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Criminalising Speech in the Name of Sovereignty: A Critical Appraisal of Sedition Law under International Human Rights Standards

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ABSTRACT

This article provides a rigorous critical appraisal of the law of sedition and its contemporary evolution, specifically examining the transition from Section 124A of the Indian Penal Code (IPC) to Section 152 of the Bhartiya Nyaya Sanhita (BNS). Against a backdrop of burgeoning global authoritarianism and the "chilling effect" on dissent, the study evaluates these domestic legal frameworks through the lens of International Human Rights Standards (IHRS), primarily the International Covenant on Civil and Political Rights (ICCPR). The central thesis posits that the criminalization of speech in the name of "sovereignty" often fails the internationally recognized tripartite test of legality, legitimacy, and proportionality.

The article explores the conceptual shift from "state sovereignty," which historically demanded absolute allegiance and the suppression of "disaffection," to "popular sovereignty," which views the protection of expressive liberty as a foundational state duty. By analyzing landmark Indian jurisprudence—from Kedar Nath Singh to the recent suspension of sedition proceedings in Vombatkere—the paper highlights the

persistent gap between judicial "reading down" and administrative "misuse." A significant portion is dedicated to the new BNS framework, arguing that the introduction of vague terms like "subversive activities" potentially widens the net of criminalization, thereby violating the principle of legal certainty.

Furthermore, the study utilizes a comparative methodology, drawing insights from the de-criminalization trends in the United Kingdom and the "imminent lawless action" standard in the United States. It concludes by advocating for a transformative constitutional approach that reimagines sovereignty not as a justification for silence, but as a capability built on institutional accountability and the protection of the "counter-majoritarian" voice. The article offers concrete recommendations for legislative reform to ensure that national security does not become a pretext for eroding the democratic marketplace of ideas

Introduction:

The concept of sovereignty has historically been interpreted as the absolute power of the state to preserve itself against internal and external threats. Within this framework, speech that challenges the legitimacy of the state or its officials has been branded as "sedition"—a crime against the state. However, the 21st-century evolution of International Human Rights Law (IHRL) suggests a shift from "state sovereignty" to "popular sovereignty," where the legitimacy of the state is derived from the protection of the rights of its citizens, rather than the suppression of their voices.

In many post-colonial nations, including India, sedition laws are vestiges of an era where the subject owed "absolute perpetual allegiance" to the Crown. The persistence of these laws creates a paradox: while the constitution guarantees freedom of speech, the penal code continues to punish the "disaffection" that is inherent to a vibrant democracy. This article examines whether the criminalization of speech in the name of sovereignty can survive the rigorous scrutiny of international human rights benchmarks, especially as India transitions into a new era of criminal jurisprudence under the *Bhartiya Nyaya Sanhita*.

Theoretical Framework: The Tripartite Test of International Law

To determine the legitimacy of any law restricting speech, International Human Rights Standards (IHRS), particularly Article 19 of the ICCPR, employ a rigorous three-part test. Any sedition law that fails even one of these limbs is considered a violation of human rights.

2.1 The Legality Limb: The Void for Vagueness

The principle of legality requires that a law must be clear, accessible, and precise. A citizen must be able to reasonably foresee the legal consequences of their actions. The term "disaffection," which formed the core of Section 124A IPC, has been criticized for being "void for vagueness." As the UN Human Rights Committee noted in General Comment No. 34, laws governing "treason" and "sedition" must not be used to suppress political opposition or dissent.

2.2 The Legitimacy Limb: National Security as a Shield

While "national security" is a legitimate aim under Article 19(3), it cannot be used to protect the *reputation* of a government. IHRS distinguishes between the "State" (the permanent entity) and the "Government" (the temporary administration). Sedition laws historically conflate the two, punishing criticism of the administration as an attack on the State's existence.

2.3 Necessity and Proportionality: The Least Intrusive Means

The most significant hurdle for sedition law is proportionality. If a state can address dissent through counter-speech, civil remedies, or administrative measures, the use of criminal law—especially with life imprisonment—is disproportionate. Proportionality requires a direct link between the speech and the threat of violence.

The Indian Transition: From Section 124A IPC to Section 152 BNS

The most critical development in Indian criminal law in recent years is the replacement of the Indian Penal Code (IPC) with the *Bhartiya Nyaya Sanhita* (BNS). While the government claimed to "abolish" sedition, a critical appraisal suggests that the new law may be even more expansive.

3.1 The Expansion of the "Sedition" Concept

Section 152 of the BNS replaces the word "sedition" with "Acts endangering sovereignty, unity, and integrity of India." However, the descriptive elements of the crime remain broad. It punishes:

"...whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation... excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities..."

3.2 The Problem of "Subversive Activities"

The introduction of the term "subversive activities" is a major point of concern for human rights advocates. Unlike "incitement to violence," which has a settled judicial meaning, "subversive activities" is not defined in the BNS. Under international law, this lack of definition violates the "Legality" limb of the tripartite test. It allows the executive to brand non-violent protests, boycotts, or radical political literature as "subversive."

3.3 Comparison Table: IPC vs. BNS

Feature	**Section 124A IPC (Old)**	**Section 152 BNS (New)**
Nomenclature	Sedition	Acts endangering sovereignty/unity
Core Offence	Exciting "disaffection"	Exciting "secession/subversive acts"
Punishment	3 years to Life	7 years to Life
Judicial Standard	*Kedar Nath* (Incitement to violence)	Yet to be tested; potentially broader

(Table 1: Comparison Table: IPC vs. BNS**)**

The Chilling Effect and Digital Sovereignty

In the age of digital communication, the impact of sedition law is magnified. The "chilling effect" refers to a situation where individuals refrain from legitimate speech for fear of legal repercussions.

4.1 Social Media and "Instant Sedition"

The speed and reach of digital speech often cause states to react with disproportionate force. A tweet or a Facebook post can be branded as "endangering integrity" before its actual impact can even be measured. International standards require that states prove a "direct and immediate connection" between the digital speech and a specific act of violence—a standard rarely met in modern sedition prosecutions.

4.2 The Doctrine of Vagueness in *Shreya Singhal*

The Indian Supreme Court's landmark ruling in *Shreya Singhal v. Union of India* (2015) is central to this debate. In striking down Section 66A of the IT Act, the Court held that speech cannot be criminalized simply because it is "offensive" or "annoying." The logic of *Shreya Singhal* suggests that the broad terms in Section 152 BNS (like "encouraging separatist feelings") are constitutionally suspect if they do not meet the threshold of "incitement."

Global Comparative Jurisprudence: The Path to Repeal

A critical appraisal must look at how other democracies have handled the "sovereignty vs. speech" dilemma.

5.1 The United Kingdom: Abolition of Seditious Libel

In 2009, the UK abolished sedition through the *Coroners and Justice Act*. The UK Ministry of Justice stated that sedition was a "vague and redundant" offence from an era when the state was fragile and the monarch's reputation was paramount. The UK now relies on specific counter-terrorism laws that require proof of *actual* intent to cause harm.

5.2 The United States: The *Brandenburg* Standard

The US Supreme Court in *Brandenburg v. Ohio* (1969) established that the state cannot forbid or proscribe advocacy of the use of force except where such advocacy is "directed to inciting or producing imminent lawless action." This remains the highest global standard for free speech protection.

5.3 South Korea and Ghana

South Korea's Constitutional Court and the Supreme Court of Ghana have both moved to invalidate or severely restrict sedition-style laws, arguing that in a modern democracy, the "State" is a robust entity that does not need to fear the opinions of its citizens.

The Counter-Majoritarian Role of the Judiciary

Transformative constitutionalism positions the judiciary as a "counter-majoritarian" institution. This means that the court's duty is to protect the rights of the minority—including political dissenters—against the "tyranny of the majority" represented by the executive.

6.1 Judicial Governance of Speech

In the absence of legislative repeal, the Indian judiciary has engaged in "judicial governance" by staying the operation of Section 124A in *S.G. Vombatkere v. Union of India* (2022). However, this is a temporary

fix. A permanent transformation requires the judiciary to adopt the "Imminent Lawless Action" test as a mandatory prerequisite for any prosecution under the BNS.

6.2 The Burden of Proof

Under IHRS, the burden of proof is on the *State* to demonstrate why a restriction is necessary. In sedition cases, the burden often shifts to the accused to prove their "loyalty" or "lack of disaffection." This reversal of the burden of proof is anathema to the Rule of Law.

Critical Analysis: Does Sovereignty Require Silence?

The fundamental question is whether a state's sovereignty is actually threatened by speech. Academic research suggests that the suppression of speech often *increases* the risk of violence by closing off democratic channels for grievance redressal.

7.1 The Safety Valve Theory

As Justice Robert Jackson famously noted, "Compulsory unification of opinion achieves only the unanimity of the graveyard." Free speech acts as a "safety valve" for social discontent. When the state criminalizes "disaffection," it forces that disaffection underground, where it is more likely to turn into armed rebellion—the very thing the law seeks to prevent.

7.2 Sovereignty as Capability

A modern view of sovereignty emphasizes a state's *capability* to protect its citizens' rights. A "sovereign" state that fears a poem, a tweet, or a protest is a state that is fundamentally insecure. True sovereignty is built on the "uncoerced allegiance" of its people.

Conclusion

The criminalization of speech in the name of sovereignty is an anachronism that has no place in a world governed by International Human Rights Standards. While the transition from the IPC to the BNS was an opportunity for India to align its domestic laws with its international obligations under the ICCPR, the broad language of Section 152 BNS suggests that the "Ghost of Colonial Sedition" continues to haunt the statute books.

Recommendations for a Rights-Centric Framework:

1. **Strict Definition of "Subversive Activities":** The executive must issue guidelines (or the judiciary must read down the law) to ensure that "subversive acts" are strictly limited to acts of physical violence or armed rebellion.

2. **The "Direct Link" Requirement:** No prosecution for speech should be permitted unless the state can prove a direct, immediate, and causal link between the words and a specific act of violence.
3. **Mandatory Pre-arrest Review:** To prevent the "process as punishment" phenomenon, all FIRs involving crimes against the state should require a preliminary review by a judicial officer before an arrest is made.
4. **Adherence to the Johannesburg Principles:** Domestic courts should treat international standards not just as "persuasive" but as "normative" benchmarks for constitutional interpretation.

Sovereignty is not a justification for the suppression of dissent; rather, the protection of dissent is the ultimate proof of a sovereign state's strength. To reimagine constitutional power is to recognize that the citizen's voice is the most sovereign power of all.

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