Colonial Stereotypes: A Study in Law through the Lens of Orientalism

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This paper aims to recognize 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 certain kind of knowledge or identity becomes dominant by virtue of a powerful source that generates such knowledge. In the Orientalist sense, the stereotype about the 'Other' was made a dominant knowledge because it originated from a power source i.e. the British. This knowledge became systematically institutionalized in the Indian laws coded by the British administrators. The paper analyses laws like Section 377, 124A and 356 of the Indian Penal Code with certain repealed provisions of Indian Evidence Act, 1872 to show such institutionalization of the British stereotypes in Indian laws. The paper aims to recognize the continued existence of the laws created on the basis of such colonial stereotypes and critically analyses the same in the process.

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 the most ordinary sense, anyone who teaches, writes about 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 on the term.

As Said puts it, Orientalism is a discourse used by the West 'for dominating, restructuring and having authority over the Orient.'[3] Before proceeding further, it is pertinent to understand the term 'discourse'. Discourse consists of several statements working together to what French social theorist Michael Foucault calls 'discursive formation'.[4] Discourse produces knowledge through language.

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1 English Oxford Living Dictionaries, 'Orient', *English Oxford Living Dictionaries Official Website* available at https://en.oxforddictionaries.com/definition/orient, accessed on 23 July 2018.

2 Edward W, *Orientalism*, Pantheon Books, New York, 1978.

3 Ibid.

4 Roger Maaka and Chris Anderson, *The Indigenous Experiences: Global Perspectives,* Canadian Scholar Press, Ontario, 2006, p.165.

In the study of Orientalism, the configuration of power behind the formation of any idea, culture or history is one of the main yardsticks. Hence, an event where discourse took place by those in power like the west in the 19th and 20th century becomes worthy of scrutiny. The enormous power of the west can be evidenced from the fact that by 1914, the colonial powers, their colonies, and their former colonies extended over approximately 85 percent of the Earth's surface.[5] When discourse is given by a powerful source, it tends to create knowledge which the subjects find difficult to disagree with. This is the extent of 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 can be continued by creating 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 the 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 was created and sustained. This is what Said refers to when he states that the west had been able to 'produce the orient' or create a parallel identity for the Orient. Knowledge was created about the Orient as per the demands and will of the Imperialism. 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. The rulers were able to create a discourse about the ruled which could not be spoken against. This discourse creation 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 a 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

5 Richard A. Webster, 'European expansion since 1763', *Encyclopædia Britannica available at* https://www.britannica.com/topic/colonialism/European-expansion-since-1763, assessed on 07 July 2018.

6 See Edward (n 2).

7 Stoddart Mark, 'Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power', vol. 28, *Social Thought & Research* p. 191, 2007.

8 Ratna Kapur, *Erotic Justice: Law and the new politics of postcolonialism*, Permanent Black, Delhi, 2005, p.23.

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'. East India Company's governor Charles Grant[11] wrote that the Indians were deprived victims of a fallen civilization.' Hence a dominant form of discourse was created about India and an identity of being other was given to them through Orientalism.

Colonial discourse produces colonized as a social reality which is at once an 'other' and yet entirely knowable and visible.[12] It employed realism as a system representing the natives in its views. Stereotypes about the Indian population were ubiquitous, being present from travel accounts to popular official reports. As Bhabha states, the stereotype must always be in excess of what can be empirically proved or logically construed.[13] Here also, these stereotypes by the British were in excess of the normal. 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.[14] Indians were considered as liars, feminine, easily excitable in an abnormally excessive way.

This narration of excess created space for an authority in the name of the English rulers to bring 'normality' to this behavior that natives were connected with. The stereotypes became discursive strategies to demonstrate the need for dominance. The process of subjectification was made possible through this stereotypical discourse. The dichotomous relationship of power and resistance, domination and dependence, civilized and uncivilized led to the identification of the players in the game i.e. the colonizers and the colonized.[15]

Since the western stereotypes were already taking shape of dominant idea or knowledge about the Indians, it became difficult to keep such stereotypes out of the legal field. Legislature started encoding laws on the basis of a prevailing stereotype. This led 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 which prevailed to govern Indian population until independence. The foundation of this Act was on the predominant view of certain castes or tribes as a whole

9 Donald C. Gordon, *The moment of Power, Britain's imperial epoch*, Prentice Hall, New Jersey, 1970.

10 Ibid, p. 35.

11 Ibid.

12 Homi K Bhabha, *The location of Culture*, Routledge, New York, 1994, p. 101.

13 Ibid, p. 100.

14 Piyel Halder, *Law, Orientalism and Post colonialism: The jurisdiction of lotus eaters*, Routledge, New York, 2007, p.59.

15 Bhabha (n 12).

being criminal irrespective the separate existence of individual within the caste. As stated by Justice T.V. Stephens while introducing the Criminal Tribes Act, 1871, '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 the crime.'[16] Asserting that certain castes are inherently criminal was the stereotype inculcated in law against the Indian subjects. The status of warrior tribes like Minas of Rajputana was gradually reduced to lowly criminal tribe because of the prevalent colonial conceptions around them.[17] This colonial conception subjected the entire tribe to criminal status. Certainty the colonial defense behind this act was to contain the burgeoning crime, but the ground fact remained that stereotypes about Indian caste identities were created and applied in favor of the West.

After codification of law, 'knowledge' that had previously existed as an attitude, an abstract, scholarly position was then applied by colonial regimes and at this point, it began to have a direct material impact on colonized people and territory.[18] There was no way out of the law. The truth for the natives was no more the truth in the books of law. Since the makers of this law were the rulers, they were able to write an alternate narrative for its Indian subject. 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 keeping in mind the principles of codification and drafting techniques of Jeremy Bentham and John Stuart Mill.[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 Indian Penal 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.

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

16 K. M. Kapadia, 'The Criminal Tribes of India', vol. 1, *Sociological Bulletin* p. 99, 1952.

17 Mark Brown, 'Crime, Liberalism and Empire: Governing the Mina Tribe of Northern India', vol. 13, *Soc. & Legal Stud*. P. 191, 2004.

18 Jenni Ramone, *Postcolonial Theories*, Palgrave, London, 2011, p.84.

19 Preeti Nijhar, *Law and Imperialism*, Pickering and Chatto, London, 2009, p.27.

ten years or life imprisonment. The history of this provision began in the book of *Leviticus*, which forms 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 the 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 the colonial discourse brought in or 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. Insertion of Section 377 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 engaging in sexual activity with no procreative potential).[24]

This law made its way in the Indian Penal Code through the passage of the British empire which was a 'hypermasculinist' enterprise. Nothing in India appeared to match their standard of masculinity. Apart from the people, the land was also described as feminine, and even wanton, whorish, naked and reclining. This can be observed from commentaries and fiction accounts. One

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20 Timothy George, *Is the Father of Jesus, the God of Muhammad? Understanding the differences between Christianity and Islam,* Harper Collins, London, 2002.

21 Alok Gupta, 'This Alien Legacy', 2008, *Human Rights Watch Official Website* available at https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism, assessed on 23 July 2018.

22 Ibid.

23 *AIDS Bedbhav Virodhi Andolan v UOI*, Civil Writ Petition 1993, p. 142. ; *NAZ Foundation v NCT of Delhi*, Writ Petition No. 7455/2001.

24 Robert Wintemute, 'Same-sex love and Indian Penal Code S. 377: An Important Human Rights Issue for India', vol. 4, *NUJS L. Rev*. p. 31, 2011.

of the passages 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 to portray inhibiting feminine characteristics as depravity. As a result, a feminine man implied physical depravity. Through this unashamedly carnal interpretation of feminine characteristics and the 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]

Apart from imposing its own morality on the Indian society, they also established stereotypes of Englishmen as powerful and superior, as against the effeminate, impotent and weak masculinity of the 'native' subject.[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 deviant sexual behavior by the British and Section 377 was the solution to treat such deviant behavior. Like Oriental men who were established as lacking masculinity, eunuchs were looked down upon by the colonizers. Surveying the culture of the 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]

By creating stereotype against Indian men and eunuchs, they were placed outside the law structured as 'monsters'. In addition to the breach of nature, the 'monster' category allegedly breached the law by rendering important legal questions

25 H. Rider Haggard, *King Solomon's mind,* Cassell, London, 1885, p.66; Jenni Ramone, *Postcolonial Theories*, Palgrave, London, 2011, p.7.

26 Halder (n 14) p.71.

27 Kapur (n 8) p. 89.

28 Ibid.

29 Mrinalini Sinha, *Colonial Masculinity: The 'manly' Englishmen and the 'effeminate' Bengali in Late nineteenth century*, Manchester University Press, Manchester, 1995, p.20.

30 A.L. Basham, *The Wonder that was India*, Ingram, London, 1954.

31 Halder (n 14) p.70.

undecidable with their bodies acting as an obstacle.[32] This monstrousness can be understood in terms of the 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] It needs outsiders to constitute itself. A dominant identity of Indian men as effeminate and flawed as against the civilized and powerful British men became a dominant form of knowledge. By creating this identity, the west defined itself as powerful, masculine and procuring an ability to control. Forming this sequence of alternate truth about the native population, a stereotyped weakness of Indian population and comparative strength of the British constituted British as the deserved subordinators. 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 the death penalty in Queen Victoria's Britain, however, the continuance of 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. The blame can be diminished from the shoulders of the British since this law was made at a time when gender identities were not much debated. 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]

Section 375

In another analysis, the crime of rape was included in the Indian Penal Code in

32 Ben Golder and Peter Fitzpatrick, *Foucault and Law*, Ashgate, Burlington, 2010, p.260.

33 Ibid p.271.

34 See Edward W (n 2).

35 Law Commission of India, 172th Report on Review of Rape Laws, March 2000, s. 3.6; Indian Penal Code (Amendment) Bill, 2016.

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 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 non-consensual, was unchaste and had lost her credibility as a complainant. Hale asserted that there was a presumption of false charge by the rape victim. He framed rape victims as a special class of witnesses on whom special standard of truth be applied. Various other writers had asserted that rape victim's age, social status, previous sexual history, and conduct were relevant for 'medical' inquiry.[37] In contrast to the 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 should be read before the juries warning them about accepting women's testimonies. Such cautionary message was, 'rape is the most detestable crime, therefore, should be severely and impartially punished with death, but it is an accusation easily to be made and harder to prove, and harder to be defended by the party counseled'.[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 includes 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] In order to prove woman's testimony trustworthy, Hale stated that if the victim concealed her injuries for a long period, if she didn't shout during the incident, these circumstances carry a strong presumption that the testimony is forged or feigned. Even though substantive law has not outrightly incorporated these provisions, similar reasoning is often

36 Mathew Hale CJ, *History of Pleas of the crown*, Britain, 1761.

37 N.M. Maclean, 'Rape and False Accusations of Rape', vol. 29 *Police Surgeon*, 1979; Jaising P. Modi, *Modi's textbook of medical jurisprudence and toxicology,* Lexis Nexis, Mumbai, 2016.

38 Hale (n 36).

39 *Tukaram v. State of Maharashtra*, AIR, 1979, SC, p. 185; *Pratap Mishra v. State of Orissa*, AIR, 1977, SC, p. 1307.

40 Elizabeth Kolsky, 'The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57', vol. 4, *The Journal of Asian Studies p.*69, 2010.

given in courts even in 2017 and used to acquit the accused.[41]

The warning was based on the common male belief in the blackmail myth according to which filling false rape charges by a woman is a conscious ploy for monetary gains or to avenge a perceived wrong. 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.

Further, in the Indian scenario, the identity of victims was used to corroborate her inclination towards lying. These identities were created either based on the laws unfamiliar to the Other (Indian women) or they were tested on the anvil of foreign law. Hence the powerful west played a major role in the creation of a dominant knowledge about the Indian rape victim and then such knowledge got embedded in the law so that it was followed for years to come with the natives unmindful of the reason behind the existence of such provisions. The reliability of evidence depended upon the colonial knowledge about her caste, religion, and class. The scientific and medical discourse was displaced by lying, imagining, hysterical and malicious rape complainant. Racial and cultural stereotypes were apparent in the trials. 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 offense 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 a 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 the general population that did not value truth.[45] Native folly in the form of perjury emerged as a quasi-legal, cultural category

41 *Raja v. State of Karnataka*, Criminal Appeal No. 1767 of 2011.

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

43 Parliamentary Papers, Report on the Indian Penal Code, 1847-48, p 28.

44 Ibid.

45 Elizabeth Kolsky, 'The Body Evidencing the Crime: Rape on Trial in Colonial India, 1860–1947', vol. 22, *Gender & History* p. 1, 2010.

soon after the establishment of the Supreme Court at Calcutta in 1930. 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]

The contemporary explanation for such conception of lie tell a different story, however, the myth of lie persisted in the pages of power. The 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, their 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 the frequency of false charges and suspicion of woman's claims combined with the colonial insistence on the peculiarity of Indian culture made it difficult for Indian rape victims to prevail in colonial courts. Convictions rates in rape cases continued to decline in the twentieth century as the defense 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.

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

46 Halder (n 14) p. 77.

47 Bhabha (n 12) p. 197.

48 Ibid.

49 Jaising P. Modi, *Modi's textbook of Medical Jurisprudence and Toxicology,* Lexis Nexis, Mumbai, 2016.

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

Indian and English laws.[51] As a result, the 1828 Parliamentary act set the age of consent in India at a mere eight years. This meant that girls as young as 9 years old could be raped under the façade of consensual sex. Further, in case of marital rape, the origin can again be traced in Sir Mathew Hale CJ, in 1736, entitled History of Pleas of the crown, where it was stated 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 British rule. Even today, the discursive residue of colonialism runs as an undercurrent in the opinion of media and public. Such discourse inhomogeneity 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 of women's safety and upliftment. Hence, rape narratives, even in today's times have been divided into the lines of the "self" and the "Others".

Section 124A

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 offense. Sedition is derived from the Latin word '*seditio*' which means "*a going apart*".[54]

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 feudal society were not questioned. The truth was no defense and intention or actual harm was irrelevant. Punishments for the crime varied from the 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. This draft was

51 Ibid.

52 Bhabha (n 12).

53 Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape', vol. 5 *Cal. L. Rev*. p.88, 2000.

54 English Oxford Living Dictionary, 'Sedition', *English Oxford Living Dictionary Official Website* available at https://en.oxforddictionaries.com/definition/sedition> assessed on 23 July 2018.

shelved for 2 years. Finally, when the Indian Penal code was enacted in 1860, the clause on sedition was omitted. Despite the 1857 revolt, the clause was added to the code only in 1870 by way of an amendment. 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, at least 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 *Queen Empress v Jogender Chunder Bose*[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 enmity' towards the government, she can 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 the colonial government. In post-independence India, the *Kedar Nath v State of Bihar* [58] the case 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 a seditious act.

However, even though the law seems to settle 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 a protest for showcasing dissatisfaction with the government etc.[61] Though the final rate of conviction is

55 Gordon (n 9) p.133.

56 *Queen Empress v Jogender Chunder Bose,* ILR, 1892, Cal. p.35.

57 *Queen Empress v. Bal Gangadhar Tilak*, Ind Cas, 1916, p. 807.

58 *Kedar Nath v State of Bihar,* AIR, 1962, SC, p.955.

59 Gaurav Vivek Bhatnagar, 'As Police continue to abuse sedition law, Lawyers say Courts, Parliament must find solution', *The Wire* (June 2017) available at https://thewire.in/150473/sedition-law-misused-by-authorities/, assessed on 23 July 2018.

60 Jagat Narayan Singh, 'Ramya doesn't deserve sedition; India must throw the law out', *Daily O* (August 2016) available at http://www.dailyo.in/politics/sedition-law-kanhaiya-kumar-jawarharlal-nehru-amnesty-international gandhi/story/1/12537.html, assessed on 23 July 2018.

61 Peter Ronald de Souza, 'JNU, and the idea of India', *The Hindu* (February 2016) available at http://www.thehindu.com/opinion/lead/JNU-and-the-idea-of-India/article14084214.

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 provision was brought to force to condemn the nationalist uprising in India during the British administration. Similar provisions existed in various countries to keep the absolutist government in power and to quell any revolt. However, a major chunk of the basis on which the sedition law was implemented and is still implemented was based on the stereotypical discourse that the British had created about India and its people.

A cultural distinction was created between the nature of the population in the west and India. The argument rested on the stereotype that Indian nature and population get effectively excitable.[62] Incidentally, when the section was introduced through Act XXVII of 1870, the title of the section read as 'Exciting disaffection' and 'whoever… excited disaffection towards the government was punished'. The discourse that Indian population gets incited easily was prevalent in art and literature. 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.[63] In 1912 novel by Edmund Candler, the character and act of the revolutionary were shown as arising out of their social and cultural background rather than displeasure from the policies of the government.[64] 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 instances of such depiction is a cartoon published in Hindi Punch entitled 'down with the monster' dated May 1908, Indian Viceroy, Lord Minto is depicted as Hercules killing twin headed Hydra of Indian anarchism. The

ece, assessed on 23 July 2018.

62 Asad Ali Ahmed, 'Spectre of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial predicament' in Raminder Kaur and William Mazarella (eds.), *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*, Indiana University Press, Bloomington, 2009, pp.172-205.

63 Neil Hultgren*, Melodramatic Imperial Writing: From Sepoy rebellion to Cecil Rhodes, Athens*, Ohio University Press, Athens, 2014.

64 Edmund Candler, *Siri Ram - Revolutionist*, Constable & Co, London, 1914.

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, and Lawlessness. The cartoon suggests a stable moral opposition between the rule of law of the colonial government and violent anarchy donated to Bengal Uprising.[65] The remark of E. Eden, Secretary, Judicial Department, and 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 offense".[66]

In the garb of Indian's being inherently easily excitable, even non-injurious acts like writing appeared to be seditious and promoting terrorism. One of the earliest cases of sedition, where Bal Gangadhar Tilak was being tried for publishing an article in his newspaper Kesari. The article contained the account of Maharashtra's military chief Shivaji's Coronation festival held in 1897. In the eyes of the British government, Tilak had used the context of Shivaji to attack the administration of the British which excited the people and this subsequently led to the killing of two British officials.[67] 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.[68]

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.[69] In this discourse, the colonial state emerged as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence.[70] 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. Through such stereotypical formation, the concept of 'excess' was used to tarnish the image/identity of the Indian population.

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65 Stephen Morton, *State of Emergency: Colonialism, Literature and Law*, Oxford University Press, Oxford, 2013, pp.61-86.

66 Bhabha (n 12).

67 The government of India, Sedition Committee Report, Home Department, 1918, pp. 2-3.

68 Aravind Ganachari, *Nationalism and Social Reform in Colonial Situations*, Kalpaz, New Delhi, 2005, p.61.

69 William Mozarella and Raminder Kaur, 'Between Sedition and Seduction: Thinking censorship in South Asia' in Raminder Kaur and William Mazarella (eds.), *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*, Indiana University Press, Bloomington, 2009, pp.1-28.

70 Sujit Chowdhary, Madhav Khosla & Pratap Bhanu Mehta, *The Oxford Handbook of Indian Constitution*, Oxford University Press, Oxford, 2016.

At a historical moment when J.S. Mills On liberty made it citizen's right to be critical of the government and when sedition law was increasingly unusable in Britain, in the British colony of India, sedition not only became the legal means by which anti-nationalist conspiracies were prosecuted, it also acquired a prominence it no longer had in Britain. The sole successful prosecution under sedition law in Britain after 1896 involved cases of critique of British colonialism in India, and support for an Indian revolutionary nationalist.[71] 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 a 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 the nationalist agenda.[72] The law of sedition reflected the British adherence to democratic ideas in theory and its actual recourse to repression as a means of political survival.

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'.[73]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 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.[74] However, this effort has not been able to get the desired success. To add to the demand for eliminating this provision, it should be noted that countries Britain[75] 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

71 Janaki Bakhle Savarkar, 'Sedition and Surveillance: the rule of law in a colonial situation', vol. 1, *Social History* p.35, 2010.

72 Ganachari (n 68).

73 Atul Dev, 'A History of the Infamous Section 124 A', *The Caravan Magazine* (25 February 2016) available at http://www.caravanmagazine.in/vantage/section-124a-sedition-jnu-protests, accessed on 23 July 2018.

74 Indian Penal Code (Amendment) Bill, 2016. National Law School of India University, Report on Sedition Laws and Death of Free Speech in India, February 2011.

75 The Coroners and Justice Act, United Kingdom, 2009, c. 25.

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 an ideological project of British domination and such discourses got institutionalized in the law. Even though IPC is appreciated for being 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 has been stated by Foucault, the law itself became a concretized discourse.[76] A powerful discourse about the identity of the other ended up making changes or messing with the real identity of the subject through the course of law. We had, to a certain extent, agreed that the West was superior to its subjects. However, the mere realization of the fact that our laws may be influenced by the dominant discourse of the West is a goal enough that has been objectively tried to be achieved by the above analysis.

[76] Ben Golder and Peter Fitzpatrick (n 32).