REVIEW OF 'SEDITION IN LIBERAL DEMOCRACIES' BY ANUSHKA SINGH[1]

—Arudra Burra[*]

I. INTRODUCTION

'*Sedition in Liberal Democracies*' is a welcome addition to the growing number of books on free speech in India published in recent years.[2] It is a book of very wide scope, combining theoretical, comparative, historical, and ethnographic perspectives. In a field which tends to be dominated by discussions of law-making, legal doctrine, and jurisprudence, these perspectives are particularly refreshing.

The book engages with three distinct conceptions of sedition: what one might call the 'authority' conception, the 'public order' conception, and the 'affective' conception.[3] On the 'authority' conception, sedition is a challenge by means of words to the legitimacy of the authority of the sovereign. Instances of such sedition include revolutions against existing political authorities, such as monarchies and colonial states. Singh surveys a range of examples involving such challenges: Jacobin challenges to the British monarchy following the French Revolution; Cold War-era suppression of communist speech in the U.S.; and the anti-colonial movement in India.

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[1] This review draws upon comments made at a panel discussion on Sedition and Liberal Democracies at the School of Law, Governance and Citizenship, Ambedkar University, Delhi, in February 2018. The other panellists were Aparna Chandra and Siddharth Narrain. Thanks to Varsha Rawtani for research assistance at very short notice, and to my colleagues Yashpal Jogdand, Sourabh Bikas Paul, and Debasis Mondal of the "Research Blues Group".

[2] *See* GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION (2015); ABHINAV CHANDRACHUD, REPUBLIC OF RHETORIC: FREE SPEECH AND THE CONSTITUTION OF INDIA (2017).

[3] These labels are mine, not Singh's. Though the conceptions are theoretically distinct, they are not mutually exclusive: the same speech-act may count as seditious on more than one conception.

The authority conception of sedition can be contrasted with a 'public order' conception, in which sedition is essentially a crime involving public violence: in the paradigm case, seditious speech is a direct incitement to such violence. The text of section 124-A of the Indian Penal Code, 1872 which defines the crime of sedition in Indian law, does not refer to public order. However, in 1962 the Supreme Court read down section 124-A to restrict its application to "acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence."[4] Indian law, thus, operates on the public order conception of sedition.

On the 'affective' conception of sedition, seditious speech involves creating 'bad feelings' against the state or nation.[5] This conception of sedition is at work when it is claimed that so-called 'anti-national' speech should be punished as seditious, even when there is no connection with public violence. According to Singh, popular discourse is dominated by the affective conception of sedition, with the crime of sedition being regarded as a form of *deshdroh* (treason). Thus, there is a wide gap between popular understandings of sedition informed by the affective conception, and formal legal understanding of sedition informed by the public order conception. Much of Singh's interest in sedition lies in understanding this gap.

II. THE COMPARATIVE LENS

Singh's comparative analysis focusses on the modern history of sedition law in the U.K., Australia, and the U.S.A. In each case, she argues, the authority conception has been displaced, though in different ways: 'modernization' in Australia, 'abolition' in the U.K., and 'restriction' in the U.S. While it is tempting to see the demise of the authority conception of sedition as an outright free speech victory in these countries, Singh is careful not to make such a triumphalist claim. She points out that in each of these cases; the gap left by the loss of sedition law has been taken up by other speech-restrictive laws, especially those involving state security and terrorism.

Though Singh's comparative analysis is very interesting, I am not clear what light it sheds on debates around sedition in India. With the *Kedar Nath Singh* case, the authority conception of sedition is also dead as a matter of formal law

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4 *Kedar Nath Singh* v. *State of Bihar*, AIR 1962 SC 955. The public order conception of sedition had also been proposed in a pre-independence judgment of the Federal Court of India, *Niharendu Dutt Majumdar* v. *King Emperor*, 1942 SCC OnLine FC 5 : AIR 1942 FC 22. The judgment in *Niharendu* was overturned by the Privy Council in 1947, in *King Emperor* v. *Sadashiv Narayan Bhalerao*, 1947 SCC OnLine PC 9 : (1946-47) 74 IA 89.

5 On the standard view, a State is a political entity individuated by a given constitutional structure, which claims, among other things, the exclusive right to use physical force within a given territory. A nation is an "imagined community" united in some way by cultural, ethnic, or historical ties. One can criticise the Indian State without criticising India, and vice versa.

in India; in that sense we are already on par with these democracies.[6] Whether the formal end of sedition law in these countries has also ended the suppression of political speech is a different matter. Analysing it would require carrying out the sort of analysis of sedition law in these countries which Singh does for India: namely, to ask whether there are other conceptions of sedition 'on the ground' which live on in these countries, and contribute to the suppression of speech. A comparative analysis of this nature would be a massive enterprise, and to say that Singh does not attempt it is hardly a criticism. But its absence does place limits on what we can learn from the comparative method she deploys.

III. THE HISTORICAL LENS

Singh devotes two chapters to the history of sedition law in India, one each on the colonial and post-colonial eras. The story of sedition law in the post-colonial era is essentially a story of the replacement of the authority conception of sedition with the public order conception in *Kedar Nath Singh* case. While the story is a familiar one, Singh adds interesting background material to this important sedition case, including interviews with some of Kedar Nath Singh's colleagues in the Forward Communist Party.

The material on sedition in the colonial period is of particular interest, since it goes well beyond the standard judicial archive. The story of sedition law is, after all, more than the story of what judges have said about it. Judges come into the story after the main action is already over: the alleged speech-act has taken place, and is followed by accusations, investigations, and finally, decisions to prosecute. How does the most important actor in the operation of sedition law – namely the state operating through government functionaries – actually function? Singh's archival work gives us a fascinating glimpse of the answer in the colonial case, by revealing deliberations between colonial officials on decisions about whether or not to prosecute for sedition.

The archive suggests that decisions to prosecute for sedition were made with a great deal of care, keeping in mind that not all publications which the colonial government would like to suppress might meet the standard for sedition in the Indian Penal Code. Sometimes at least, these deliberations led to a decision *not* to prosecute. This runs counter to a natural nationalist reading of sedition law as essentially a tool of persecution, applied across the board to suppress speech which the colonial state found unwelcome.[7] On this reading, formal

[6] Of course, the removal of S. 124-A (and with it the word "sedition") from the Indian Penal Code would still be a free speech victory. This is because, as Singh points out in great detail, it is routinely used as a tool of suppression and harassment even when there is no chance of a conviction on the *Kedar Nath Singh* standard.

[7] Singh's findings do not of course completely undercut the nationalist story. The "colonial State" was not a monolith, the "colonial period" which she studies is a long one, and we do not get a sense of the basis for her selection of examples, or of how representative they are.

sedition law would not have acted as a genuine constraint on the actions of the colonial state in its suppression of the nationalist movement. Singh's archival work forces us to temper this reading.

Singh does not develop these implications of her work – her interests lie elsewhere. However, her investigations add to a growing body of historical work on free speech in the colonial period, which complicate the standard nationalist narrative vis-à-vis the censorship practices of the colonial state. For instance, Devika Sethi has questioned the nationalist narrative on censorship by noting that decisions about suppression were often quite nuanced. In the 1930s, for instance, the colonial state's decisions to ban books by Indian authors paid careful attention to the domestic political consequences of such a ban; at other times, it chose to suppress speech by non-Indian authors who wrote books critical of India, even though these criticisms would have bolstered the case for colonial rule.[8]

IV. THE ETHNOGRAPHIC LENS

In my view, Singh's detailed investigation of the contemporary use of sedition law is the most valuable part of this book. She uses an impressive range of techniques, including interviews, newspaper reports, fact-finding commissions, RTI requests, and the examination of police case-diaries. She covers a wide range of cases, though her primary case-studies are in Haryana, Maharashtra, and Punjab. In Haryana, her focus is on the use of sedition law to suppress Dalit activism on issues regarding land rights and discrimination. In Maharashtra, she studies the persecution of activist groups such as the *Kabir Kala Manch* who are charged with 'Naxal' or 'Maoist' sympathies; and in Punjab, she provides an account of sedition cases in connection with the Khalistan movement. In addition to these detailed case-studies, she also provides an overview of many other current sedition charges, such as those against Kanhaiya Kumar, and the Koodankulam anti-nuclear movement.

The study seems to support five conclusions. *First*, at present, the higher judiciary has a public-order conception of sedition. However, the more quotidian understanding of sedition is an affective one, involving *deshdroh* i.e. betrayal of the nation or 'anti-national speech,' to use the now-familiar appellation. This is one reason why most sedition charges never make it beyond the FIR stage, and why many sedition cases are overturned at the appellate level. It is heartening to note that on the whole, appellate courts seem to have upheld the requirement that a charge of sedition must be backed by evidence that the speech in question has some tangible connection to public violence. Even the

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[8] *See* Devika Sethi, War over Words: Censorship in India, 1930-1960 (2019). *Also see* Neeti Nair, *Beyond the 'Communal' 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295-A of the Indian Penal Code*, 50(3) Indian Econ. & Soc. Hist. Rev. 317-40 (2013).

advocacy of secession (for instance during the Khalistan movement) has not been regarded by itself as seditious -- though it might be seen as a textbook case of 'anti-national' expression.

Second, and unsurprisingly, the use of sedition law on the ground is often to suppress voices of protest in support of the marginalized. In the Haryana cases, for instance, accusations of sedition against Dalit groups were made for burning effigies of the Chief Minister and calling for an election boycott, without any incident of public violence except in one minor case. While we know that sedition charges are a tool of harassment, it is interesting to learn that the association of sedition with *deshdroh* has specific social consequences which are not associated with other charges of illegal activity. The social stigma, often amplified by media reporting, sticks even when the complaint is thrown out or withdrawn.

Third, the quotidian meanings of sedition outside the law have unpredictable consequences. In the Maharashtra cases she discusses, Singh points out that as a purely legal matter, the Unlawful Activities (Prevention) Act (UAPA) is preferred over section 124-A as a tool for oppression because it gives the authorities much more procedural leeway. There is a complex relation between the use of the UAPA and section 124-A, but even when no formal sedition charges are brought, the state presents these prosecutions as prosecutions for sedition so that the *deshdroh* label can stick. More interestingly, civil liberties activists have started labelling UAPA charges as involving sedition because they hope to cash in on a tradition of sedition-as-dissent, captured in the famous trials of Tilak and Gandhi.

Fourth, politics matters. Whether or not sedition charges are brought, or are withdrawn, is driven in part by broader party-political issues. This is true of the sedition charges in one of the Haryana cases involving effigy-burning, in which pressure from the Union Minister Kumari Selja led to the dropping of sedition charges against the accused. In another Haryana case, sedition charges against a powerful Jat leader – whose followers had in fact been involved in violence – were withdrawn after the Congress came to power in 2005. Political compulsions were also at work in a remarkable series of sedition cases involving successive Shahi Imams of the Jama Masjid dating from 1986. The story of sedition and free speech generally is greatly enriched by micro-studies of this sort, of a kind unavailable in a purely judicial archive.[9]

Finally, the affective conception of sedition is driven in great part by accusations made by private parties against others who they claim to have made 'anti-national' speech. They are an exercise in imposing what Singh terms

[9] *See* Francis P. Cody, *Defamation Law and the Political Body*, in ACT OF MEDIA (Siddharth Narrain ed.) (forthcoming) for a model micro-study of this kind, investigating the use of defamation law in contemporary Tamil Nadu.

"normative nationalisms." Many of these are members of right-wing groups who have pressed sedition charges against others for, among other things, allegedly supporting Pakistan in cricket matches against India, claiming that there is state oppression in Kashmir, sharing 'anti-India' Facebook posts, and refusing to stand for the national anthem.

In none of these cases is there any evidence to show that the speech in question has or could lead to violence. Thus these charges will never sustain convictions, at least at the appellate level. But in many cases, presumably the threats will do their job: that of stifling political dissent in service of right-wing ideologies, or more insidiously in the long run, that of changing the character of public discourse in India. It would be interesting to learn about the extent to which the making of such charges is an organised political activity – so many of these charges are made by members of the ABVP that it is hard to believe that they are uncoordinated and 'spontaneous'.[10]

There is an interesting subset of these 'private' sedition charges which warrant further study, for they do not fit the same pattern. These are cases in which sedition charges are filed ostensibly against individuals who have, in some way, brought a bad name to the country. Consider the case of Sudhir Ojha, an advocate in Muzaffarpur who filed a case of sedition against TDP legislators who fought with one another using pepper spray in the Lok Sabha in 2014. Or consider the sedition case filed by Vibhor Anand in 2012 against Arvind Kejriwal for a statement he made to the effect that legislators in Parliament were "murderers, rapists and dacoits". (Anand had earlier filed sedition charges against Prashant Bhushan for supporting a plebiscite in Kashmir, and against Baba Ramdev for making derogatory remarks against Parliamentarians.)

Are these publicity stunts, or a way of fighting political battles by other means? Or do they represent something more interesting about conceptions of the nation, and of 'anti-national' speech, which go beyond the neat distinctions between left-wing and right-wing political ideologies? Singh does interview figures such as Ojha and Anand, but I would have welcomed quite a bit more by way of texture and context. Answers to such questions would tell us a great deal about the free speech landscape in this country today.

Singh is to be commended for the breadth and thoroughness with which she has catalogued the contemporary use and misuse of sedition law in the country. However, as the case-studies piled up, I found myself getting lost in the details at times, and wishing for a clearer sense of how they were being

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[10] *See* Christophe Jaffrelot, *Hindu Rashtra, de facto*, (August 12, 2018) The Indian Express), https://indianexpress.com/article/opinion/columns/hindu-rashtra-de-facto-bjp-rss-gau-rakshak-mob-lynching-5301083/ (accessed August 15, 2018), for a similar point with respect to the so-called "gau rakshaks".

marshalled in service of an overall argument. The case studies would have been easier to absorb had they been presented more clearly as pieces of evidence pointing towards a particular set of conclusions presented at the beginning of the book. And I was left wishing for more sustained theoretical reflection on some aspects brought out by her case-studies, for instance on the fact that the prime movers behind so many sedition charges are private individuals rather than the state. But in any case, this portion of the book will be invaluable to anyone wishing to explore these questions further.

V. CONCLUSION

At one level this book should be read as a case-study in legal sociology, documenting the distance between the formal and quotidian aspects of a legal term. It also has lessons for broader debates about free speech in particular. First, the demise of the authority conception of sedition has taken away with it some of the most powerful free speech arguments we are familiar with in the liberal tradition. The famous free speech arguments offered by John Stuart Mill and Alexander Meiklejohn, for instance, seek to protect precisely the kind of speech that challenged the authority of the state by questioning the political ideologies sustaining it.

In Mill's case, the defence of such speech follows from the general argument that the truth about contentious issues was most likely to emerge from the free and frank airing of contentious views, in politics as with everything else.[11] In Meiklejohn's case, the right to freedom of speech is derived from the right of self-governing citizens to be exposed to information relevant to making decisions about how they ought to govern themselves. Thus, he writes,

> [The First Amendment] tells us that we may attack the Constitution in public discussion as freely as we may defend it. It gives us freedom to believe in and to advocate socialism or communism, just as some of our fellow citizens are advocating capitalism. It declares that the suppressive activities of the Federal Bureau of Investigation, of the un-American Activities Committees, of the Department of Justice and its Immigration Service, of the President's Loyalty Order-all these are false in theory and therefore disastrous in practice. It tells us that such books as Hitler's *Mein Kampf,* or Lenin's *The State and Revolution,* or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States. And the purpose of that provision is not to protect the need of Hitler or

[11] *See* J.S. MILL, ON LIBERTY (1859).

> Lenin or Engels or Marx "to express his opinions on matters vital to him if life is to be worth living." We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favour of those institutions, everything that can be said against them.[12]

Both these arguments defend speech which is deemed to be 'dangerous' because it will change the way people think about the right way to organise social and political life. Thus, what is at issue is the kind of speech which might potentially 'subvert' the authority of the state. On the authority conception, it is precisely such speech which sedition laws seek to suppress. Mill and Meiklejohn thus offer straightforward arguments against the existence of sedition laws.

Once the authority conception of sedition has given way to the public order and affective conceptions, these arguments no longer have the same kind of traction. On a public order conception of sedition, the ideological content of the speech in question no longer has much relation to the reasons for its suppression; what matters is its propensity to trigger violence. On the affective conception of sedition, what matters is what the speech in question reveals about the relation of the speaker to the nation – as assessed by the person who wishes to censor the speech. To counter this kind of claim, one needs a different repertoire of arguments, having to do with nationalism, patriotism, and the proper affective relations between citizens and the nation. Mill's arguments might still retain some traction here, Meiklejohn's much less. Thus, Singh's work offers a challenge to free speech advocates to articulate a new set of arguments to respond to this new challenge.

The second implication of the book is with respect to efforts to abolish section 124-A. One argument in favour of abolishing section 124-A is its history as a tool of political repression under the British Raj. Now strictly speaking, after the *Kedar Nath Singh* judgment, the law of sedition is *not* the same as it was under the British Raj. But once we see that contemporary understandings of sedition follow the affective rather than the authority conception of sedition, we see that appeals to colonial continuity will have little effect from a free speech perspective.

A right-wing government keen to acquire the powers to suppress speech which it considers 'anti-national' has a simple expedient. Abolish section 124-A because of its colonial origins, then re-enact a new law aimed especially at 'anti-national' speech. Justify this law in the name of democracy: it is precisely

[12] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 90-91 (1948).

because we are an independent country that we need to fight speech which constitutes *deshdroh*, and weakens our country from within. Democracy, as this version of the argument would go, requires that citizens be instilled with love for the country: those who do not have this love do not belong here.

For those concerned with free speech and the importance of democratic dissent, this is a chilling vision, made even more chilling by the possibility that it might have widespread democratic support. Responding to it will require a new array of strategies, arguments, and analysis. Anushka Singh's book tells us that this task is essential for the defence of free speech in this country.