A Study of Colonial Stereotypes in Law Through Orientalism

• VRINDA SINGH
JINDAL GLOBAL LAW SCHOOL, SONEPAT

This paper aims to understand the presence of colonial stereotypes within the Indian Penal Code, 1860. It elaborates on the concept of Orientalism, given by Edward Said to study how knowledge or identity becomes dominant through a discourse created by a powerful source. The above assertion is supported by taking instances of knowledge creation by the British in colonial India. The stereotypes about the Orient like feminine nature of Indian men, unreliability of native witnesses, uncivilized nature of the Indian population etc. were made a dominant knowledge because it came from the mouth of the powerful Imperialist empire. This knowledge further became permanently and systematically institutionalized in the Indian laws coded by the British. The paper analyses these institutionalized stereotypes by studying the origins and the causes behind the formation of Section 377, 124A and 356 of the Indian Penal Code read with certain repealed provisions of Indian Evidence Act, 1872. The paper aims to provide an informed opinion on the continued existence of the above provisions considering that these laws were formed as a result of the dominant stereotypical discourse of the British empire to serve their purpose.

Introduction

The term 'Orient' derives its meaning from the latin verb '*orior*' which means 'to rise'. In latin '*oriens*' means morning. Consequently, 'Orient'[1] was derived to mean the place from where the sun rises i.e. East. In ordinary sense, anyone who teaches, writes or researches on the Orient, is an Orientalist and his work is Orientalism.[2] However, Edward Said, in his book 'Orientalism' has provided a new perspective to the term.

As Said puts it, Orientalism is a discourse used by the West 'for dominating, restructuring and having authority over the Orient.'[3] Discourse consists of several statements working together to what French social theorist Michael Foucault calls 'discursive formation'.[4] Discourse produces knowledge through language. Hence the discourse coming from those in power like the west in the 19th and 20th century, whose colonies extended over approximately 85 percent of the Earth's surface, keep immense potential to shape the lives of people.[5] Such discourse by a powerful source tends to create knowledge which the subjects find difficult to disagree with. This is the extent interplay between power and knowledge discourse, through which the West has been able to, in Said's words, 'produce the Orient'.

Further, knowledge created through this power discourse continues through a 'form of cultural leadership or hegemony'[6]. Hegemonic power works to make individuals and social classes concede to the norms and social values of even an exploitative system.[7] The positional superiority of the west led to creation of hegemony of certain ideas which were not imposed by force but by consent of the civil and political society.

Hence through power, knowledge and hegemony, a discourse is created and sustained. This is what Said refers to when he states that west has been able to 'produce the orient' or create a parallel identity for the Orient. In this process, the stereotypes that the west possessed regarding the Orient begun to be perceived as dominant knowledge by virtue of it being sourced through the Imperial power. This included the process of annotating superiority to the European identity. An identity of the Other (East) as different from the west on the basis of nature, culture, civilization etc. came to be produced. Different treatment to the Other was justified placing of the society at the primitive end of the civilization scale, in need of being civilized.[8] The object of colonial discourse was to construe the colonized as a population of degenerate types on the basis of racial origin, and the conquest over such population was justified to establish system of administration and instruction. With Charles Darwin's Origin of Species in 1859, many started to believe that the dominion over the Asian and African population was not an accident of history but immutable law of biological and human progress.[9] James Mills in his essay 'Civilization'[10] argues that all features of 'civilization' reside in 'modern Europe, and especially Great Britain, in a more eminent degree than any other place or time'. EIC governor Charles Grant[11] wrote that the Indians were depraved victims of fallen civilization.' Stereotypes about the

[1] 'Orient', OED Online, Oxford University Press, (2018) ‹https://en.oxforddictionaries.com/definition/orient.

[2] Edward W. Said, *Orientalism* (Pantheon Books, New York 1978).

[3] *I.d.* at 2.

[4] Roger Maaka, Chris Anderson, *The Indigenous Experiences: Global Perspectives* 165 (Canadian Scholar Press 2006).

[5] European expansion since 1763 (2012). In *Encyclopædia ‹Britannica*https://www.britannica.com/topic/colonialism/European-expansion-since-1763› last assessed 25.06.2018.

[6] *Supra* note 2 at 4.

[7] Stoddart Mark, "Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power" Social Thought & Research 28 191-225 (2007).

[8] Ratna Kapur, *Erotic Justice: Law and the new politics of Postcolonialism*, 23 (Permanent Black 2005).

[9] Donald C. Gordon, *The moment of Power, Britain's imperial epoch*, Prentice Hall (1970).

[10] *I.d.* at 35.

[11] *I.d.* at 35.

Indian population were ubiquitous, being present from travel accounts to popular official reports. As stated by Bhabha, these stereotype were always in excess of what can be empirically proved or logically construed.[12] In the common discourse, such excess was described in size of the species in the travel accounts, monarchic expenditure, aberrant and transgressive behavior of the warrior, animal hunting for pleasure beyond utility etc.[13] Indians were considered as liars, feminine, easily excitable in an abnormally excessive way. In this way, colonial discourse produce the colonized as a social reality which is at once an 'other' and yet entirely knowable and visible.[14] . This narration of excess created space for English authorities to bring 'normality' to this behavior. The stereotypical discourse paved the way for subjugation of the natives.[15]

Since the western stereotypes were already taking shape of dominant knowledge, it became difficult to keep such stereotypes out of the legal field. Legislature started encoding laws on the basis of prevailing stereotypeleading to a systematic institutionalization of these stereotypes in the law of the land. An example of this can be seen through the Criminal Tribes Act, 1871. It was based on a predominant view that certain castes or tribes are genetically criminal thus need to be punished. Whiel introducing the Act, Justice T.V. Stephens stated "The special feature of India is the caste system. When a man tells you that he is an offender against law, he has been so from the beginning, and will be so to the end, reform is impossible, for it is his trade, his caste, I may almost say his religion to commit crime."[16] Due to belief that certain tribes are inherently criminal and reform is impossible, warrior tribes like Minas of Rajputana etc were gradually reduced to lowly criminal tribe.[17] Certainty the colonial defence behind this act was to contain the bourgeoning crime, but the ground fact remained that stereotypes about Indian caste identities were created and applied in favor of the West. In other instances of codification of law, 'knowledge' that had previously existed as an attitude, an abstract, scholarly position began to have a direct material impact on colonized people and territory.[18] Through this narrative/discourse of law, the natives faced a loss of tradition, culture and identity.

Institutionalizing the Stereotypes

In 1860, Thomas Babington Macaulay completed the task of drafting the comprehensive Indian Penal Code.[19] Through this paper, I will analyze three main provisions of this Code i.e. Section 377, Section 375 in conjunction with Indian Evidence Act, 1872 and Section 124 A. These provisions are the quintessential embodiments of institutionalized colonial stereotype in the Code. This paper will analyze the dominant perception that went behind the formation of these provisions and will suggest a need for removal or alteration of the same.

(a) *Section 377*

Under Section 377 of the Indian Penal Code, 1860 any 'carnal intercourse against the order of nature' is punishable with imprisonment that may be extended to ten years or life. Its history may be traced to the book *Leviticus*, which forms a part of the Jewish Torah and the Christian Bible's Old Testament. There is a striking resemblance between these rules of Jewish-Christian religious law, and parts of Islamic religious law (shari'a law) which included death penalty for adultery, blasphemy and male-male sexual activity, condemned by human rights lawyers today.[20] From the book of Leviticus, this provision was put in the Buggery Act, 1533, enacted under King Henry VIII. Under this Act, "detestable and abominable Vice of Buggery committed with mankind or beast," was punished by death.[21] The jurist Edward Coke, in his seventeenth-century compilation of English law, wrote that "Buggery is a detestable, and abominable sin, amongst Christians not to be named."[22] This was the extent to which homosexuality was being abhorred in the English culture. The argument frequently used by the proponents of homosexuality in India is that homosexuality has always been a part of Indian culture as is also evidenced from the passages of Kamasutra.[23] The paper will not get into the deliberation of Indian culture being a proponent of homosexuality. Instead, the paper aims to show that it was the colonial discourse that primarily added to the current despicable behavior towards homosexuality that has firmed its roots in the Indian population and law today.

Section 377 is a form of cultural imperialism imposed by the colonial power to address their stereotypes and concerns about Indian sexuality. It highlights the hostile reaction of an ancient middle eastern society towards homosexuality as a violation of a strict gender hierarchy (the man penetrated by other 'was acting like a woman'), and to a perceived threat to the expansion of society's population (the two men were wasting their 'sperm' by

[12] *I.d.* at 100.

[13] Piyel Halder, *Law, Orientalism and Postcolonialism: The jurisdiction of lotus eaters*, 59 (Routledge-Cavendish 2007).

[14] Homi K Bhabha, *The location of Culture* 101 (Routledge, New York 1994).

[15] *Supra* Note 12.

[16] K. M. Kapadia, "The Criminal Tribes of India" 1 Sociological Bulletin 99-125 (1952).

[17] Mark Brown, "Crime, Liberalism and Empire: Governing the Mina Tribe of Northern India" 13 Soc. & Legal Stud. 191 (2004).

[18] Jenni Ramone, *Postcolonial Theories* 84 (Palgrave 2011).

[19] Preeti Nijhar, *Law and Imperialism*, 27 (Pickering and Chatto: London 2009).

[20] Timothy George, *Is the Father of Jesus the God of Muhammad? Understanding the Differences Between Christianity and Islam* (Harper Collins 2002).

[21] This Alien Legacy, Human Rights Watch https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism last assessed 25.06.2018.

[22] *I.d.*

[23] *AIDS Bedbhav Virodhi Andolan v UOI*, Civil Writ Petition 1993; *NAZ Foundation v NCT of Delhi*, 160 Delhi Law Times 277.

engaging in sexual activity with no procreative potential).[24]

This law made its way in the Indian Penal Code through the passage of a 'hypermasculinist' British empire. According to the empire, even the Indian land was described as feminine, wanton, whorish, naked and reclining. This can be observed from commentaries and fiction accounts. One of the passage describing India from a well acclaimed novel by H. Rider Haggard reads as follows "These mountains [...] are shaped after the fashion of a woman's breasts and at times the mists and shadow beneath them take the form of a recumbent woman, veiled mysteriously in sleep [...] and upon the top of each is a vast hillock covered with snow, exactly corresponding to the nipple of female breast".[25] The critique of this passage does not lie in its feminine description of Indian geography, rather it lies in the usage of such description in a way that portrayed inhibiting feminine characteristic as a depravity. As a result, if a man was feminine, he was depraved or lacking essential characteristics. Through this unashamedly carnal interpretation of feminine characteristics and human body, the Oriental world of appearance came to be regarded as an effeminate space which privileged the sensual over the rational and the poet over the lawyer, which were undesirable qualities to possess.[26]

As opposed to the above mentioned effeminate Indian space, Englishmen were described as powerful and superior.[27] The flawed effeminate Indian male came to be associated with hosts of sexual practices, including homosexuality.[28] Various explanations such as diet, the hot and humid climate of India, the social and economic organization of the Indian society were offered as explanations for the stifling of 'manly independence' of the men in India.[29] This form of effeminacy and unmanliness was seen as a deviant sexual behavior by the British and Section 377 was the solution to treat such deviant behavior. Surveying the culture of Indian subcontinent, A.L. Basham wrote, "The eunuch is avaricious and accumulates wealth in excess of his needs."[30] The words of Italian traveler Manucchi "The tongues and hands of these baboons act together, being most licentious in examining everything, both goods and women coming into the palace."[31] Thus, any form not adhering to strict masculine requirement of the empire was treated as 'monster'category breaching the law by rendering important legal questions uncertain with their bodies acting as an obstacle to the structure of law and society.[32] This monstrousness can be understood in terms of act of sodomy or threat to heterosexual gender order[33]. The identity of 'monsters' were associated with the Other. As stated by Said, society can only describe itself against its strangers.[34] A dominant identity of Indian men as effeminate and flawed as against the civilized and powerful British men became a dominant form of knowledge forming a justification for subjugation. Indian effeminate men i.e. those who could not reach the British standard of masculinity came to be treated as sexually deviant and subordinate and were termed uncivilized. This identity created through the power discourse was then made punishable under a law which, in the original place, was never a part of the Indian culture or jurisprudence. Hence in this case, the west created an unfamiliar identity for the Other and then further punished them under an unfamiliar law was used to justified the need for the rule.

What is peculiar in this age is that the identity that Britishers created and institutionalized for allegedly effeminate Indian men, continue to exist in Indian law with impunity till date. It is true that homosexuality was a detestable characteristic to be possessed by a man punished by death penalty in Queen Victoria's Britain, however, the continuance of a law based on the Victorian morality in India becomes a matter which needs to be given due consideration by the legislature and the judiciary. Section 377 was a merger of the stereotype of effeminate Indian men and English morality of such effeminacy being unwarranted and India as a country continues to carry forward this legacy. Britain has come a long way since then, by legalizing same sex marriage in 2014. In India, on the other hand, the stigmatization and the chilling effect of 377 makes it much harder for the Indian LGBT minority to be visible and to challenge legal and social discrimination. Despite attempts by the Law Commission and parliamentarians, there always exists technical issues to the repeal of 377.[35]

(b) ***Section 375***

In another analysis, the crime of rape was included in the Indian Penal Code in 1860 under Section 375, 376. However, the criminal justice system pertaining to the rape law is very differently applicable.

The infamous 'Hale Warning'[36], by the seventeenth century jurist Mathew Hale placed emphasis on the

[24] Robert Wintemute, "Same sex love and Indian Penal Code S. 377: An Important Human Rights Issue for India", 4 NUJS L. Rev. 31 (2001).

[25] H. Rider Haggard, *King Solomon's mind* (Cassell: London 1885) 66; *Supra* Note 18, at 7.

[26] *Supra* Note 14, at 71.

[27] *Supra* note 8, at 89.

[28] *I.d.*

[29] Mrinalini Sinha, *Colonial Masculinity: The 'manly' Englishmen and the 'effeminate' Bengali in Late nineteenth centuary* 20 (Manchester University Press: 1995).

[30] A.L. Basham, *The Wonder that was India*, (Ingram: London1954).

[31] *Supra* Note 14, at 70.

[32] Ben Golder and Peter Fitzpatrick, *Foucault and Law*, 260 (Ashgate: Burlington, 2010).

[33] *I.d.* at 271.

[34] *Supra* Note 2.

[35] Law Commission of India, 172 Report (Review of Rape Laws) (March25, 2000) ; Indian Penal Code(Amendment) Bill, 2016 ‹ http://www.prsindia.org/mptrack/shashitharoor› last assessed on 25.06.2018.

[36] Mathew Hale CJ, History of Pleas of the crown.

character and prior sexual experience of a rape victim. It was believed that a woman, who publicly admitted to a sexual encounter, whether consensual or nonconsensual, was unchaste and had lost her credibility as a complainant. Hale asserted that there was a presumption of false charge by the rape victim. Various other writers had asserted that rape victim's age, social status, previous sexual history and conduct were relevant for 'medical' enquiry.[37] In contrast to law's approach where the focus should be on *actus reus* and *mens rea*, Hale's strict evidentiary requirement focused on the victim. The victim's claim and credibility required corroborating 'circumstances of fact', all of which centered attention on her character, body and behavior before, during and after the alleged incident. He advised that a cautionary message that the accusation of rape is easily made and is hard to prove should be read before the juries warning them about accepting women's testimonies.[38] The Indian penal code until 2003 shared Hale's fear of malicious prosecution.[39]

In colonial India with British judges, the use of Hale's warning was abundant. One of the many cases where this grossly unjust law was applied include the 1854 case of Jhakoo Wulud Bhowanee. In this case, a twelve year-old was allegedly raped by a thirty year-old man who smothered her face with saree to prevent the passerby from hearing her cries. A court in Bombay acquitted the accused using Hale's warning and stating that the accused could not have raped the victim because no one heard her cries.[40] Hale stated that incidents like concealing the injuries, silence during the incident etc. play a major role in determining whether the testimony is forged. Even though substantive law has not outright incorporated these provisions, similar reasoning is often given in courts even in 2017 and used to acquit the accused.[41] The reminiscence of this argument can still be seen in the Indian mentality where women are blatantly and blindly accused of filing false rape, domestic violence and abduction cases.

In addition to the above, the identity of victims was used to corroborate her inclination towards lying. Through this identity discourse, the powerful west created a dominant knowledge about the Indian rape victim and then such knowledge got embedded in the law. Scientific and medical discourse was shrouded in the name of lying, imagining, hysterical and malicious rape complainant. In trial after trial, the judge focused on the looks, size and social status of the victim to determine the likelihood of whether she could have been raped by the defendant.[42] Even her own statements were tested on the backdrop of her caste and social standing.

That the character of the rape victim was given immense importance can be seen from this report Charles Hay Cameron and Daniell Elliot.[43] Suggesting creation of degrees in the offence of rape, the author of the report argued for a separate category for "chaste high caste woman who would sacrifice her life to save her honor from an unknown man" and "woman of lower caste, without character, without any pretension of purity, easy to access"[44] . This way caste and respectability also became entwined in colonial imagination.

In addition to the British existing jurisprudence on rape victims, there was prevalent colonial conception about the untrustworthiness of the native witness. In the British legal landscape India was seen as a land of perjurers, forgers, professional witnesses and general population that did not value truth.[45] Native folly in the form of perjury emerged as a quasi-legal, cultural category. In his code of Gentoo law, Halhead assures that no European form of word existed for perjury. Talking about Indians involving in perjury, Halhead refers as 'madness', 'completely wild and unconscious of itself'. It was stated at various times that because of notorious problem of false evidence in India, the petitioners suggested that the Europeans in the mofussil would become victim to false charges that would "expose them and their property to utter ruin from error of judgment, incompetence, prejudice, corruption and injury.[46] This popular and suitable reading of the native culture became ambivalently incorporated in the colonial knowledge.[47] In such a scenario when the natives were made to speak the British truth, the native's truth led to perjury, since there was no common page for truth between the British and the natives. Even before the codification of the criminal law in 1860, English common law presumptions about frequency of false charges and suspicion of woman's claims combined with colonial insistence on peculiarity of Indian culture made it difficult for Indian rape victims to prevails in colonial courts. Convictions rates in rape cases continued to decline in the twentieth century as the defence of the victim raising a false case was prevalent. Hence, Indian women faced two-fold challenges in colonial courtroom'[48], first was a result of British stereotype of women lying in case of rape. And the second about the unreliability of native witnesses.

[37] N.M. Maclean, "Rape and False Accusations of Rape" Police Surgeon 29, 30, 38 (1979); Jaising P. Modi, *Modi's textbook of medical jurisprudence and toxicology* (Lexis Nexis 2016).

[38] *Supra* note 36.

[39] *Tukaram v State of Maharashtra*, AIR 1979 (SC) 185; *Pratap Mishra v State of Orissa*, AIR 1977 SC 1307

[40] Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India 1805-57" 69 *The Journal of Asian Studies* 4 (2010).

[41] *Raja and Ors. V State of Karnataka*, Criminal Appeal No. 1767 of 2011.

[42] *Government v Mussumaut Monee v Jeenaram*, NAR 1853, Vol 3; *Meessonyoung and Government v Gnayen*, NAR 1855, vol 5; *Dokuree Kulloo v Rajoo Chung*, NAR 1851, Vol 1.

[43] "Report on the Indian Penal Code" PP XXVIII, (1847-48).

[44] *I.d.*

[45] Elizabeth Kolsky, "The Body Evidencing the Crime: Rape on Trial in Colonial India, 1860–1947" 22 Gender & History 1 (109–130) (2010).

[46] *Supra* Note 14, at 77.

[47] *Supra* Note 12, at 197.

[48] *I.d.*

Even in the Indian medical jurisprudence[49] above presumption and stereotype about the Indian rape victims being untrustworthy were prevalent. It stated that most rape cases were either concocted for blackmail or to deny consensual sex. Now repealed section 155(4) of the Indian Evidence Act also stated that the general immoral character of a prosecutrix can be taken into account when a man is accused of rape. Not just the provision, but a plethora of cases have confirmed the existence of this stereotype within the law of the land.[50] There were various other detestable provisions which were subsequently amended. Colonial theories about the early age at which the females in the tropical environment 'ripened' were used to justify this difference between the Indian and English laws.[51] As a result, the 1828 Parliamentary act set the age of consent in India at mere eight years. This meant that girls as young as 9 years old could be raped under the façade of consensual sex. The origin of marital rape can also be traced in Sir Mathew Hale CJ stating that "*The husband cannot be guilty of a rape committed by himself upon his lawful wife*"[52] if there was a mutual matrimonial agreement. This irretrievable idea of consent was the main crux behind the above law. Treatises and cases applied Hale's words, throughout the nineteenth century, often as the only explanation they offered for the exemption.[53]

These policies existed despite the known cases of violence on women during the British rule. Even today, the discursive residue of colonialism runs as an undercurrent in the opinion of media and public. Such discourse in homogeneity treats Indian women as victims of oppression and men as violent, misogynistic and culturally backward. There is also a civilized West who is looked up to be followed as an example for women's safety and upliftment. Hence, rape narratives, even in today's times have been divided on the lines of the "self" and the "Others".

(c) *Section 124A*

Sedition is derived from Latin word '*seditio*' which means "*a going aside*".[54] Added by way of amendment in the Indian Penal Code in 1870, the provision on sedition, as it stands currently, makes spreading hatred, contempt and exciting disaffection against the government established by law in India or attempting to do so a punishable offence.

The history of the application of this law is long and complicated. Sedition and criminal libel evolved from some of Britain's oldest laws, such as the Statute of Westminster 1275, when the divine right of the King and the principles of a feudal society were not questioned. Truth was no defence and intention or actual harm were irrelevant. Punishments for the crime varied from death penalty to imprisonment and the loss of the offenders' ears.

In Indian Criminal Laws, the clause of sedition was incorporated as Section 113 of Draft Indian Penal Code of 1837 made by Lord Macauley. When the Indian Penal code was enacted in 1860, the clause on sedition was omitted. It was inserted 10 years after the formation of IPC despite the 1857 revolt. The main reasons for the same are assumed to be that the provision was inserted to oppress the Wahabi uprising that gained momentum between 1863 and 1870. The provision of sedition was an easy way to deal with the rising nationalist agitation. Since the character of british political life, in theory atleast prohibited any wholesale use of military force or of terrorism against Indian nationalism even if such a course had any chance of success, sedition came as a successful weapon to quell the uprising. [55]

The first case under this law was the Bangobasi case[56] in 1891 where the newspaper Bangobasi was booked for criticizing an 'Age of Consent Bill'. Charges were dropped since the jury could not reach a unanimous verdict. The case of Bal Gangadhar Tilak of 1897 changed the effect of Section 124A. Through this case[57], Justice Strachey enunciated that if an individual develops "feeling of enimity" towards the government, she can will be liable for sedition irrespective of whether it actually led to any disturbance, mutiny or rebellion. The section was repeatedly used against nationalist leaders by colonial government. In post-independence India, the Kedar Nath case[58] changed the course which the law of sedition was designed to take. It laid down guidelines specifying that only those acts which involve 'incitement to violence' or 'violence' constitute seditious act.

However even though the law seems to settled with the principles laid down in the Kedar Nath case to be the benchmark, the current provision is still misused to a great extent. Some of the most absurd cases include charging men for sedition for allegedly celebrating Pakistan's victory during Champion's Trophy,[59] an actress booked for sedition for praising Pakistan in her comments after returning from the country[60], booking of JNU students for holding protest for showcasing

[49] Jaising P. Modi, *Modi's textbook of medical jurisprudence and toxicology* (Lexis Nexis 2016).

[50] *Tukaram v State of Maharashtra* AIR 1979 SC 185; *Premchand v State of Haryana* AIR 1989 SC 937.

[51] *I.d.*

[52] *Supra* note 19.

[53] Hasday, Jill Elaine, "Contest and Consent: A Legal History of Marital Rape" 88 California Law Review 5 (2002).

[54] Webster New Internationals Dictionary, 2nd Ed. (1956).

[55] *Supra* Note 9, at 133.

[56] *Queen Empress v Jogender Chunder Bose*, (1892) ILR 19 Cal. 35.

[57] *Queen Empress v Bal Gangadhar Tilak*, 11 Ind. Dec. (N.S.) 656.

[58] *Kedar Nath Singh v State of Bihar*, AIR 1962 SC 955.

[59] Gaurav Vivek Bhatnagar, "As Police continue to abuse sedition law, Lawyers say Courts, Parliament must find solution" The Wire, 25 June 2017 <https://thewire.in/150473/sedition-law-misused-by-authorities/> last assessed on 25.06.2018.

[60] Jagat Narayan Singh, "Ramya doesn't deserve sedition; India must throw the law out", DailyO, 23

dissatisfaction with the government[61] etc. Though the final rate of conviction is not as high, nothing stops the police bodies from booking people on even the slightest of indication of actions against the will of the government. This law has been prone to misuse since its inception, whether by the colonial British government or the bureaucracy of the democratic Indian government. In such a scenario, it becomes imperative to trace the evolution of this law and to introspect the reasons for its continuity despite the horrific implementations.

The British argument for sedition rested on the stereotype that Indian nature and population get effective excitable. Books, plays, cartoons the common discourse portrayed Indians as law breaking, impatient and anarchist people who thrive to create terror in the otherwise lawfully existing state of British administration in India. The characters of the uprising and the revolution were depicted as evil. The literature around such character was melodramatic appearing to reveal ethical consideration of the characters indicating a providential design.[62] In 1912 novel by Edmund Candler, the character and act of the revolutionary was shown as arising out of their social and cultural background rather than displeasure from the policies of the government.[63] In this way, the British administrator always portrayed itself as peace loving administration who needed to control the terror that the uprising created. The fault for the uprising and chaos was shifted to the nationalist rather than being on the colonialists.

One of the instance of portraying the easily excitable nature of the Indian population is a cartoon published in Hindi Punch entitled 'down with the monster' in 1908 wherein Indian Viceroy, Lord Minto is depicted as Hercules killing twin headed Hydra of Indian anarchism. The cartoon signified moral authority of the British government's counter terrorism strategy in the early twentieth century colonial Bengal. While the Herculean figure was accompanied with the words 'Law and Order', the Hydra was accompanied with Terrorism, Sedition, Lawlessness. The cartoon suggests a stable moral opposition between the rule of law of the colonial government and violent anarchy donated to Bengal Uprising.[64] The remark of E. Eden, Secretary, Judicial Department, Government of India is further indicative of the fact. He stated that "There is no doubt that where the population is at once is ignorant and fanatical as the mohammedans in India, seditious teachings are to be made a substantive offence".[65] In the garb of Indian's being inherently easily excitable, even non-injurious acts like writing appeared to be seditious. In one of the earliest cases of sedition, Bal Gangadhar Tilak was tried for publishing an article about Maharashtra's military chief Shivaji's Coronation festival in his newspaper Kesari. In the eyes of the British government, Tilak had used the context of Shivaji to attack the administration of the British.[66] However, various historians have countered that narration stating that such an opinion was an exaggeration which was added to by Imperialist Anglo-Indian Press and non-Marathi knowing, European dominated jury and judges.[67] In this way, the law of sedition was justified to protect the excitable, ignorant and indiscriminate majority from its own worst tendencies. The result was a flagrantly self-serving and elitist discourse.[68] In this discourse, the colonial state emerged as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence.[69] This colonial legacy assumes affection for the state as a natural condition. This was supported by the concept of 'excess' as Bhabha stated, that Indians are criminals, liars, immoral, and excited in an abnormally high proportion. Sedition law was widely used in India to suppress the nationalist uprising and with each judicial decision the ambit of law became wider and wider. The law is clear example of colonial morality and colonial governance imposed on the Indian subcontinent by creating a stereotypical discourse of the Indian population which suits the application of this law. The bureaucracy aimed to maintain a legal fiction of easily excitable Indian population while using every means to suppress nationalist agenda.[70] The continuance of this law in the post-independence India is a contestable question. In 1922, Mahatma Gandhi stated "Sedition is the prince of all the laws to curtail liberty."[71] During the constituent assembly debates, even Nehru questioned the law stating "Section (section 124A of the IPC) is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better." Even after doubting the credibility of the provision, Nehru found it

August 2016. http://www.dailyo.in/politics/sedition-law-kanhaiya-kumar-jawarharlal-nehru-amnesty-international-gandhi/story/1/12537.html last assessed on 25.06.2018.

[61] Peter Ronald deSouza, "JNU, and the idea of India", The Hindu, February 2016 ‹ http://www.thehindu.com/opinion/lead/JNU-and-the-idea-of-India/article14084214.ece› last assessed on 25.06.2018.

[62] Neil Hultgren, *Melodramatic Imperial Writing: From Sepoy rebellion to Cecil Rhodes, Athens* (Ohio University Press, 2014).

[63] Edmund Candler, *Siri Ram - Revolutionist* (Constable &Co 1914).

[64] Stephen Morton, *State of Emergency: Colonialism, Literature and Law*, 61-86 (Oxford University Press 2013).

[65] *Supra* Note 15.

[66] Sedition Committee Report [1918: 2-3].

[67] Aravind Ganachari, *Nationalism and Social Reform in Colonial Situations*, 61 (Kalpaz, 2005).

[68] William Mozarella, Raminder Kaur, "Between Sedition and Seduction: Thinking censorship in South Asia" (unpublished).

[69] Sujit Chowdhary, Madhav Khosla and Pratap Bhanu Mehta, *The Oxford Handbook of Indian Constitution*, (Oxford University Press 2016)

[70] *Supra* Note 68

[71] Atul Dev, "A History of the Infamous Section 124 A' Feb 2016", The Caravan Magazine, 25 Feb 2016. ‹ http://www.caravanmagazine.in/vantage/section-124a-sedition-jnu-protests› last accessed on 30-04-2018.

appropriate to continue with the law and his successors carried his legacy. There have been many appeals by politicians, lawyers, policy tanks etc. to eliminate this provision.[72] However, this effort has not been able to get the desired success. To add to the demand of eliminating this provision, it should be noted that countries Britain[73] who guided the insertion of this law in our criminal code have done away with these laws.

Conclusion

As historian Eric Stokes puts it, the aim of the British was to 'annihilate' the difference between the east and the west by transplanting genius of English laws in the Indian administration and the most representative figure of this attitude was Macaulay. Macaulay drafted a penal code for India which institutionalized English laws and English stereotypes in the Indian criminal justice system. Imperial discourses became "masks of conquest" to pull Indians into ideological project of British domination and such discourses got institutionalized in the law. Even though IPC is appreciated for being a comprehensive and progressive legislation, it cannot be ignored that various provisions were made as a tool to exercise power over the natives. The process of exercising this power through the creation of discourse was elaborate, unique and systematic. The result was a widespread erasure of identity and culture of a population. Natives were seen from the eyes of the powerful rulers who could portray them according to their own convenience. The oddness lies in the fact that these stereotypes of the colonial imaginations as discussed in the paper still continue to exist in Indian laws and inform its present. The callous assumptions of the colonial era are still subsisting because they were hegemonized in our cultural lives until now. The power- knowledge discourse created by the British was carried forward as the Orient started conceding to those laws. As Foucault would say, here, the law itself became a concretized discourse.[74] Through blindly accepting these laws, we as a people had agreed that the West was superior to its subjects. However, the mere realization of the fact that our laws may be influenced by dominant discourse of the West is a goal enough that has been objectively tried to be achieved by the above analysis.

[72] Indian Penal Code(Amendment) Bill, 2016 ‹ http://www.prsindia.org/mptrack/shashitharoor› last assessed on 25.06.2018; Report on "Sedition Laws and Death of Free Speech in India", National Law School of India University.

[73] Coroners and Justice Act, 2009.

[74] *Supra* Note 32.

