CHAPTER II

HISTORICAL CONSIDERATIONS

1. THE ENGLISH LAW AND ITS INTRODUCTION INTO INDIA

(i) *The English Law*

In England a person is punishable for the publication of written or spoken word under three different laws. They are the Statute of Treason passed in the time of Edward III, the Treason-Felony Act of 1848 and the Common Law of Seditious Libel.

To compass or imagine the King's death is treason under the Statute of Edward III.[1] This apparently attempts to make a person liable for what passes through his mind. Thought can be established only by an overt act. An overt act is, therefore, an evidence of the intention. "To put the King in circumstances in which, according to the ordinary experience of mankind his life would be in danger" was considered sufficient to compass the King's death.[2] To say that the King could be deposed by Parliament and to incite people to sedition or rebellion were considered to be overt acts. These principles were sought to be applied against societies agitating for political reform in the last part of the eighteenth century.[3] An act of 1795 made an overt act itself sufficient to establish the offence.[4] Treason-Felony Act, 1848,[5] made certain acts felonies, which were until that time punishable as treason.

The common law of seditious libel as settled in the latter part of the eighteenth century may be said to constitute "any written censure upon public men for their conduct as such, or upon the laws, or upon the insitutions of the country."[6] Lord Holt, in his charge to the Jury in *R.* v. *Tutchin*,[7] said:[8]

1. Treason Act, 1351 25 Edw. III Stat. 5 C.2.
2. Holdsworth, *History of the English Law*, Vol. III pp. 317-18.
3. *Id.*, p. 318. See R.V. Thomas Paine, 22 St. Tr. 357 (1792).
4. Treason Act, 1795 (36 Geo. 3.C.7) This Act dealt with evidence and so the three laws given above are the only ones under which punishment is given.
5. 11 & 12 Vict. C.12.
6. Stephen, *History of the Criminal Law of England*, Vol. II, 348 (1883).
7. 14 St. Tr. 1095.
8. *Id.*, at p. 1128.

> "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any Government, than to endeavour to procure animosities, as to the management of it; this has always been looked upon as a crime, and no government can be safe without it be punished."

In substance, seditious libel was the publication of any written matter defamatory of the Government. Freedom of the press existed at the sufferance of the Government.

In procedure, the function of the jury was only to pronounce upon the fact of publication alleged to be made by the accused. It was for the judge to decide whether or not the matter was seditious.[9] An inference to be drawn from the facts is a question of law. As it was the function of the judge to decide questions of law, it was supposed that the judge alone could determine whether the matter was seditious.

The law in England thereafter has undergone two changes. The first took place under Fox's Libel Act, 1792.[10] Therefore the composite question, covering both the fact of publication and the guilt of the accused, was to be submitted to the verdict of the Jury. The conviction for the crime thus came to depend upon popular condemnation. The second was a change in the approach to the content of the law. The law of seditious libel was considered to take care of public disturbances which had certain tendencies more than the personal regulation of the reigning monarch. This was perhaps an inevitable concomitant of the electoral reform of 1832. However, after that date, the gist of the offence was considered to be the tendency of the publication to cause public disturbance and prosecutions for seditious libel became rare.[11] The trend in this direction may be seen even in 1837.[12] The law was definitely settled in *Reg.* v. *Sullivan.*[13] Fitzgerald, J. in his summing up to the jury in that case said:[14]

9. *Dean of St. Asaph's* case, 21 St. Tr. 847.
10. 32 Geo. III C.60.
11. See Stephen, *History of the Criminal Law of England*, Vol. II, p. 299 and Holdsworth, *History of the English Law*, Vol. VIII, p. 338.
12. See Littledale J.'s summing up to the Jury in *Reg.* v. *Collins*, 9 Car. & P. 456: 173 E.R. 910, 912.
13. (1869) 11 Cox C. C. 44.
14. *Ibid*, p. 54.

> "Sedition . . . embraces all those practices whether by word, deed, or writing, which are calculated to disturb the public tranquillity of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the government and to bring the administration of justice into contempt, and the very tendency of sedition is to invite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbances or to lead to civil war, to bring into hatred or contempt the sovereign and government, the laws or the constitution of the realm and generally all endeavours to promote public disorder."

Nothing short of incitement to disorder is an offence at the present time. Exciting ill-will between different classes of the King's subjects is one way of incitement to disorder.[15]. If the law of seditious libel were now to be restated, then it has to be done with reference to the tendency of the publication and not with reference to the supposed intention of the person publishing it.[16]

(*ii*) *The Introduction of the English Law of Sedition into India*

When a flourishing trade and fortunes of war attracted a large number of English people to India who were, generally speaking, concentrated in the three towns known as the Presidency Towns of Calcutta, Bombay and Madras, it was a natural consesequence of that historical setting that this English population sought and got the privilege to be governed by their own laws. Just as those settlements gradually over a period of about two centuries (1600-1800) got established, the factual process of the introduction of English law into those settlements also was a gradual and imperceptible process. It was only when the administration of English law in the English settlements in India began to affect life and liberty and title to lands and succession, that controversies arose around some very crucial points governing the subject. The exact date of the introduction of the Common law into India, its content (whether custom, statute and case-law) and the continuing validity in India of laws statutorily amended in England were peshaps the three foremost questions in this regard.

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15. See the definition of sedition in Russel, *The Law of Crimes*, 87 (9th ed.).
16. Stephen, *History of the Criminal Law of England*, Vol. II, p. 362.

The result of the controversy is this. Although the extent to which the English law applied in India could not be definitely ascertained, the press in the Presidency Towns was subjected to the stringent restrictions of the early English Law and did not have the benefit of the later statutory and judicial liberalisation in England.

2. DOUBT AS TO THE COMPETENCE OF INDIAN LEGISLATURE TO ENACT A LAW OF SEDITION

The Legislature constituted under the Charter Act of 1833 was charged with the task of enacting a criminal law for India. With this object in view, a Law Commission was appointed in which MaCaulay was one of the members. The Commission doubted the competence of the Indian Legislature to enact a general law of sedition.[17] Therefore, they suggested that the Imperial Parliament should take upon itself the task of enacting such law applicable to the whole Empire.[18] One of the restrictions to which the legislature was subjected to was contained in section 43 of the Charter Act, 1833. It said:

> "The Governor-General-in-Council shall not have the power of making any law or regulation which shall in any way affect the prerogative of the Crown, and the authority of the Parliament, and the Constitution or the rights of the said Company, or any part of the unwritten laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or Dominion of the said Crown over any part of the said territories."

In view of the above provision, the Law Commissioners thought that punishment under the English law affecting the prerogative of the Crown could not be reduced by the Indian Legislature. There is a close connection between the right of the sovereign to exact allegiance and the penal sanction of a law affecting allegiance. Therefore, they argued, the Parliament which withheld the one must also have withheld the other.

But the Law Commissioners proposed a section making excitation of feelings of disaffection against the Government established by law in the territories of the East India Company criminal. This they proposed in section 113 of the Draft Penal Code. It said:

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17. Note C appended to the Draft Penal Code.

18 *Ibid.*

"Whoever, by words, either spoken or intended to be read, or by signs, or by visible representations, attempts to incite feelings of disaffection to the Government established by law in the territories of the East India Company, among any class of people who live under that Government, shall be punished with banishment for life or for any term from the territories of the East India Company, to which fine may be added, or with simple imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation: Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government against unlawful attempts to subvert or resist is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within this clause."

This section did not attempt to penalise any conduct against the Queen and the British Government. Even after the enactment of this section, the English Law of Treason and Seditious Libel would have continued to be in force in the Presidency Towns.

3. PROBABLE REASONS FOR NOT ENACTING A SECTION IN TERMS OF THE SUGGESTION OF THE LAW COMMISSION

For some unaccountable reasons, the section was omitted when the Penal Code was enacted in 1860. Three possible reasons therefor may be visualised. Sir Barnes Peacock thought[19] that the omission was either due to forgetfulness or mistake and that it should have taken place after it was passed by the Committee of the House. This seems to be improbable after such discussion as was said to have taken place,[20] the criticisms it evoked,[21] the amendments proposed to the section[22] and the controversies involved.[23]

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19. Sir Barnes Peacock was the Chief Justice of the Supreme Court at Calcutta. He was also a member of the Governor-General's Council. For the most part of the proceedings of the Council in the course of the passing of the Penal Code, he presided over the House. This observation was made by him in his letter to Sir Henry Maine dated June 7, 1869.

20. See the letter referred to above.

21. Norton's and Huddlestan's criticisms to be found in the second Report of the Law Commissioners on the Penal Code.

22. See Bethune's Amendments recited in the above said letter of Sir Barnes Peacock.

23. See Note C of the Draft Penal Code (1837).

Mr. Natarajan in *The History of Indian Journalism* which is adopted as Part II of their Report by the Indian Press Commission said[24] that it should have been omitted on the advice of Lord Canning on the ground that it was a restriction on freedom of speech. No such reference may be found in the extracts of the eproceedings of the Governor-General-in-Council now available. When the discussions on the Penal Code Bill were taking place, for the most part, Sir Barnes Peacock presided over the meetings of the House and Lord Canning was absent. In view of the remarks he made on the Press Bill at the time of passing the Press Bill, 1857, it is not also probable that Lord Canning should have given the advice attributed to him above.

Reasons given by the Law Commissioners for the disability of the Council of India to enact a law of sedition required reconsideration after the transfer of power in 1858, when the Crown assumed direct administration of the Indian territories.[25] Although transfer of power took place, no substantial change was made in the formal provisions for administration of the Government of India and in particular section 43 of the Charter Act, 1833, already extracted, was still in force. Therefore the Council should have been undecided as to whether or not it had the competence to enact a law of sedition. This seems to be the more probable reason for the omission.

4. ENACTMENT OF SECTION 124-A IN THE PENAL CODE AND ITS REVISION

The omission was unnoticed until 1869. When *Wahabi conspiracy* case was going on and *Jehad* was preached by a section of the population against another, the Government of India noticed the omission. Eventually a Bill was drafted on the lines of section 113 of the Draft Code. It was piloted by Stephen and was passed as section 124-A of the Penal Code as part of the Act XXVII of 1870. It reads as follows:

> "Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or

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24. He said: "When the Indian Penal Code drawn up by Lord MaCauly came up for final adoption in 1860, Lord Canning suggested the omission of the section on the ground that it may be taken as an attack on the liberty of the Press, and when the Indian Penal Code was adopted in 1860 (Act XLV) the section was omitted." *History of Journalism in India*, p. 69.

25. Government of India Act, 1858.

attempts to excite feelings of disaffection against the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for any term, to which fine may be added, or with imprisonment for a term which may extend to three years. to which fine may be added, or with fine.

Explanation: Such a disapprobation of the measures of the Government as is compatible with a disposition to render obeidence to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempt to subvert or resist that authority, is not disaffection. Therefore making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within the section."

Again it may be noted that the section did not penalise conduct against the Queen or the British rule generally. The restrictions on the legislative competence of the Governor-General-in-Council in 1870 were the same as those existed in 1833, whereunder the Law Commissioners expressed a doubt on the validity of a law against sedition, if enacted by the Council of India.

Any provision wider than the one enacted was liable to objection for two reasons. First, the extent to which section 43 of the Charter Act operated as a fetter on the powers of the Council was not known.[26] Secondly, doubts were cast on the competence of a subordinate legislature to enact laws opposed to great constitutional documents like the *Magna Carta*[27].

It was generally believed that the explanation did cut down the meaning of the section.[28] Strachey J. in *Queen-Empress* v. *Bal Gangadhar Tilak*,[29] interpreted it as an exception. The Judicial Committee accorded its approval to the interpretation so placed.[30]

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26. The meaning of the section was never fully determined. For reasons for the uncertainty see *Government of India* by Sir Courtney Ilbert, 3rd ed. (1915) p. 235. Cf. also Note C attached to the Dreft Penal Code.
27. Per Norman J. *In re Ameer Khan* (1970-71) 6 Beng. L.R. 392.
28. See the opinion of Sir Barnes Peacock in his letter to Maine dated 7th June, 1869.
29. (1898) I.L.R.XXII Bom. 112.
30. (1898) I.L.R.XXII Bom. 528.

At that time, the Government of India were considering a proposal to amend the section and also to invest the Magistrates with a jurisdiction to try cases of minor importance.[31] But in view of the interpretation placed by the courts, they dropped the proposal to amend the section. But the Secretary of State suggested that it would be better to amend the section and invest the Magistrates with jurisdiction.[32] Accordingly section 124-A was re-enacted by the Act IV of 1898. It was adapted from time to time.[33] It now reads as follows:

> "Whoever by words, either spoken or written, or by signs or visible representations 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 shall be punished with transportation for life or any shorter term to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."
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> *Explanation* 1: The expression "disaffection" includes disloyalty and all feelings of enmity.
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> *Explanation* 2: Comments expressing disapprobation of 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 under this section."

Marginal note to the section described the offence as sedition and before the Constitution the acts mentioned therein were punishable whether directed against the Queen or the Government established by law. Noticeable omission from the draft suggested by

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31. The offence of section 124-A was triable only by a Sessions Court.

32. Judicial No. 44A dated the 16th December, 1897, from the India Office to the Governor-General-in-Council paragraph 3 states:

> "Your Government, however, admits that the Section is somewhat intricate, perplexing, and that its meaning might be elucidated by better drafting. I also observe that one of your proposals is that cases of slight importance, falling or supposed to fall within its provisions, shall be tried by tribunals possessing less skill and experience than a High Court or Court of Session. It is therefore desirable that the definitions of the offence should be made as simple and clear as possible, and I have come to the conclusion that the section should be revised and this being so, it seems better to make necessary alterations simultaneously with the change of jurisdiction."

33. Adaptation of Laws Orders 1937, 1948, and 1950.

Secretary of State[34] was the clause penalising promotion of feelings of hatred or ill-will between different classes of Indian subjects. But it was enacted into section 153-A of the Penal Code by the Act IV of 1898. The proposal to invest the Magistrates with jurisdiction to try minor cases of sedition was dropped when the Criminal Procedure Code was revised in 1898.[35]

5. CLASS HATRED AS A CRIME

Creating class hatred as a crime necessarily involved three kinds of policy considerations:

(1) As the British Government accepted the policy of proselytism and constituted ecclesiastical department of the Government of India,[36] legislation could not unduly interfere with the work of the Missionaries. Unless a person was made to hate his religion, the Missionaries argued,[37] conversion to another religion could not take place. This kind of hatred should not fall within the purview of the criminal law.

(2) After the seventies of the ninteenth century, the feelings between the Europeans and the Natives particularly in the Presidency Towns were tense. The Administrators generally thought that the Anglo-Indian papers were addressed to an enlightened section of the people, and therefore they should not be penalised, even if they make allegations amounting to class hatred. If the same allegations were to be made by vernacular newspapers, they should be punishable because they were addressed to an unintelligent section of the people.[38]

(3) The policy of divide and rule required that the communities within the body-politic should hate each other, but the hatred should not reach such an extent as to undermine law and order

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34. The Secretary of State's draft was as follows:

> "Whoever by words either spoken or intended to be read, or by signs, or visible representations or otherwise, excites or attempts to excite hatred, contempt, or disaffection towards the Queen or the Government, *or promote feelings of illwill between different classes of the Queen's subjects*, shall be punished with transportation for life, and for any term to which fine may be added or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine . (emphasis added).

35. Act V of 1898. See sec. 196.

36. Charter Act, 1813.

37. See the Second Report of the Law Commission on the Penal Code in the Chapter dealing with offences against religion.

38. This was the policy underlying the enactment of the Vernacular Press Act, 1878.

within the State which the Government in its own interest should protect. Under the Vernacular Press Act, 1878, attempt for the first time was made to forfeit the publication, or the press itself, or any security demanded to be deposited for printing matter in the vernacular press, if the matter was likely to provoke class hatred. The act was repealed in 1882.

Suggesting a revision of section 124-A in 1897, the Secretary of State wrote that the offence of class hatred might be made punishable under the section itself by inclusion of suitable words. He said :[39]

> "By the second addition the same penalty is assigned for stirring up racial and class animosity. This is treated in English Law as a species of seditious libel, and may appropriately be dealt with in section under consideration. Its insertion there will effectively attain one of the principal directives which Your Excellency's Government has in view."

On the recommendation of the Select Committee sedition as a political offence and the same as class hatred were separated and enacted into sections 124-A and 153-A of the Penal Code respectivey.[40] In England, reasons for both kinds being punishable under seditious libel are historical, it said. In India, in its view, they should be enacted at appropriate places. But the true reason seems to be this. Mere attempt to excite bad feelings against the Government was an offence under section 124-A as interpreted in *Tilak's* case. But the same kind of words uttered against a class should not be punishable as provoking class hatred. Whatever may be the reason, class hatred as an offence was created and enacted into the Code as section 153-A for the first time by Act IV of 1898. As adapted from time to time, in 1950, the section 153-A read as follows :

> "Whoever by words, either spoken or written, or by signs, or visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different class of the citizens of India, shall be punished with imprisonment which may extend to two years, or with fine or with both."
> *Explanation* : It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which

39. Judicial No. 44A from the Secretary of State to the Governor-General-in-Council dated the 16th December, 1897.

40. G. K. Roy, *Law Relating to Press and Sedition*,. pp 12-13 (1915).

are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of the citizens of India."

The above explanation was added during the discussion of the Bill in the Council.

In the post-Constitution period, tendency to accentuate the differences between groups and communities within India was found to be on the ascent.[41] To put an end to this tendency, the National Integration Committee suggested that section 153-A of the Code should be suitably amended.[42] By Act XLI of 1961, the section is replaced. It reads as follows:

"Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes, or attempts to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or

(b) Commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to distrust the public tranquillity, shall be punished with imprisonment which may extend to three years, or with fine or with both."

The main differences between the present and the repealed provisions are:

1. The explanation to the section is now omitted.

2. Punishment for the offence is enhanced.

3. Formerly, promoting or attempting to promote feelings of hatred or enmity between different classes of citizens was punishable. Now promoting or attempting to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities is punishable. It is significant that the language of the amended section does not contain the qualifying words "of citizens", in mentioning several groups.

4. Any act done by a person which is prejudicial to the maintenance of harmony between castes, communities or racial or langu-

41. See Lok Sabha Debates, Vol. LVII Col. 5884.

42. *Ibid.*

age groups and is disturbing to the public tranquility is punishable.

6. RELIGIOUS INSULT AS A CRIME

Provisions of section 153-A and of section 295-A of the Penal Code may overlap.[43] Section 295A was added by Act XXV of 1927.[44] The immediate reason for the enactment was the decision of the Lahore High Court in *Raj Paul* v. *Emperor*.[45] In that case the pamphlet in question contained a scurrilous satire on the founder of Islam. It was held that section 153-A made criminal attacks againt a community as it existed but was not intended to stop polemics against deceased religious leaders. This view of the law was questionable.[46] Nevertheless, to place the matter beyond any doubt section 295-A of the Code was enacted. It was adapted from time to time.

As part of the scheme of tightening up the law against class hatred and thus to reduce animosity between classes, Act XLI of 1961 amended section 295-A.[47] Two changes affected by the amendment are:

(1) The means by which the crime may be committed are enlarged, and

(2) Maximum punishment for the offence is enhanced.

The section now reads as follows:

"Whoever with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written or by visible representations or otherwise insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment of either description for a term which may be extend to three years, or with fine, or with both.

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43. Gour, *The Penal Law of India, Vol. I, 739 (7th ed. 1961)*

44. The Criminal Law Amendment Act, 1927

45. A. I. R. 1927 Lahore 590.

46. In *Devi Sharan Sharma* v. *Emperor*, A. I. R. 1927 Lahore 594, Broadway and Skemp JJ., said, "the writing of scurrilous and foul attack on such a religious leader would *prima facie* fall under the said section." But they have not referred to the earlier decision. In *Kali Charan Sharma* v. *Emperor*, A. I. R. 1927 All. 654, the Allahabad High Court dissented from the decision in A. I. R. 1927 Lahore 590 and held that an attack on a religious leader in pursuance of propaganda would certainly promote feelings of hatred and enmity between classes.

47. The Penal Code Amendment Act, 1961.