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# Offences of Acting against the State: A Comparative Study of Legal Positions in India and United States

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## ABSTRACT

*The objective of this paper is to study comparatively the points of convergence and divergence in the legal positions in the modern democracies of India and United States with respect to offences of acting against the state. This paper will be restricted in scope to the offences of treason and sedition laws in both the nations. It starts with elucidating the nature of such offences and then enlists the relevant penal provisions in both jurisdictions which punish for offences perpetrated against the State. Then, it also maps out the similar provisions. Subsequently, it starts with the understanding of laws and the historical context, specific to treason and then sedition in both the jurisdictions of India and United States.*

**Keywords:** *Offences against State, India, United States, Treason, Sedition, Comparative Analysis.*

## I. INTRODUCTION

All the Nation-states are independent and sovereign by virtue of which they are entitled with the right of self-preservation. The existence of a State brings in the desired stability which advances the well-being of the citizens. In the ancient and medieval era, the King possessed divine rights and these divine rights advocated for the preservation of the state. The violence perpetrated against the State was considered as *lese majestic* (treason or degrading a monarch) and in order to prevent the acts of such violence and also to punish the accused for treacherous and seditious activities, many laws have been formulated since time immemorial.<sup>2</sup>

All the conducts and offences enlisted in the penal codes or various criminal statutes are committed by the anti-social elements to cause a disequilibrium in the society or causing harm to a particular individual, but the offences against the State is considered most dangerous as it disturbs the public order and tranquillity, hampering the national integration and its

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<sup>2</sup> K.D. GAUR, CRIMINAL LAW: CASES AND MATERIALS 935 (9th ed., Lexis Nexis 2019).

sovereignty.<sup>3</sup> Both India and United States were colonies of the British empire and the origin of the concept of imposing penal provisions for offences of acting against the State especially treason and sedition emerges from the tyrannical rule of the colonizers. Both of these democracies have their own written constitution and a limited government.<sup>4</sup> They both promote ideas of liberty and freedom of speech and expression.

## **II. HISTORICAL CONTEXT OF LAWS PENALIZING OFFENCES OF ACTING AGAINST THE STATE IN THE MODERN DEMOCRACIES**

### **(A) Case of India**

- In the ancient and medieval era, the king was considered as divine and committing treason against king was similar to committing treason against the State. The punishment for treason during these times was death.
- Mauryas, Guptas, and subsequent dynasties had a system of espionage or spies. The spies were punished with death penalty if their identity was disclosed.
- During the British Rule in India, it became a necessity for British to maintain their stronghold of the Indian Territory.
- Several restrictions were imposed in form of curbing the freedom of press in order to wither away dissent against the unjust rule of British Raj.
- Same laws which were put in the Indian Penal Code, 1860 and other legislations still exist in the same form with limited amendments post-independence.
- Today, the provisions of the Indian Penal Code with respect to treason are mainly used to punish the terrorists and the separatists.

### **(B) Case of United States**

- The United States, just like India, was also a colony of the vast British Empire.
- It also contained laws to punish for the conduct of offences against the State. These were enacted to curb dissent from the people against the exploitation of resources by the British.
- During World War-I, United State played a crucial role as an Allied power and during these times such laws were necessary.

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<sup>3</sup> *Id.* at 934.

<sup>4</sup> SUBHASH C. KASHYAP, *OUR POLITICAL SYSTEM 2-4* (1st ed., National Book Trust, India 2008).

- During World War-II, United States emerged as a nuclear power after the Manhattan Project and these laws were crucial to prevent the proliferation of nuclear weapons.
- Then, during the period of Cold War which entailed ideological warfare, the laws became a doctrinal necessity for U.S. to prevent the spread of Communist ideology.
- Today, these laws are used curb terrorist tendencies and conspiracies and to uphold democratic principles and ideology.

### III. OFFENCES OF ACTING AGAINST STATE: TREASON

Treason is one of the gravest crimes which exists today, and every country punishes the traitors for their treacherous acts with severest punishments. It is an offence which is ethically and morally reprehensible as it is orchestrated towards the very existence of the State.<sup>5</sup>

The term ‘treason’ is narrow and restricted in its meaning and applies only to offences of very serious and grave nature which can inimically, in a direct manner affect the security architecture and integrity of the nation.<sup>6</sup> The offences like waging a war against the establishment, aiding the state’s adversaries, perpetrating the death of the Head of State, etc. can be classified as ‘high treason’, however ‘treason’ can also encompass acts of disloyalty towards the government which can hamper the integrity and public order in a State.<sup>7</sup>

#### (A) Case of United States

Offences like treason, sedition, advocating the overthrow of the government, perjury, espionage, etc are considered to be harmful to the government and are penalised under various statutes and the U.S. Code Title 18- ‘Crimes and Criminal Procedure’

In the context of US, the offenses perpetrated against the state can be categorised under two heads, namely-

- i) *Offences which are antagonistic to the very existence of the state*
- ii) *Offences which are harmful to the conduct of day-to-day public affairs by the government and also the public order*<sup>8</sup>

Treason is defined in Article III of the U.S. Constitution which states that: “*Treason against the United States shall consist only in levying War against them, or in adhering to their*

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<sup>5</sup> LAW COMMISSION OF INDIA, OFFENCES AGAINST THE NATIONAL SECURITY, para 1.1 (Law Commission 43rd Report, 1971).

<sup>6</sup> LAW COMMISSION OF INDIA, OFFENCES AGAINST THE NATIONAL SECURITY, para 1.4 (Law Commission 43rd Report, 1971).

<sup>7</sup> *Id.*

<sup>8</sup> Herbert L. Packer, *Offenses against the State* 339 The Annals of the American Academy of Political and Social Science 77 (1962).

*Enemies, giving them Aid and Comfort.*"<sup>9</sup> And a person who commits the offence of treason is punished under U.S. Code Title 18- 'Crimes and Criminal Procedure'.<sup>10</sup>

Treason has been interpreted in a restrictive sense in U.S. unlike the United Kingdom where the idea of 'constructive treason' applies in which a person attracts penalties for treason due to his/her course of cumulative actions rather than any separate treacherous act. Under the idea of 'constructive treason', a person can be put to death even if he had imagined the death of the King. The framers of the U.S. Constitution decried the idea of 'constructive treason' and they were the advocates of liberty and in the pursuit of establishing a liberal, progressive and democratic country, they tried to restrict the conception of treason.<sup>11</sup>

The definition of treason constitutes of two elements which almost all the offences generally contain- Actus reus and Mens rea:

- (a) Mens rea (intention/knowledge) to betray- this intent needs to be specific (unlike constructive treason),
- (b) Actus reus or an overt act<sup>12</sup>

In U.S., it is essential for the prosecution to display evidence of overt acts in order to charge a person for treason. In the case of *Ex parte Bollman*<sup>13</sup>, it was held that the meaning of treason does not include a mere conspiracy or enlisting an army of men to levy war against the state. Also, in yet another case of *United States v Burr*<sup>14</sup>, treason was said to be restricted when the Court reiterated that just an intention to commit treason will not be sufficient to penalise the person.

A person who has the knowledge of any treason being perpetrated against the United States and despite of this knowledge, he/she conceals and does not disclose it to the Government or Judiciary, then he/she will be liable for committing the offence of misprision of treason and can be punished for a period of not exceeding 7 years and/or fined.<sup>15</sup> And, if a person engages/assists/incites the carrying out any rebellion or insurrection against the Government of United States, then he/she will be liable for punishment of imprisonment for a period not exceeding 10 years and/or fined.<sup>16</sup>

## **(B) Case of India**

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<sup>9</sup> U.S. CONST., art. III, § 3.

<sup>10</sup> U.S. Code Title 18-Crimes and Criminal Procedure, § 2381.

<sup>11</sup> Herbert L Packer, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Ex parte Bollman*, 8 U.S. 75 (1807).

<sup>14</sup> *United States v. Burr*, 25 F Cas 55 (1807).

<sup>15</sup> U.S. Code Title 18-Crimes and Criminal Procedure, § 2382.

<sup>16</sup> U.S. Code Title 18-Crimes and Criminal Procedure, § 2383.

Offences like treason, sedition, advocating the overthrow of the government, assaulting the Head of the State etc. are considered to be dangerous to the government and are penalised under various special laws and the Indian Penal Code 1860.

In the Indian Scenario, the Indian Penal Code (IPC) in its sixth chapter states the offence of treason under the title of ‘*Waging, or attempting to wage war, or abetting waging of war, against the Government of India*’ which makes a person liable for the offence of ‘treason’ if he/she wages war against the Government of India.<sup>17</sup> The scope of treason in India is wider in comparison to that of United States. The Indian laws considers the three stages of complicity, namely, attempt, abetment and overt act as punishable under this section.<sup>18</sup> An attempt to wage such war or abetting to wage such war attracts capital punishment or life imprisonment.<sup>19</sup> The abetment to wage war against the State can happen through the acts of instigation, conspiracy and intentionally aiding the perpetrator.<sup>20</sup>

Although the term ‘treason’ is nowhere mentioned in IPC, however this section postulates the essence of treason. It can apply to both citizens as well as non-citizens. The liability of foreigners in such offences is justified on the principle of “*de jure gentium*” according to which when the foreigners are allowed to enter into the jurisdiction of a country, they are bound by a tacit condition which subjects them to the laws of that particular country in return of their protection. By applying this justification, the Indian law punishes the terrorist and the anti-establishment organizations for acting against the security and integrity of the State.<sup>21</sup>

The offence of insurrection against the Government of India is also punishable under this section, unlike United States where there are two different thresholds to determine the culpability in form of two different sections. An insurrection against the State in India, unlike United States attracts death penalty or life-imprisonment.<sup>22</sup> The Criminal laws in India also contain specific provision for punishing the offender for conspiracy of treason.<sup>23</sup>

The misprision of treason or concealment with the intent to facilitate the design of waging of war against the State or possessing knowledge of such design is an offence which may attract imprisonment for a period not exceeding ten years and a fine.<sup>24</sup>

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<sup>17</sup> The Indian Penal Code 1860, § 121.

<sup>18</sup> K.D. GAUR, *supra* note 3, at 935.

<sup>19</sup> The Indian Penal Code 1860, § 121.

<sup>20</sup> The Indian Penal Code 1860, §107.

<sup>21</sup> K.D. GAUR, *supra* note 3, at 935.

<sup>22</sup> The Indian Penal Code 1860, § 121.

<sup>23</sup> The Indian Penal Code 1860, § 121A.

<sup>24</sup> The Indian Penal Code 1860, § 123.

In light of *Regina v Gul*<sup>25</sup>, the court observed that the actions of the insurgents to harm or injure the armed forces of the State have the potential to influence the Government and falls within the meaning of “terrorism”, and the person will be liable for waging a war against the state within the meaning of IPC.

With the advent of the rarest of the rare doctrine in India after the cases of *Bachan Singh*<sup>26</sup> and *Machhi Singh*<sup>27</sup>, section 121 is also considered by the Courts within the light of this ‘rarest of the rare standard’. The death penalty is rarely given in the cases of treason in India and is mostly reduced to life imprisonment. The Gujarat High Court in one of its cases refrained from giving death penalty to the culprits by citing that it was not the one amongst ‘rarest of the rare’ cases.<sup>28</sup>

The Law Commission of India has described offences like treason, sedition, espionage, etc. being in the nature of a threat to security of the nation and has advocated for stringent punishments for committing these offences.<sup>29</sup>

#### IV. OFFENCES OF ACTING AGAINST STATE: SEDITION

##### (A) Case of United States

The laws against sedition in the United States can be traced back towards the end of 18<sup>th</sup> Century when the Sedition Act of 1798 which makes a person liable for punishments under this Act if he/she “*opposes or resists any law of the United States*” or writes or publishes “*false, scandalous and malicious writing*” against the President or the U.S. Congress. This legislation was seen by the opposition parties to be violative of the First Amendment Rights as it tried to curb political dissent.<sup>30</sup>

Then, the Espionage Act of 1917 which was enacted during the World War-I made it punishable to wilfully disseminate false news about the armed forces with an intention to disrupt their operations or to incite mutiny within armed forces or causing obstruction in their recruitment. The subsequent Sedition Act of 1918 expanded the scope of the Espionage Act to include statements criticizing the Government under the meaning of sedition.<sup>31</sup>

During the period of Cold War, the Alien Registration Act 1940 commonly known as Smith Act was passed which made punishable the act to preach or advocate the overthrowing of the

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<sup>25</sup> *Regina v. Gul*, U.K.S.C. 64 (2013).

<sup>26</sup> *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684: A.I.R. 1980 SC 898.

<sup>27</sup> *Machhi Singh and Others v. State of Punjab*, (1983) 3 S.C.C. 470.

<sup>28</sup> *State of Gujarat v. Jaman Haji Mamad Jat*, (2007) Cri.L.J. 1584: (2007) 2 G.L.R. 1165.

<sup>29</sup> LAW COMMISSION OF INDIA, OFFENCES AGAINST THE NATIONAL SECURITY, para 1.2 (Law Commission 43rd Report, 1971).

<sup>30</sup> Herbert L. Packer, *supra* note 9.

<sup>31</sup> *Id.*

lawfully established Government of U.S.<sup>32</sup> This law was primarily used against the communist organisations in the country which propagated their ideas of communism.<sup>33</sup> At present, the United States Code: Title 18 under chapter 115 punishes a person for committing the offence of seditious conspiracy.<sup>34</sup>

In the United States, sedition has a generic meaning which includes advocating through speech or in writing ideas or statements which incites hatred and contempt for the lawfully established government, causing people to defy the laws, advocating the overthrowing of the government by force, etc.<sup>35</sup> Also, Seditious conspiracy is a punishable offence in the United States. The offence of seditious conspiracy is understood as the following:

*“If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof.”*<sup>36</sup>

The offence of seditious conspiracy attracts a punishment of imprisonment for a period not exceeding twenty years or fine or both.<sup>37</sup>

### **(B) Case of India**

The penal provisions against sedition in the Indian scenario can be traced back to the British Raj where the colonial power tried to impose its draconian and unjustified policies onto the people of the colonies. Sedition was introduced as an offence into the Indian Penal Code in the year 1870 and one of the reasons for its introduction can be attributed to the rise of the Wahabi movement in India. This movement wanted to establish the rule of Caliphate in Turkey. The sedition laws were enacted by the British to curb the freedom of the people of India by punishing them even for a constructive and fair criticism of the policies and legislations of the colonial administration by construing them as being seditious in nature. The torchbearers of the Indian Freedom Struggle like Bal Gangadhar Tilak and Mahatma Gandhi were also charged, tried and convicted under this section.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.S. Code Title 18-Crimes and Criminal Procedure, § 2384.

<sup>35</sup> Herbert L Packer, *supra* note 9.

<sup>36</sup> U.S. Code Title 18-Crimes and Criminal Procedure, § 2384.

<sup>37</sup> *Id.*

<sup>38</sup> Siddharth Narrain, *Disaffection and the Law: The Chilling Effect of Sedition Laws in India*, 46(8) Economic



This section was amended in 1898 to include words “bringing or attempting to bring into hatred or contempt” which elucidated the earlier copula of “exciting the feeling of disaffection towards the Government”. This amending act also split the original single explanation into three. However, it is still unclear whether this section penalizes one for exciting the “feelings” itself or punishes one for exciting these feelings with the purpose of disturbing the public order or inciting violence as a consequence.<sup>39</sup>

According to the Indian Penal Code, “Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India”<sup>40</sup> is liable for the commission of offence of sedition under the code. A person convicted for sedition is liable for punishment of life imprisonment or with an imprisonment of up to 3 years to which a fine may be added as well.<sup>41</sup>

The term “disaffection” in this section includes “disloyalty and all feelings of enmity”. The second and third explanation under this section clarifies that criticizing the policies and administrative actions of the government even if they are strongly worded, will not constitute an offence of sedition as long as there is no intention or ill-will attached to it for purpose of causing public disorder and incite hatred amongst others against the Government.<sup>42</sup>

The sedition laws have been a matter of controversy since its inception into the IPC. This controversy started with the judgement of Calcutta High Court in the *Queen-Empress v Jogendra Chandra Bose*<sup>43</sup> in which Chief Justice Petheram posited that a person can be held liable for sedition if his/her words are calculated and intended to incite feelings of hatred and contempt of the people towards the Government.<sup>44</sup>

The controversy around the draconian law of sedition being violative of the fundamental right to freedom of speech and expression was settled in the Romesh Thappar’s case<sup>45</sup> where the Supreme Court of India held that the section on sedition falls within the exception of reasonable restriction and hence, it is valid. This stance of Supreme Court was further approved in Kedar Nath’s case<sup>46</sup> as well.

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and Political Weekly 33 (2011).

<sup>39</sup> R.K. Misra, *Freedom of Speech and the Law of Sedition in India*, 8(1) Journal of the Indian Law Institute 117 (1966).

<sup>40</sup> The Indian Penal Code, § 124A.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Queen-Empress v. Jogendra Chandra Bose*, (1892) I.L.R. 19 Cal. 35 (India).

<sup>44</sup> R.K. Misra, *supra* note 40.

<sup>45</sup> *Romesh Thappar v. State of Madras* (1950) A.I.R. 124: (1950) S.C.R. 594.

<sup>46</sup> *Kedar Nath Singh v. State of Bihar* (1962) A.I.R 955.

In the present times, there is a debate on the existence of sedition laws as these laws coupled with preventive detention laws like UAPA<sup>47</sup> create a gloomy atmosphere of fear and anxiety marred by a chilling effect these laws have on the fundamental rights of the citizens. The political party or alliance at power has misused these provisions to curb political dissent.<sup>48</sup> These laws have to imposed only in case of extreme necessity because if an innocent citizen is charged with this section, then he/she has to face the wrath of societal stigma and hatred.<sup>49</sup> Thus, it can be said conclusively that the Legislature needs to have a relook into the sedition provisions and through a consultative and deliberative approach, introduce certain reforms

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<sup>47</sup> The Unlawful Activities (Prevention) Act, 1967 (India).

<sup>48</sup> Siddharth Narrain, *supra* note 38.

<sup>49</sup> *Id.*