffection" was the criminal withholding, or incitement to withhold, of the allegiance that the subject owed to its sovereign.[40] Disaffection as a concept originated from the same theory of rule as the concept of sedition. In an absolutist monarchy, the king commanded the love and fealty of his subjects, and to disprove of him, in public or in private, was a great crime.[41] Trials under the common law offence of seditious libel in Great Britain, Ireland and the 13 colonies had

33 Hussain, *Jurisprudence of Emergency*, 92–95.
34 Quoted in Ganachari, *Nationalism and Social Reform*, 56.
35 Imperial Legislative Council of India, *Abstract of the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations* 9 (1870): 451–452.
36 *Abstract of proceedings*, 9, 371.
37 *Abstract of proceedings*, 9, 371.
38 Ganachari, *Nationalism and Social Reform*, 55.
39 *Abstract of proceedings*, 9, 374.
40 *Abstract of proceedings*, 9, 374.
41 Donogh, *A Treatise*, 11.

seen the term used by judges and prosecutors, often interchangeably with "dissatisfaction."[42] On August 16, 1870, the bill was formally introduced to the Legislative Council by Stephen and referred to a select committee for further consideration.[43] It immediately met with public criticism. On August 24, the *Times of India* reprinted an article, originally published in *Native Opinion* that criticized the proposed amendment.[44] The article quoted Stephen's claim in the Legislative Council session of August 2, 1870, that the Indian Code was "a far better [. . .] system of criminal law [than] any of the systems in force in England, France or America." Why then, the author questioned, should such a refined code of laws undergo "a change of such vital importance?"

Further criticism of the proposed sedition law came from the British Indian Association. The association had been founded in 1851 by conservative Hindu scholar Radhakanta Deb and frequently petitioned British authorities to reform their rule over the subcontinent.[45] In the summer of 1870, the committee of the association, noting that "the whole of the Indian Press protested vehemently against the clause," warned that the proposed section "would seriously interfere with the liberty of speech and writing of the public."[46] The statement appealed to Stephen and others "nurtured under the free institutions of their native land" to embrace freedom of the press in India and cautioned that the law was "liable to great abuses in times of political ferment." The British Indian Association's statement also criticized a "point of difference" between English and Indian law. The English law, the statement insisted, punished an overt act, whereas the Indian law would punish even an "intention" to do such an act: "The experiences of England have always been a guide in matters of legislation in India and it may fairly be asked whether there is any law in force in that country analogous to the one proposed for India? The Committee are aware of none." The association further argued that even in Ireland, which was in a "similar political relation to England" as India, no comparable sedition law existed.[47]

42 Donogh, *A Treatise,* 12–32.

43 *Abstract of proceedings*, 9, 370.

44 "Penal Code Amendments," *Times of India*, August 24, 1870, The British Newspaper Archive, https://www.britishnewspaperarchive.co.uk/viewer/bl/0002850/18700824/101/0003. The original publication of the article in *Native Opinion* is no longer available.

45 See British Indian Association, *Petition of the British Indian Association to the House of Commons: On various subjects connected with Indian administration* (Calcutta: C.H. Manuel, 1860).

46 P. N. Singh Roy, ed., *Chronicle of the British Indian Association, 1851–1952* (Calcutta: British Indian Association, 1965), 60. The exact date of the committee's statement has not been recorded. It must have been published between August 2 and November 25, 1870. Further sections of the original statement are documented in the Council's proceedings. See *Abstract of proceedings*, 9, 437–453.

47 *Abstract of proceedings*, 9, 449.

The British Indian Association's critique of the sedition law sought to expose the inconsistencies in liberal imperialism. The association praised the "free institutions" of Great Britain and questioned why its liberal practices might be outlawed in India by those who themselves had lived under them, thus highlighting the idea of "difference" that shaped the colonial rule around the globe. In comparing India to Ireland, which also found itself under British colonial rule, the association sought to further question sedition legislation within the imperial framework, by highlighting the unequal treatment of sedition across the British Empire.

Sedition across the Empire

As claimed by the British Indian Association, the English Treason Acts of 1661 and 1848 indeed punished acts rather than mere intent, but across the British Empire, "seditious libel" could be prosecuted under common law. Seditious libel, or, if spoken, "seditious words," described any speech, spoken or published, "with seditious intention," the exact definition of which could vary depending on the case and the presiding judge.[48] In 1868, the Attorney-General for Ireland charged two Irish publishers, Sullivan and Pigott, editors of the Dublin-based weekly newspapers *The Irishman* and *Weekly News*, with seditious libel.[49] The two papers had published a series of articles and woodcuts that, in the eyes of the prosecution, "represent[ed] Hibernia cast upon the ground, held down by the violent hand of England."[50] The case in Ireland provides an important point of comparison to India, then as it does now, in the globe-spanning justice system of the British Empire, in which legislation and case law would be tracked, compared, and cited across the Empire by judges, lawyers, and officials alike. The trial of the two publishers was presided over by John David Fitzgerald and decided by a Grand Jury for the County of Dublin. Fitzgerald began his statement to the jury by pointing out the extreme rarity of any prosecution of seditious libel and recounted the tradition of "complete liberty of the Press in Great Britain and Ireland."[51] "If the law of libel was carried out in the full strictness of its letter," he noted, "it would materially interfere with the freedom of the press."[52] He also pointed out a core flaw in the division of legitimate and illegal criticism: "It is open to the community and to the Press to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may

48 Donogh, *A Treatise*, 10.
49 R v. Sullivan, [1868] 11 Cox 44; R v. Pigott, [1868] 11 Cox 60.
50 Donogh, *A Treatise*, 18.
51 Donogh, *A Treatise*, 13–14.
52 Donogh, *A Treatise*, 18.

be said to be seditious."[53]

This issue had also been raised by James Fitzjames Stephen in the Legislative Council, who had pointed out that disaffection, in the broad definition of the colonial state, could be incited without any intention to do so.[54] After all, a pure statement of fact could make a group of subjects angry at their government and thus create disaffection. Stephen and Fitzgerald both believed, however, that sedition, no matter how undefinable in theory, would be apparent to any jury.[55] Stephen further argued that material that might represent legitimate criticism in calm times could, in times of turmoil, be considered seditious.[56] Similarly, Fitzgerald drew upon the recent Fenian Rising of 1867 when he urged the jury to consider that:

> If the country was free from political excitement and disaffection, such articles [. . .] might be free from danger and comparatively innocent, but in a time of political trouble and commotion, when the country [is] overrun by the emissaries of a treasonable conspiracy [. . .] publication of articles advocating the views and objects of that conspiracy seems to admit but of one interpretation.[57]

Sedition, in the understanding of Stephen and Fitzgerald, was a fluid crime that was defined by colonial security concerns and the perceptions of government, prosecution, judge and jury. In this understanding, the freedom to criticise the government was not an inherent right but might be granted by the state under the right circumstances. Both defendants were found guilty.

The next charge of sedition under common law occurred in 1886, 16 years after the passing of section 124A in India and 18 years after the cases in Ireland. Socialist orator John Burns, later MP and member of the Privy Council, was accused, among others, of having delivered a seditious speech to a group of unemployed workers, who then proceeded to riot and cause material damages in London's West End.[58] The prosecution argued that while the defendants did not "directly incite the crowd to cause such disturbances [. . .] they must have been aware of, and were answerable for, the natural results of the language they used."[59] The presiding judge, Justice Cave, explained the legal precedent around sedition and attempted to define the

53 Donogh*, A Treatise,* 18.
54 *Abstract of proceedings*, 9, 442.
55 Donogh, *A Treatise*, 18.
56 *Abstract of proceedings*, 9, 374.
57 Donogh, *A Treatise*, 15–16.
58 R v. Burns, [1886] 16 Cox 355.
59 Donogh, *A Treatise,* 22.

relation between intention and effect in the case of sedition. The incitement of disaffection was separated from its success or failure, so any attempt to cause sedition was criminal, but the question of what should happen when there was disaffection, but not necessarily intent, remained. Lacking a clear answer under English common law, Cave turned to Stephen. Citing Stephen's *History of the Criminal Law of England*,[60] Cave argued that seditious intent could not just be derived from the occurrence of "disaffection" or disturbances: "It is one thing to speak with the distinct intention to produce disturbances, and another thing to speak recklessly and violently of what is likely to produce disturbances."[61]

It is worthy of note here, that Cave's description of Stephen's views on seditious intent are at odds with the views expressed by Stephen to the Legislative Council. In his defence of the proposed legislation on November 25, 1870, Stephen had claimed that intent should be easy to infer in most cases and that, when it came to the risk of unfair punishment of journalists who had expressed criticism without seditious intent, "men must be content to take the risks incidental to their profession."[62] While Stephen's interpretation of sedition in his *History of the Criminal Law of England,* which Cave followed, allowed for the unintended outcomes of government criticism, his interpretation delivered to the Legislative Council did not. To Stephen, a suspect might accidentally contribute to unrest through his words in Britain without intending to do so. In India, such an intention could simply be assumed wherever "disaffection" had occurred. Having agreed on the "legitimate" nature of the criticisms uttered by the orators in the case against Burns and noting the lack of clear intent to incite disturbances, the jury found Burns and his fellow defendants not guilty.

Stephen had been partially correct, when he claimed in 1870 that his proposal "improved and condensed the existing English law on the subject."[63] The provisions of 124A encapsulated the application of sedition under common law, where judges were required to furnish their own definition of sedition and juries could freely decide to what extent criticism of the government ought to be allowed. As Fitzgerald claimed in the Irish case of 1868, in sedition trials "the law casts upon the jury the determination of both law and fact."[64] In this sense, section 124A merely codified existing English case-law. As the trial of John Burns shows however, judges and juries could, where colonial insecurities were not concerned, also emphasize the right

60 James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883).
61 Donogh, *A Treatise*, 27.
62 *Abstract of proceedings*, 9, 450.
63 *Abstract of proceedings*, 9, 438.
64 Donogh, *A Treatise*, 14.

to criticize the Crown, even when such criticism might support instances of disaffection or disturbances. Naturally, jury selection also mattered. The members of Irish Grand Juries, like the Grand Jury for the County of Dublin, which ruled in the case of 1868, were chosen among wealthy landowners. In India, juries disproportionately included white jurors who tended to vote along colour lines.

In Britain, the idea of sedition had been gradually weakened, as freedom of expression for English men came to be recognized as a core value of English law over the course of the 18th century,[65] a transformation that was, once again, affirmed in court in the case against Burns. While this tradition was acknowledged in Ireland, considerations of colonial rule weakened concerns for the freedom of the press. In India, the change in sedition rulings found only symbolic consideration. In his defence of section 124A, Stephen refused to acknowledge this transformation, but rather sought to negate the difference between the English and the colonial spheres.[66] Why should the Indian press fear the sedition law, Stephen asked, when the "English papers in this country" were happy to publish about "every man, every measure, every principle which they thought it right to discuss" under the same law?[67] Moreover, he claimed, undue press censorship would be "altogether repugnant [. . .] to the habits in which English public men were trained up."[68] Instead of emphasizing colonial "difference," as Justice Norman had done in the case against Amir and Hashmadad Khan, two alleged supporters of the "Wahhabi Conspiracy," Stephen sought to obfuscate the hierarchy of colonizers and colonized. By insisting that the law of the British Empire was one and the same, anywhere and for anyone, the authoritarian character of colonial rule and colonial anti-sedition legislation could be reconciled with liberal visions of imperial justice. In Stephen's narrative, 124A was introduced as a matter of due diligence, a simplified and improved version of what should already have been in place. The Indian press, having witnessed the brutal reprisals following the rebellion of 1857 or the attempts by colonial officials to suppress alleged "Wahhabi Conspiracies," rejected these claims. Like in the cases against the Wahhabi "conspirators," protests invoked a liberal critique of colonial rule that sought to demonstrate the different shapes the law would take for colonizer and colonized.[69]

65 Kumar, "Indian sedition law," 488–489.
66 *Abstract of proceedings*, 9, 450.
67 *Abstract of proceedings*, 9, 451.
68 *Abstract of proceedings*, 9, 451.
69 For the protests in the "Great Wahhabi case," see Stephens, "The Phantom Wahhabi." A similar critique was voiced when the Vernacular Press Act of 1878 curtailed criticism of the government in Indian-language newspapers, except English papers. The Act was repealed in 1881 by the liberal viceroy, Lord Ripon. See Chatterjee, *Nation and Fragments*, 24–26.

Section 124A on trial

It would take 31 years for section 124A to be used in a trial, perhaps an indication of the extreme unpopularity of the law. The colonial government, aware of its controversial nature, may have chosen to avoid the use of the law. Finally, in 1891, Jogendra Chunder Bose was indicted along with three fellow staffers of the Bengali weekly newspaper *Bangavasi* for the publication of several articles that had criticised the passing of the Age of Consent Act (1891) and British rule in general.[70] "The English ruler is our Lord and Master," one of the articles claimed, "[. . .] he has the rifle and bayonet and slanders the Hindu from the might of the gun."[71] The articles depicted colonial rule to be fundamentally authoritarian and subversive to Hindu values. At the same time however, they did not call for resistance against the British and explicitly rejected rebellion.[72] Nevertheless, the prosecution insisted that the articles did not amount to reasonable criticism, but rather attempted to incite disaffection.[73] The Counsel for the Defence quoted Fitzgerald's opinion that, in sedition cases, the jury decided both law and fact. He reminded the jury of the statements made by Stephen in the Legislative Council and argued that the freedom of the "native press" had been affirmed by the government repeatedly. In contradiction to Stephen, the defence attacked the concept of disaffection and disapprobation, arguing that the two words were effectively synonymous.[74] Criticism could not simply be rated along a scale, where one end was legitimate disapprobation of government measures and the other seditious disaffection. Instead, a "direct incitement to rebellion" should be required to convict.[75] The Crown, on the other hand, argued that:

> The intention of the articles in referring to famines and high prices and charging the Government with persecuting the Hindu religion was to make the people discontented and dissatisfied. [It is] always dangerous to excite the religious feelings of people [. . .] surely the public peace is imperilled.[76]

The presiding judge, Justice Petheram, rejected the claims made by the defence on the definition of disaffection and disapprobation: "Disaffection means a feeling contrary to affection, in other words dislike or hatred. It is sufficient [. . .] to excite feelings of ill-will towards the Government and to hold

70 Queen-Empress v. Jogendra Chunder Bose and Others, (1892) ILR 19 Cal 35.
71 Donogh, *A Treatise,* 38. All quotes from the vernacular newspapers *Bangavasi* and *Kesari* are taken from court-ordered translations into English by unknown translators.
72 Queen-Empress v. Jogendra Chunder Bose and Others, (1892) ILR 19 Cal 35.
73 Donogh, *A Treatise*, 39.
74 Queen-Empress v. Jogendra Chunder Bose and Others, (1892) ILR 19 Cal 35.
75 Donogh, *A Treatise*, 39.
76 Donogh, *A Treatise*, 39.

it up to the hatred and contempt of the people."[77] Here Petheram followed traditional phrasing in older English case-law and ignored the definition that Stephen had suggested. Petheram also weakened the role of seditious intent, when he addressed the jury, stating:

> You will have to consider not only the intent of the person who wrote and disseminated the articles [. . .] but the probable effect of the language indulged in. Then you will have to consider the relations between the Government and the people, and having considered the peculiar position of the Government and the consequence to it of any well-organized disaffection, you will have to decide whether there is an attempt [. . .] of exciting the feelings of the people till they become disaffected.[78]

This definition removed the need to prove intent or the ability to demonstrate lack of intent, as was done in the case against Burns and replaced these considerations with the "probable effect" of criticism, which, in the context of colonial anxieties, could always be construed to be disaffection.[79] The "peculiar position" of the colonial government, the supposedly catastrophic consequences of sedition, and the "excitable religious nature" of the colonized population, could be used to argue that disaffection was the probable result of virtually any form of government criticism. This interpretation seems to echo Fitzgerald's warning that if seditious libel were interpreted strictly, the "mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious."[80] The emphasis on feared religious backlash exposed a key point of imperial fragility: the counsel for the Crown had evoked the ostensibly excitable nature of its Hindu subjects. Religion was once again a focal point of alleged anti-colonial disaffection, just as it had been in 1857 and in 1870.[81] The discussion around the alleged intent to excite disaffection had thus been moved away from the specific statements made in the paper and unto a discussion of the colonized populace, which was alleged to be irrational and vulnerable to agitation. Despite the reframing of 124A by Petheram, the jury could not agree on a verdict and the accused were released. A retrial was ordered by Petheram, but the charges were dropped after an apology from *Bangavasi*. Petheram's interpretation of sedition, however, survived the court proceedings and would be taken up and expanded upon in subsequent sedition cases.[82]

77 Donogh, *A Treatise*, 39–40.
78 Donogh, *A Treatise*, 40–41.
79 Bhatia, *Offend, Shock, or Disturb*, 85.
80 Donogh, *A Treatise*, 18.
81 Agathocleous, "Criticism on Trial," 445.
82 Ganachari, *Nationalism and Social Reform*, 58.

On June 22, 1897, William Charles Rand, the sanitation commissioner of Pune, was shot alongside his escort, Lt. Charles Ayerst. The attack had been carried out by a group of brothers from Pune, who disapproved of the commissioner's draconian measures to curtail the spread of the bubonic plague.[83] In addition to the hunt for the perpetrators of the shooting, the *Times of India* demanded punishment for alleged agitators, who, through their criticism of the government measures, were accused of having contributed to the killings.[84] Bal Gangadhar Tilak, a prominent critic of Commissioner Rand, quickly drew the ire of the Anglo-Indian press for several articles in the Marathi-language newspaper *Kesari*, of which he was the editor in chief and, following a public campaign against him, became the suspect in India's second trial under 124A.[85] The object of the case against Tilak were two writings on Shijavi (1630–1680), the founder of the Maratha Empire.[86] In the two texts, Shijavi's rebellion against the established order and his killing of the general Afzal Khan during negotiations between the two, are reframed into a legitimate quest for self-rule.[87] Both works argue that violence, under certain circumstances, can be justified or, at the very least, cannot be judged by the usual moral and legal frameworks.[88] The texts appear to indirectly lambast oppression under colonial rule and to question the illegitimacy of anti-colonial violence.

The prosecution was handed a difficult case against Tilak. Neither text explicitly called for resistance against the British and Tilak had repeatedly condemned the act of violence against Rand.[89] As such, the conditions for a conviction under 124A as set out by Stephen in 1870, namely that disaffection required support for a removal of the established government, were not met. Instead, the prosecution and the presiding judge, Arthur Strachey, once again utilized an expanded definition of disaffection. Tilak argued in court that his criticism was not incompatible with loyalty to the government, and that he had in no way advocated to overthrow it.[90] Strachey, however, disagreed with the statement and instructed the jury that "the amount or intensity of disaffection [was] immaterial,"[91] when it came to determining seditious intent,

83 I. J. Catanach, "'The Gendered Terrain of Disaster'?: India and the Plague, c. 1896–1918," *South Asia: Journal of South Asian Studies* 30, no. 2 (2007): 248.
84 Ganachari, *Nationalism and Social Reform*, 60.
85 Sukeshi Kamra, "Law and Radical Rhetoric in British India: The 1897 Trial of Bal Gangadhar Tilak," *South Asia: Journal of South Asian Studies* 39, no. 3 (2016): 549.
86 Queen-Empress v. Bal Gangadhar Tilak, (1898) ILR 22 Bom 112.
87 Kamra, "Law and Radical Rhetoric," 553.
88 Kamra, "Law and Radical Rhetoric," 554.
89 Tilak stated in court: "We do not hold that bomb throwing is not a criminal act and is not reprehensible. We condemn it." Quoted in Kamra, "Law and Radical Rhetoric," 555.
90 Ganachari, *Nationalism and Social Reform*, 60.
91 Ganachari, *Nationalism and Social Reform*, 60.

and that disaffection "simply [meant] the absence of affection."[92] Justice Strachey's interpretation, in which any criticism deemed to lack "affection" for the government could be seen as an expression of disloyalty, quickly came to be referred to by the press as "Strachey's law" and faced widespread criticism in Indian papers.[93] Nevertheless, Tilak was found guilty and sentenced to a prison term of 18 months. The European majority in the jury had voted to convict and overruled the three Indian jurors.[94]

In 1898, the Legislative Council moved to amend section 124A.[95] The updated section criminalized the incitement of "hatred, contempt [. . .] disloyalty and all feelings of enmity" towards the government. Members of the council also heavily utilized narratives of civilizational differences between colonizers and the colonized.[96] The presiding member of the select committee, Mackenzie Dalzell Chalmers, stated that Stephen had introduced 124A to "assimilate the law of India to the law of England as regards the offence of sedition."[97] The planned amendment, he argued, would now bring sedition "clearly into accord with English law."[98] Others however, Chalmers conceded, had claimed:

> That the proposed clause goes further than English law. But after all, these arguments are more or less academic [. . .] How much license of speech can be safely allowed is a question of time and place. [. . .] Language may be tolerated in England which it is unsafe to tolerate in India [. . .] It is clear that a sedition law which is adequate for a people ruled by a government of its own nationality and faith may be inadequate [. . .] for a country under foreign rule and inhabited by many races, with diverse customs and conflicting creeds.[99]

Conclusion

In the decades that followed the Tilak trial, charges of sedition would remain one of the central tools to suppress the nationalist movement.[100] In the

92 Quoted in J. Minnatur, "Freedom of the Press in India: Constitutional Provisions and their Application" (PhD diss., The Hague: Martinus Nijhoff, 1961), 31.
93 Ganachari, *Nationalism and Social Reform*, 61.
94 Kamra, "Law and Radical Rhetoric," 550.
95 Bhatia, *Offend, Shock, or Disturb*, 86–87.
96 Tanya Agathocleous, "Reading for the Political Plot: A Genealogy of Disaffection," *Criticism* 61, no. 4 (2019): 577.
97 Donogh, *A Treatise*, 61.
98 Donogh, *A Treatise*, 61.
99 Donogh, *A Treatise*, 64–65.
100 Morton, "Terrorism, Literature, and Sedition," 203.

immediate aftermath of the amendment of 1898, the Bombay government alone prosecuted half a dozen newspapers. Following the Partition of Bengal in 1905, dramatic performances (1905), gatherings (1908) and works of literature (1910) could be deemed seditious.[101] It is worth considering, if claims of colonial difference were inherent to the prosecution of "sedition," and how section 124 came to grow into "the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen" that Gandhi decried in 1922.[102] In Great Britain, consecutive court decisions had placed great emphasis on the freedom of the press and the importance of public criticism. In the case against John Burns, a jury ruled in favour of the defendant, despite the riots that followed his speech. Ireland and India, on the other hand, were described in court as perpetually insecure and vulnerable to conspiracy and agitation. Despite frequent claims to the contrary, the "state of the country" and its colonized population, that were enshrined in the colonial interpretations of sedition, opened the door for racial, religious, or cultural narratives of difference. These authoritarian cracks in the liberal façade of British rule accompanied perceived ruptures in colonial stability. In Ireland, prosecution charges followed the Fenian Rising. The *Bangavasi* case in India came after widespread protest against the Age of Consent Bill and was shaped by the colonial fear of religious incitement brought on by the rebellion of 1857. The changing relationship between universalism and "difference" occurred in a time of crisis: the British Empire found itself rocked by the rebellions and uprisings in India (1857), Jamaica (1865) and Ireland (1867). As Karuna Mantena has argued, against increasing resistance, "universalism easily gave way to harsh attitudes about the intractable differences between people, the inscrutability of other ways of life, and the ever-present potential for racial and cultural conflict."[103] In the court room, a liberal ideal of the "complete liberty of the Press" gave way to the increasingly paranoid concerns of the colonial security state.

101 Ganachari, *Nationalism and Social Reform*, 68–69.

102 Morton, "Terrorism, Literature, and Sedition," 203.

103 Karuna Mantena, "Mill and the Imperial Predicament," in *J.S. Mill's Political Thought: A Bicentennial Reassessment*, ed. Nadia Urbinati and Alex Zakaras (Cambridge: Cambridge University Press, 2017), 299.