CHAPTER VII.

THE LAW AMENDED.

A BILL to amend the Penal Code in relation to Extra-territorial offences had been for some time on the legislative anvil during the year 1897, when circumstances drew the attention of the Government to the expediency of amending at the same time the law of sedition.

The *raison d'être* of the contemplated amendment was stated by the Hon'ble Mr. Chalmers, the member in charge of the Bill, on the 25th December, of that year, in the following terms:—"As the Council are aware, recent events in India have called prominent attention to the law relating to seditious utterances and writings. We have had anxiously to consider the state of the law regarding these matters and to decide whether, and in what respects, it required amendment. We determined that we would do nothing hastily, and that the course we adopted should be the result of cool and deliberate consideration."

"Two different lines of action," he continued, "were open to us. The first was to re-enact a Press Law similar to the Vernacular Press Act of 1878. The second was to amend the general law relating to sedition and cognate offences, so as to make it efficient for its purpose. We have come to the conclusion that the second course is the right one for us to take."

"We welcome all fair, candid, and honest criticism," he added, "and, speaking for ourselves, we care very little as to the terms or language in which such criticism may be expressed. The essential principle of English law is this. Every man is free to speak, write and print, whatever he pleases, without asking the leave or permission of any authority. But if he speaks, writes, or prints anything which contravenes the law of the land, he is liable to be proceeded against and punished. As long as a man keeps within the law no one can interfere with him. But, if he breaks the law, he is liable to punishment by a Court of Justice in the ordinary course of law. This seems to us a sound and healthy guiding principle, and we have

determined to adhere to it. But we are also determinod that the law shall not be a dead-letter, and that offenders against the law of the land shall be capable of being promptly brought to book."

The Hon'ble Member then proceeded to point out the flaws in the law as it existed, as well as the urgency of amending it. "As for the section," he said, "which deals with the offence of exciting disaffection against the Government, or, as it is called in England, sedition, I cannot say that that section strikes me as a model of clear drafting. That section was introduced into the Penal Code by Sir Fitzjames Stephen in 1870. In introducing the Bill I believe he stated that his intention was to assimilate the law of India to the law of England as regards the offence of sedition. The interpretation of the section has recently been discussed before the Calcutta, Bombay, and Allahabad High Courts, and it has been interpreted in accordance with English law. The result of the cases is to establish that it is a criminal offence to stir up feelings of contempt or hatred for the Government, and that such conduct is none the less an offence because resort to actual violence is not advocated. But no one can read the able arguments addressed to the Courts by Counsel for the accused in the *Bangobasi* and Tilak cases without coming to the conclusion that the law might be expressed in clearer and less equivocal terms. When law is codified, the codes should be as explicit as possible."

"Moreover," he continued, "though the Calcutta, Bombay, and Allahabad Judges have substantially agreed in the interpretation of section 124A, their decisions are not technically binding on other High Courts. Having regard to these considerations we think it desirable to amend and re-draft section 124A, so as to bring it clearly into accord with English law. In England, words spoken or written with seditious intent constitute a criminal offence, and the intent is presumed from the natural meaning of the words themselves, without reference to the actual feelings of the person who used them. In other words, the law applies a purely objective test. A seditious intention is thus defined in Stephen's '*Digest of the Criminal Law*.' It is 'an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, Her heirs or successors,

or the Government of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of hostility or ill-will between different classes of such subjects.' Now adapting that definition to the language of the Indian Penal Code and the circumstances of India, we propose that section 124A shall be repealed, and that the following section shall be substituted therefor :—'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 Her Majesty or the Government, (or promotes or attempts to promote feelings of enmity or ill-will between different classes of Her Majesty's subjects) shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to ten years, to which fine may be added, or with fine.

Explanation 1.—The expression 'disaffection' includes disloyalty and all feelings of enmity (or ill-will).

Explanation 2.—Comments on the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence.'"

Such was the measure submitted to the Select Committee for consideration. The words within brackets were ultimately omitted by them, and the provision dealing with the promoting of class-hatred was placed by itself as a separate offence under section 153A. It will be referred to hereafter under the class of cognate offences.

The Hon'ble Member concluded his remarks on the new provision as follows :—"Let me say a word or two as to the scope of the new section. There is nothing in it which in any way interferes with the fair and free discussion of public matters. People are at liberty to criticise the action and conduct of the Government in all its departments. And more than that, they are at liberty to bestir themselves to procure reforms, and to obtain such alterations of the law as they may think desirable, provided

they do so by lawful and constitutional means. There is nothing in the section to prohibit this, but we have added *Explanation* 2 to the section in order to affirm this principle expressly. I wish further to point this out. Subject to one possible exception, our proposed new section in no wise alters the law at present in force in India. It merely affirms in, I hope, unmistakable terms, the consentient opinions of the various High Courts which have been called upon to interpret the existing section 124A."

The possible exception referred to was the provision which was ultimately removed from the section, and incorporated in the Code as section 153A.

On the 18th February, 1898, the Legislative Council assembled for the final consideration of the Bill. The Select Committee had made various concessions to the critics, some of whose suggestions had been adopted. The provision regarding class-hatred, as already mentioned, had been extracted, and assigned a more important position in the Code, and the term 'ill-will' had also been struck out, as being too wide and vague in its meaning.

In addition to these changes, the term 'Government' had been replaced by 'Government established by law in British India,' the original words of the section; the maximum term of imprisonment had been altered from ten years to three years; and a third *Explanation* had been added, to prevent misapprehension. This last addition was thus explained by the Hon'ble Member:—"We have added a further *explanation* to clause 124A. The second *explanation* was intended to protect fair and honest criticism which had for its object the alteration of the policy pursued by the Government in any particular case. Some people were apprehensive that the express declaration of this principle might be held impliedly to negative the right of people to criticise Government action when that criticism could not lead to a reversal of such action; for instance criticism on past expenditure, or criticism on an appointment which the critic may think objectionable. I think this apprehension was quite unfounded, but in order to allay it we have introduced the third *explanation*."

Some of the main objections, however, to the Bill were advanced on this occasion. It was contended that the existing

law was being altered and extended, while there was no occasion for it. To this it was answered:—"No one who candidly and carefully reads the consentient decisions of the Calcutta, Bombay and Allahabad High Courts can come to any other conclusion than this—namely, that in our new section we are keeping well within the existing law, though, we are expressing that law in less ambiguous language."

"Then it is urged," the Hon'ble Member continued, "that the proposed clause goes further than English law, and again some passages in Sir Fitzjames Stephen's speech are referred to. All I can say is this. If in 1870 he thought that an appeal to force was a necessary constituent of sedition, he afterwards changed his mind. After he had served on the Criminal Code Commission, which was composed of some of the most distinguished Judges of modern times, he published his *Digest of the English Criminal Law*. In Article 96 of that Digest he states the English law in the clear and precise terms which I read to the Council on the 21st December. There is nothing in that article, and there is nothing in the almost identical article framed by the Criminal Code Commission to suggest that an appeal to violence is a necessary factor in the offence. I take it that the offence is complete, both in India and England, if it be proved that the offender has attempted to excite disaffection towards the Government. It is not necessary that he should himself appeal to force. What he does is to excite or attempt to excite feelings of discontent which make people ready for mischief should the opportunity arise."

"But after all," he added, "these arguments are more or less academic. No one in his senses would contend that because a given law is good and suitable in England, it is therefore good and suitable in India. If a rule of law exists in England we may fairly consider whether it is suitable to India, but the answer to the question must always depend on the conditions which prevail in India. How much license of speech can be safely allowed is a question of time and place. If I smoke a cigar on the *maidan* it pleases me, and hurts no one else. If I smoke a cigar in the powder magazine of the Fort, I endanger the lives of many, and do an act well deserving punishment. Language may be tolerated in England which it is unsafe to tolerate in India,

because in India it is apt to be transformed into action instead of passing off as harmless gas. In legislating for India we must have regard to Indian conditions, and we must rely mainly on the advice of those who speak under the weight of responsibility and have the peace and good government of India under their charge."

The difference between the social conditions prevailing in England and those of India appears to have been entirely overlooked by the most vigorous opponents of the Bill, for their arguments would seem to be based on the assumption of their complete similarity. This would account for the strenuous efforts made for the introduction of the English law, or what they supposed to be the English law of sedition into India.

On this point the observations of the Lieutenant-Governor of Bengal, Sir Alexander Mackenzie, carry with them the weight of authority and experience. "Much of the outcry," he said, "against the present Bill rests upon its supposed divergence from the law of England on seditious libel, and on the assertion that the law as settled in 1870 was sufficient and ought to be final. Now I venture to assert these two propositions—first, that the law of England, built up by judicial rulings to meet the circumstances of a homogeneous people directly interested in and sharing in its own government, is not necessarily a norm to which the law of India ought strictly to conform; and second, that the conditions of the country have themselves so altered since 1870 that what was adequate then is not necessarily adequate now. As to the first point—If the section is in strict accord with the English law, all criticism of it loses weight; if it is not, there is in the very great difference in the conditions of the two countries ample justification for any deviation from the English law necessary for effectively checking the offence of sedition in India. It is clear that a sedition law which is adequate for a people ruled by a government of its own nationality and faith may be inadequate, or in some respects unsuited, for a country under foreign rule and inhabited by many races, with diverse customs and conflicting creeds. It is impossible in India to accept the test of direct incitement to violence or intention to commit rebellion, and limit the interference of the Government to such cases. It is not the apparent intention of the writers, or

speakers so much as the *tendency* of the writings or speeches which has to be regarded, and the cumulative effect of depreciatory declamation on the minds of an ignorant and excitable population has to be taken into consideration."

"As to the second point," he continued, "the necessity for the proposed legislation is unquestionable. Ever since the repeal of the Vernacular Press Act, the Native Press has been year by year growing more reckless in its mode of writing about the Government, Government officers, and Government measures. Doubts having been always felt by the law officers as to the scope of section 124A of the Penal Code, the general policy has been to ignore these attacks. In Bengal the only Press prosecution for seditious writing has been that of the *Bangobasi* newspaper, instituted in 1891, in which the jury disagreed, and which terminated eventually in the acceptance of an apology by the Government from the offending editor. The absence of other prosecutions cannot, however, be urged as evidence that seditious writing is rare in Bengal, and that an alteration of the law is not therefore called for in this Province. Resistance to the Government by violence has, it is true, not been directly suggested in the Bengal Press, and a sufficient reason for this may be found in the character of the writers, who belong to, and whose readers are, a people wanting in the warlike spirit of many other races of India; but there has been incessant writing tending to bring the Government, whether in itself or through its officers, into hatred and contempt, and such writing, though not immediately leading to resistance by force to the Government, cannot fail by its cumulative effect to create disaffection and ill-will, and thus produce such a state of feeling as may eventually prove dangerous to the maintenance of order and find its culmination in active resistance. Whether, then, we look at the objections which have been taken by the people themselves to the interpretation of the present law by the Courts, or to the nature of much that has been written in the Native Press, the necessity for an amendment of the law is clear."

"To any one," he continued, "who studies, as I do from week to week, the utterances of the Press in India, nothing can be more clear than that, though we seldom have such bold sedition preached as led to the recent trials in Bombay, or

as prevailed here in 1870, we are now face to face with a far more insidious and equally dangerous style of writing and speaking. And this is an evil which is yearly growing, and with the spread of what is called education is becoming more far-reaching in its noxious effects. It is indeed, in my opinion, to our own system of education that we owe all the trouble. I have long been convinced that it is thoroughly unsound. We are turning out by scores of thousands young men who are trained only in words, look mainly for Government employment, and failing to get it become, as the Maharaja of Travancore described them, 'a host of discontented, disobedient, and sometimes troublesome young men.' This is the class that writes for the Native Press, perorates on platforms, and generally vents its spleen upon the Government which has not been able to find appointments for more than a fraction of its members. To honest, well-informed criticism no English Government would ever object. But every Government has the right to object when its critics wander off from criticism to calumny. No Government, such as ours in India can afford to allow the minds of an ignorant and credulous oriental population to be gradually poisoned and embittered by persistent calumny of the Government and all its measures. If these sections lead to a more careful, well-considered and responsible journalism, they will confer a benefit not only on the State and the public, but on the journalistic profession itself."

The wide difference between the social conditions of the two countries was freely discussed by other members of the Council as well; notably by Sir Griffith Evans, whose remarks are both weighty and interesting. He said:—"The advantages of free and intelligent criticism and discussion of the acts and measures of Government, and of pointing out abuses and failures and suggesting remedies, are apparent and undeniable, and the liberty of the Press is a household word dear to the heart of every Englishman. I am glad to think that a large number of the newspapers in India, English and Vernacular, have carried out these objects, and have discharged their duties as fearless critics to the benefit alike of governors and governed. But a free Press is an exotic in India, and indeed in Asia, and, like plants and animals transplanted into new surroundings,

is liable to strange developments. For many years a portion of the Native Press, and particularly of the Vernacular Press, has devoted itself to pouring forth a continual stream of calumny and abuse of the British Government in India and to teaching its readers that all their misfortunes, poverty and miseries arise from a foreign Government, which draws away their wealth and is callous to their miseries, and from whom they can expect neither justice nor sympathy."

It might almost be thought that the Hon'ble Member was here paraphrasing the articles in the *Bangobasi*, at the trial of which he was Counsel for the Crown.

"Now it needs no argument," he continued, "to prove that writing of this character, whatever the motives or ultimate objects of the writers may be, circulated daily for years amongst a credulous people, must tend to make them hate the cause of all their woes. It is a hopeless task for any Government, especially a foreign one, to endeavour to win or retain the affections of the people by just government and solicitude for their benefit, if the minds of the people are daily poisoned with matter of this kind, written in their own language and by men who know how to appeal to their sympathies, credulity, and religious feelings."

"Some of the apologists of the Native Press," he added, "minimise the evil. But to those who have watched it, as I have for thirty years, and for twenty years as a Member of this Council, it is apparent that this is the work of a small minority who have partaken of the cheap education of our schools and who distil and sell the poisonous product of the ferment in their heads of ill-assimilated and misapplied Western ideas. This opinion is not a hasty one; it is the same as I expressed in this Council in 1878, and as was then expressed in weighty language by the present Advocate-General of Bengal, whose knowledge of the country none can deny, and who has never been accused of want of sympathy with its inhabitants. He then said:—'Having attentively considered these extracts, I am irresistibly led to the conclusion that it is intended by these publications to disseminate disaffection, to excite evil prejudices, to stir up discontent, and to produce mischief of the gravest character: in short, *to render the Government, its officers, and Europeans gene-*

rally, hateful to the people. These are evil purposes which should be repressed with a strong hand and their controversy restrained from all further attempt to administer their subtile poison to the lower orders of the people, to saturate their minds with evil thoughts and to arouse their evil passions.' Since then the evil has grown greatly."

From these important statements it would appear that the measure introduced by Sir James Stephen in 1870 had not proved effective in checking the license of a certain section of the Native Press. That measure had been passed at the time of the Wahabi conspiracy, and it was probably framed, as the Lieutenant-Governor elsewhere remarks, "to meet that exigency."

At all events in 1878 the state of things must have been serious, if the description given by Sir Griffith Evans and Sir Charles Paul be a correct one. In that year Lord Lytton's Press Act (IX and XVI of 1878) was introduced to meet the evil, but it was repealed in less than four years, during the régime of his successor. As to the wisdom of this policy Sir Griffith Evans expressed no opinion. He merely said:—"The Vernacular Press Act was introduced to check license while leaving liberty. It worked well and without hardship, but was repealed in 1882. Since then the mischief has spread rapidly."

The Lieutenant-Governor, Sir Alexander Mackenzie, was more explicit when he said:—"Ever since the repeal of the Vernacular Press Act, the Native Press has been year by year growing more reckless in its mode of writing about the Government," though he made some notable exceptions. Speaking in 1898 his opinion was:—"We are now-a-days face to face with a far more insidious and equally dangerous style of writing and speaking."

It is clear then that the Government, as the Law Member had stated at the outset, were presented with two alternatives—the one, to restore the Press Act of 1878; the other to amend the law of sedition so as to make it more effective.

The former course was obviously repugnant. The Law Member openly avowed his reluctance to adopt it. He said:—"We have been urged both from official and private sources to re-enact

the Press law. But we are entirely opposed to that course. We do not want a Press in leading strings that can be made to dance to any tune that its censors may think fit to call. We want simply a free Press that will not transgress the law of the land. We are aiming at sedition and offences akin to it, and not at the Press."

In adopting the other course, how was the law to be made more effective? Obviously, by expressing it in plainer language so that it could not be misunderstood. If it was to be interpreted as the defence desired in the *Bangobasi* and Tilak cases, it was quite clear that it would never reach a large class of seditious writing, referred to by the Lieutenant-Governor of Bengal, which fell short of counselling open resistance, but nevertheless worked an infinite amount of mischief. Three High Courts had been opposed to that view, and held it to be erroneous. But nevertheless it was thought desirable that the law as codified should be plainly in accord with judicial opinion, and free from the liability of misconstruction, and this was accordingly done.

In conclusion His Excellency Lord Elgin, the President, spoke as follows:—"All that we, the Government, can say is that we desire the powers necessary to put down sedition. We ask for nothing more, but we can be satisfied with nothing less. We do not desire to have a law which bears oppressively on one particular section of the community. Only partial justice is done to us when it is said that we have abstained from proposing an enactment aimed at the Vernacular Press, because as a matter of fact our legislation is not a Press Act at all. It lays down certain rules of conduct, by observing which any member of the community can keep within the law, rules which are applicable to all and show favour to none."

The Bill amending section 124A of the Penal Code was then passed as Act IV of 1898.