Protest and the Right to Freedom of Speech and Expression[i]

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Arrest of students in Jawaharlal Nehru University and resultant police intervention has kindled a debate on the legal and constitutional dimensions of the right to protest and freedom of expression. It is clear that freedom of speech and expression within the Indian legal tradition includes any form of criticism, dissent and protest. It cannot be held hostage to narrow ideas of what constitutes "anti-national" speech.

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The arrest of Kanhaiya under sedition charges, the manner in which the university administration had encouraged the police to intervene on the Jawaharlal Nehru University (JNU) campus, has brought sharply into focus the legal and constitutional dimensions of the right to protest and express one's political opinion. The right to protest, dissent and criticise, challenge State policy, and question the government which is squarely protected under the Indian Constitution. This right is enshrined in the Fundamental Rights Chapter in Part III of the Constitution in Article 19 (the fundamental right to freedom). Of the different kinds of rights under Article 19, the ones most closely connected to the right to protest are 19(1)(a) (the right to freedom of speech and expression) 19(1) (b) (right to assemble peaceably and without arms) and 19(1)(c) (right to form associations or unions). These three rights are inextricably linked, although in terms of case law, and it is 19(1)(a) jurisprudence that has dominated legal discourse. These reasonable restrictions can be *in the interests of* public order, security of the State, sovereignty and integrity of India, friendly relations with foreign States, decency or morality or *in relation* to contempt of court, defamation or incitement to violence. Since much of political speech and dissent has been curbed in the pretext of public order, the legal contestation on what amounts to reasonable restrictions on Article 19(1)(a) in the interest of public order is crucial for us to understand the scope of this right.

Unlike the United States where freedom of speech and expression is almost absolute, in India (and as every case reminds us) freedom of speech is subject to 'reasonable

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restrictions'. Intuitive as it sounds that all rights will be subject to a host of other concerns and values, it is our argument that this split between rights and restrictions gets politically calibrated along the lines of what is considered acceptable and unacceptable speech and to read cases that forcefully express such a restriction is to engage not only with the formal life of free speech doctrine but its substantive political career. Thus many of the responses to the JNU events would repeatedly point out that while there is freedom of speech in India, this did not mean that people could shout anti-national slogans. This, as we shall see is just not true in the law, and yet is so commonly accepted as to constitute a populist version of the contours of free speech.

The law of sedition was introduced by Sec. 124A of the Indian Penal Code in 1870 as a draconian measure to counter anti-colonial sentiments and most major leaders of the independence movement including Gandhi and Tilak were tried under this provision. Gandhi famously described Sec, 124A as the 'prince among the political sections of the IPC designed to suppress the liberty of the citizen' (Noorani, 2009, p. 235). Two years before Tilak was tried for sedition, he had been responsible for drafting the Constitution of India Bill, 1895, which comprised of a bill of rights which contained a broadly worded provision for free speech. Article 16 is relevant:

> Every citizen may express his thoughts by words or writings, and publish them in print without liability to censure, but they shall be answerable to abuses, which they may commit in the exercise of this right, in the cases and in the mode the Parliament shall determine (As cited in Rao, 1967, p. 7).

When the Constituent Assembly deliberated the scope and extent of restrictions that could be placed on free speech the prominent exclusion from what eventually became Art. 19(2) was the word sedition.[1]

Colonial continuity, sedition and public order

A recurring theme that emerges in evaluations of the state of free speech in India is the assertion that many laws which curtail free speech have their origins in colonial experience and their continued existence and use testifies to the fact that in the domain of speech we face a problem of colonial continuity (Burra, 2008). What is it about the colonial construction of the public sphere and the speaking subject that continues to influence the State and the judiciary's response to free speech issues? The constituent assembly debates reveal that the law makers were acutely aware of the political misuse of penal laws such as sedition to suppress free speech and their motivation to recognize a strong free speech right stemmed partially from their desire to distinguish the democratic republic from colonial rule. At the same time we encounter a paradox which began with the making of the Constitution and continues till date where we encounter a reluctance to recognise an absolute right of free speech since the Indian polity is not ready for it, thereby recycling some assumptions that had informed the logic of colonial governmentality.

[1]Art.13 in the Constituent Assembly debates. These can be found in the debate on 1st and 2nd December 1948, 16th October 1949 and 17th October 1949

It is my contention that the logic of colonial rule creates a split at its very origin between a universal rational subject (the enlightened European as a bearer of rights) and the native subject (marked by a hyper sensitive excess) and this foundational split gets recycled in the postcolonial context in terms of class, gender and literacy. In other words the realm of the political is circumscribed by an excessive social sphere which is unable to shed its positivity to emerge as the properly constituted public sphere (Dhareshwar & Srivastan, 1996). If one were to map this out onto the terrain of the Constitution one can see a mirroring of this split in the distinction between Art.19(1)(a) which imagines the citizen as a rational speaking and listening subject even as Art.19(2) circumscribes the possibilities of such speech through the incorporation of regulatory measures that have in mind an affective public sphere susceptible to outrage and provocation (Dhavan, 2007). Asad Ali Ahmed, outlining the evolution of hate speech laws in colonial India argues that the colonial subjects were portrayed by law makers like Macaulay and others as highly excitable subjects who were easily prone to taking offense and responding violently to such offense (Ahmed, 2009). These racially essentialist accounts created the context for the emergence of the colonial State as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence.

Arun Thiruvengadam characterises the different historical periods of free speech as encompassing a universalist nature (dominant during the anti colonial struggle) which were subsequently replaced (during the constituent assembly debates) by particularist concerns which led them to permit several grounds of restrictions of rights in response to such conditions (Thiruvengadam, 2012). We would add to this argument to say that one way of thinking about the paradoxes of free speech in India is to think of it as a right that is granted to all citizen but the question of who is can occupy the space of the properly constituted citizen is far more tenuous. Jaya Nandita Kasibhatla argues the coming-into-being of the Constitution and the citizen took place in the moment of Partition, a crisis that exerted a profound influence on the definition of the citizen that first clashed with, but was then incorporated into, the policy structure of social revolution. She claims that the Constitution is haunted by the crisis of the partition and many of the provisions effectively memorializes the partition and as a result of its incorporation of the idea of historical crisis, the effect on full citizenship is one of infinite deferral (Kasibhatla, 2005). Read in this context, we can see that if Art 19(1)(a) seeks to create a space of deliberative democracy, it is at best a partial project where the deliberative nature of reason underlying it is also accompanied by a sense of a nervous public sphere exemplified in Art. 19(2) with the full citizen and the infantalised citizen occupying the same sphere.

In the original draft that was up for discussion the word sedition had been included as one of the ground for restriction on speech. A number of the constituent assembly members took objection to this. Seth Govind Das in his speech for instance says:

> I would have myself preferred that these rights were granted to our people without the restrictions that have been imposed. But the conditions in our country do not permit this being done. I deem it necessary to submit

> my views in respect to some of the rights. I find that the first sub-clause refers to freedom of speech and expression. The restriction imposed later on in respect of the extent of this right, contains the word 'sedition'. An amendment has been moved here in regard to that. It is a matter of great pleasure that it seeks the deletion of the word 'sedition'.I would like to recall to the mind of honourable Members of the first occasion when section 124 A was included in the Indian Penal Code. I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section It is a matter of pleasure that we will now have freedom of speech and expression under this sub-clause and the word 'sedition' is also going to disappear (CAD VII(18), December 2, 1948).

Three speakers in particular anticipated some of the key constitutional questions around seditious speech. T. T. Krishnamachari argued that the word sedition was anathema to Indians given their experience of it and he suggested that the only instance where it was valid was when the entire State itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder. Any attack on the government, he claimed, ought not to be made an offence under the law. Somnath Lahiri provocatively asked Sardar Patel whether he wanted to create a police State and argued that as a member of the opposition it was his duty to criticize the government as harshly as possible (CAD III(2), April 29, 1947). And finally Damodar Swarup claimed that wide and restrictive provisions threatened to undo the very freedom granted by the Constitution. In particular, he argued that the phrase 'in the interests of general public' was too wide and would enable the legislative and the executive authority to act in an arbitrary manner (CAD VII(17), December 1, 1948). All these issues - whether a criticism of the government would fall under reasonable restrictions, the scope of the phrase 'in the interests of' and more generally the relationship between subversive speech and subversive action ended up becoming the defining battles over free speech in the postcolonial period.

A recurring theme that emerges in evaluations of the state of free speech in India is the assertion that many laws which curtail free speech have their origins in colonial experience and their continued existence and use testifies to the fact that in the domain of speech we face a problem of colonial continuity (Burra, 2008). What is it about the colonial construction of the public sphere and the speaking subject that continues to influence the State and the judiciary's response to free speech issues? The constituent assembly debates reveal that the law makers were acutely aware of the political misuse of penal laws such as sedition to suppress free speech and their motivation to recognize a strong free speech right stemmed partially from their desire to distinguish the democratic republic from colonial rule. At the same time we encounter a paradox which began with the making of the Constitution and continues till date where we encounter a reluctance to recognize an absolute right of free speech since the Indian polity is not ready for it, thereby recycling some assumptions that had informed the logic of colonial governmentality. How do we understand and reconcile this paradox?

It is our argument that the logic of colonial rule creates a split at its very origin between a universal rational subject (the enlightened European as a bearer of rights) and the native subject (marked by a hyper sensitive excess which needs to be regulated) and this foundational split gets recycled in the postcolonial context in terms of class, gender and literacy. In other words the realm of the political is circumscribed by an excessive social sphere which is unable to shed its positivity to emerge as the properly constituted public sphere (Dhareshwar & Srivatsan, 1996). If one were to map this out onto to the terrain of the Constitution one can see a mirroring of this split in the distinction between Art. 19(1)(a) which imagines the citizen as a rational speaking and listening subject even as Art. 19(2) circumscribes the possibilities of such speech through the incorporation of regulatory measures that have in mind an affective public sphere susceptible to outrage and provocation (Dhavan, 2007).

Turning towards the history of subversive speech in the postcolonial context one of the most important precedents in this area, one especially relevant to the JNU situation is the Lohia judgment. In 1954, Ram Manohar Lohia, then General Secretary of the Praja Socialist Party was arrested by the U.P. government for leading protests around the governments policy that had increased irrigation rates for water supplied for canals to cultivators. He was prosecuted under the U.P. Special Powers Act 1942, which criminalized instigating people to refuse to pay taxes. The Allahabad High Court and Supreme Court ruled in favour of Lohia, holding that the State government's action was in violation of Article 19(1)(a). In this case the Supreme Court held that for an action to be restricted under Article 19(2), there needs to be a proximate and reasonable connection or nexus between the speech in question and public order.

The Court said:

> In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a land owner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section (sic). We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark, which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations were accepted, it would destroy the right to freedom of speech, which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order. In this view, we must strike down 3 of the Act as infringing the fundamental right guaranteed under Art. 19(1)(a)

of the Constitution (*The Superintendent, Central Prison v Ram Manohar Lohia,* 1960).

The Court here firmly recognises the right to agitate and protest, while at the same time safeguarding the right to freedom of speech and expression by laying down the bar for when speech can be limited in the interests of public order. The Court's decision assumed enormous significance given that it is the public order restriction that is invoked in most cases dealing with protests, agitations, and criticism of the government.

The debate around the scope and constitutional validity of the sedition law also revolve around the question of the limits of legitimate protest, dissent and criticism of the government. After all, sedition itself is based on the premise that there is a category of speech that has to be criminalized because it causes "disaffection" or disloyalty against the State. The constitutionality of the sedition law was decided by the Supreme Court in a case that dealt with has been upheld as a reasonable restriction based on public order.

In 1961, a Constitutional Bench of the Supreme Court examined a challenge to section 124A of the Indian Penal Code (the sedition law) in *Kedarnath Singh v. State of Bihar,* (1962). The Supreme Court, bunched together a clutch of cases including sedition charges against Kedar Nath, a member of the Forward Communist Party in Bihar, who publicly attacked the Congress in Bihar, alleging corruption, black-marketing and tyranny and talking about a revolution that would overthrow capitalists, *zamindars* and Congress leaders. The other appeals bunched together were that of Mohd Ishaq Ihahi, who was prosecuted for having delivered a speech at Aligarh as Chairman of the Reception Committee of the All-India Muslim Convention in 1953; an appeal related to a meeting of the Bolshevik Party in 1954 organised in a village named Hanumanganj, in the district of Basti, in Uttar Pradesh, where the members were accused of inciting people to open rebellion against the government; the case was that of Parasnath Tripathi for delivering a speech in the village Mansapur in the district of Faizabad, in 1955, in which he is said to have exhorted the audience to organise a volunteer army and resist the government and its servants by violent means (*Kedarnath Singh v. State of Bihar,* 1962).

The Court in this case upheld the constitutionality of the sedition law, but held that at the same time curtailing its meaning and limiting its application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. The Court observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality. One can see a slight disjunct here between the language of 'tendency to create disorder' used in *Kedarnath and Ram Manohar Lohia,* which as pointed out earlier lays down a much more speech protective test.

While the courts in India have recognised the constitutional right to protest, they have also laid down certain restrictions on the time, place and manner of protests in India. For instance, courts have upheld the constitutionality of a prohibition on meetings

within railway premises that (*Railway Board v. Niranjan Singh,* 1969). Similarly in *J.R. Parashar v. Prasant Bhushan,* (2001) the Supreme Court while dealing with the question of whether protests in front of the court related to its judgment on the Narmada dam amounted to contempt of court, observed that while holding that a *dharna* may not per se amount to contempt of court, the dharna is question ought to be discouraged for fear that "otherwise every disgruntled litigant could adopt this method of ventilating his grievance." The Court distinguished the dharna in question as "an inappropriate form of protest since the object…is either to raise public opinion or to exhibit the extent of public opinion against a decision of a court."

In *Communist Party of India v. Bharat Kumar,* (1997) the Supreme Court ruled that while other types of protests and strikes, such as holding signs along a public pathway or chanting in front of a public building or simply refusing to work, may generally be protected in most situations, there is a distinction between an ordinary strike and a *bandh* in that the latter causes or compels people to stop exercising their lawful rights and engaging in lawful activities. Specifically, the Court agreed in that the government "… being duty bound to protect the people, has to prevent unlawful activities like Bundh, Rally etc. which invade or threaten to invade their life, liberty, and property" (*Ranchi Bar Association v State of Bihar,* 1999).

In constitutional challenges related to the right to strike, courts have again not upheld blanket bans, (*Kameshwar Prasad v. The State of Bihar,* 1962), while at the same time ruling that there is not statutory provision allowing for government employees to go on strike. (*T. K. Rangarajan v. Government of Tamil Nadu,* 2003). Similarly, in a series of cases, courts have regulated the use of loudspeakers during public protests or meetings. Further local laws regulate the time, place and manner of protests, including designated zones for protests, and regulating demonstrations based on the number of persons involved.

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