SEDITION LAWS IN INDIA: A GROWING THREAT TO FREE SPEECH

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"Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear."

Harry S. Truman

The Indian Constitution bestows upon its citizens the right to choose its own government and to depose it in instances of despotism or such acts which are contrary to public welfare. In a democratic country being run by representatives of the people, by the people and for the people, every citizen has a right to put forth his opinions, ideas, and grievances. Therefore, among the several fundamental rights, the most powerful one is the right to free speech and expression.[1] However, this right has been curbed by the sedition laws of the country.

Sedition laws are found in the following laws in India: Section 124-A[2] of the Indian Penal Code, 1860; Section 95[3] of the Code of

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1 Article 19 of The Constitution of India, 1950.

2 Section 124 A, as it stands today, reads:
"Sedition.-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, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added or with fine.
Explanation 1. - The expression "disaffection" includes disloyalty and all feelings of enmity.
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.
Explanation 3. - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

3 Section 95 reads:
"Power to declare certain publications forfeited and to issue search-warrants for the same.-(1) Where-
(a) any newspaper, or book, or

Criminal Procedure, 1973; Section 5[4], The Seditious Meetings Act, 1911; and Section 2(o)[5] & Section 13[6] the Unlawful Activities (Prevention) Act, 1967. Common to these laws is the idea of 'disaffection' that we have inherited from the British. Sedition laws assumed their most draconian form during the colonial era.

Back in the history, the famous targets of Section 124A of the IPC were the renowned nationalists Bal Gangadhar Tilak, Mahatma Gandhi and Annie Bessant. In 1897, Bal Gangadhar Tilak was convicted under the law for making a statement regarding the killing of Afzal Khan by the Maratha warrior-king Shivaji. Consequently, his statement incited the murder of two British officers. It was pointed out that the murders of the two officers were the direct result of the incitement caused by Tilak's speeches

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(b) any document,
wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the Indian Penal Code, the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any book or other document may be or may be reasonably suspected to be."

4 Section 5 reads: Power to prohibit public meetings:
The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquility.

5 Section 2(o) reads:
"unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representations or otherwise),-
(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or
(ii)which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or
(iii)which causes or is intended to cause disaffection against India;"

6 Section 13 reads:
"Punishment for unlawful activities.-(1) Whoever-
(a) takes part in or commits, or
(b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

and articles.[7] Tilak was again tried in 1909 for sedition in respect of certain articles published in the "Kesari" in May and June 1908.

Similarly, the most famous sedition trial after Tilak's was the trial of Mohandas Gandhi in 1922. Gandhi was charged, along with Shankerlal Banker, the proprietor of "Young India", for two articles published in the magazine. During his trial, Gandhi explained to the judge why from being a staunch royalist he had become an uncompromising disaffectionist and non-co-operator, and why it was his moral duty to disobey the law. In a stunning statement, Gandhi commented:
"Section 124 A, under which I am happily charged, is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen."[8]

Ironically, these barbaric laws have survived the demise of colonial rule and continue to haunt media personnel, political dissenters, human rights activists and public intellectuals across the country. While sedition laws are part of a larger framework of colonial laws that are now used liberally by both the central and state governments to curb free speech, the specificity of these laws lie in the language of 'disaffection' and severity of the punishment associated with them.

The sedition charges against medical practitioner and human rights worker Dr Binayak Sen have provoked outrage amongst a large section of Indian citizens as well as human rights activists globally in 2010. Mr Sen was accused of carrying and propagating messages from the imprisoned Maoist ideologue Narayan Sanyal. Sen's application to be released on bail was rejected by the Bilaspur High Court.

Arundhati Roy along with other political activists and media theorists were booked on charges of sedition by Delhi Police for their "anti-India" speech at a seminar on Kashmir titled 'Azadi: The Only Way' in 2010 .

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7 Available on http://bombayhighcourt.nic.in/libweb/historicalcases/cases/First_Tilak_Trial_-_1897.html Accessed on 7th March, 2016.

8 Mohandas Gandhi, cited from "Famous Speeches by Mahatma Gandhi; Great Trial of 1922," Gandhian Institute Bombay Sarvodaya Mandai and Gandhi Research Foundation, www.mkgandhi.org/speeches, accessed on 7th March, 2016.

Aseem Trivedi was arrested on charges of sedition for displaying cartoons during the Anna Hazare protest in the Bandra-Kurla complex (BKC) in November 2011.

And the most recent is the much talked about arrest of the students of Jawaharlal Nehru University, who have been charged for sedition for raising incendiary slogans at a public meeting held on the campus on the evening of 9th February concerning the hanging of Afzal Guru. The arrest of students has again taken face of widespread public criticism and protests by students and professors of JNU in Delhi.

The word "Sedition", per se has not been used in Section 124-A of the Indian Penal Code. It is only a marginal note to the Section and not an operative part but merely provides the name by which the crime defined in the section will be known.

Section 124-A of IPC reads as:
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, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

The definition does not precisely make it clear as to what acts would amount to sedition and what constitutes free speech. Also, most of the times the person accused with the offence easily takes the defence of 'intention' contending that he/she did not intent to stand against the government but only wanted to express their opinion.

Several formerly colonized countries have retained sedition laws even after their independence from colonial rule. In these countries, the crime of sedition has either been abolished or the courts have read it down to focus on an extremely narrow range of activities. In all the cases discussed below, either the judiciary or civil society has recommended the abolition of the crime. While countries like the United Kingdom and New Zealand have abolished the crime of sedition, in the United States and Nigeria, prosecutions for sedition have largely fallen into disuse. Further, in Australia and Malaysia, laws relating to sedition have attracted much criticism.

History of Sedition Laws in India

Sedition laws have had a long history in India. The judiciary has always given conflicting interpretations to the law both before and after independence. In the pre-Independence era, a number of landmark cases on sedition were decided by the Federal Court and the Privy Council. These two high judicial bodies have always been on different footings regarding the meaning and scope of sedition as a penal offence. After Independence, Sedition law was held constitutional subject to strict limitations.

Before Independence

Originally, the Section which defined 'Sedition' in IPC was Section 113 of Macaulay's Draft Penal Code of 1837-39, but later the section was omitted from the IPC as it was enacted in 1860. James Fitzjames Stephens, the architect of the Indian Evidence Act, 1872, has been quoted as saying that this omission was the result of a mistake[9]. Another reason for this omission was that the British government wished to adopt more wide-ranging strategies against the press including a deposit-forfeiture system and general powers of preventive action[10]. The British government introduced the draconian Section 124A as they felt the need for a specific section to deal with the offence.

The framework of this section was imported from various sources- the Treason Felony Act (operating in Britain), the common law of seditious libel and the English law relating to seditious words. The common law of seditious libel governed both actions and words that pertained to citizens and the government, as well as between communities of persons.[11]

Amongst the initial cases that invoked the sedition law was the trial of Jogendra Chandra Bose in 1891. Bose, the editor of the newspaper, Bangobasi, wrote an article criticising the Age of Consent Bill for posing a threat to religion and for its coercive relationship with Indians. His article also commented on the negative economic impact of British colonialism. Bose was prosecuted and accused of exceeding the limits of legitimate criticism, and inciting religious feelings. The judge rejected the

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9 W.R. Donogh, A Treatise on the Law of Sedition and Cognate Offences in British India, 1 (Calcutta: Thakker, Spink and Co., 1911).

10 R. Dhavan., Only the Good News: On the Law of the Press in India, 287-285 (New Delhi: Manohar Publications, 1987).

11 W.R. Donogh, A Treatise on the Law of Sedition and Cognate Offences in British India, p. 4 (Calcutta: Thakker, Spink and Co., 1911).

defence's plea that there was no mention of rebellion in his article. However, the proceedings against Bose were dropped after he tended an apology.[12]

Other famous sedition trials of the late 19th and the early 20th century were the trials of Bal Gangadhar Tilak, Annie Besant and Mahatma Gandhi. The moral question that Tilak raised was whether his trials constituted sedition of the people against the British Indian government *(Rajdroha)* or of the Government against the Indian people *(Deshdroha)*[13]. This was the similar question asked by other targets like Arundhati Roy who faced sedition charges for speaking at a seminar on Kashmir titled "Azaadi: The Only Way".

Tilak was first tried in 1897 for instigating the murder of two British officers by delivering speeches that referred to killing of Afzal Khan by Martha warrior Shivaji.[14] He was later released in 1898 after the intervention of internationally known figures like Max Weber on the condition that he would do nothing by act, speech, or writing to excite disaffection towards the government.[15] After the charges were framed against Tilak, Justice James Strachey, who presided over this case, rejected the defence's argument that the articles describing the suffering of people were consistent with loyalty. He further expanded the scope of the definition of this law and held that the term 'feelings of disaffection' meant 'hatred', 'enmity', 'dislike', 'hostility', 'contempt' and every form of ill will to the government. He equated disaffection to disloyalty, and held that the 'explanation' that followed the main section which made allowance for acts of disapprobation, would not apply to "any writing which consists not merely of comments upon government measures, but of attacks upon the government itself, its existence, it's essential characteristics, its motives, or its feelings towards people.".[16] In 1898, section 124A was amended to reflect Strachey's interpretation.

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12 Aravind Ganachari, "Combating Terror of Law in Colonial India: The Law of Sedition and the Nationalist Response" in Engaging Terror: A Critical and Interdisciplinary Approach, (eds.) M. Vandalos, G.K. Lotts, H.M. Teixera, A. Karzai & J. Haig, Boca Raton, Florida: Brown Walker Press, 2009 pp. 98-99.

13 Id. at .95

14 Q.E. v. Bal Gangadhar Tilak, ILR 22 Bom 12.

15 A.G., Noorani Indian Political Trials: 1775-1947, New Delhi: OUP, 2009, p. 122.

16 W.R. Donogh, supra, at 93- 110.

Later, the British government also enacted the Newspapers (Incitement to Offences) Act in 1908, a law that empowered District Magistrates to confiscate printing presses that published seditious material and The Seditious Meetings Act to prevent more than twenty people from assembling for meetings. In 1916, Tilak again faced sedition trial for orally disseminating seditious information through three of his speeches in 1916, one given in Belgaum and two in Ahmednagar. Jinnah skilfully argued that since Tilak had attacked the bureaucracy through his speeches and not the government, he could not be charged with sedition. The Court held that while the effect of the words in the speech would not naturally cause disaffection, i.e. hostility, enmity or contempt, they would create a feeling of disapprobation (which would not amount to sedition).[17]

In *Annie Besant* v. *Advocate General of Madras*[18] the Privy Council upheld Justice Strachey's interpretation and confiscated the deposit of Annie Besant's printing press as the case targeted the English bureaucracy. The case dealt with Section 4(1) of the Indian Press Act, 1910, that was similar to Section 124A. The Section said, any press used for printing/publishing newspapers, books or other documents containing words, signs or other visible representations that had a tendency to provoke hatred or contempt to His Majesty's government...or any class of subjects (either directly or indirectly, by way of inference, suggestion, metaphor, etc.) would be liable to have its deposit forfeited.

Another famous trial after Tilak's was the trial of Mahatma Gandhi in 1922 along with Shanker lal Banker, the proprietor of Young India for the three articles published in the weekly. Judge Strangman, who presided over the case, acknowledges the stature of Gandhi and his commitment to non-violence but expresses his inability to not hold him guilty of sedition under the law, and sentences him to six years imprisonment.[19]

Conflict in interpretation between the Federal Court & Privy Council

The conflict regarding the scope of the legal definition of sedition can be traced back to the colonial period. In defining sedition in the *Niharendu Dutt Majumdar case*[20], the Federal Court had held

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17 Aravind Ganachari, supra , at 163-184.
18 Annie Besant v. Advocate General of Madras, (1919) 46 IA 176.
19 Aravind Ganachari, supra, at 236.
20 Niharendu Dutt Majumdar v. The King Emperor, AIR 1942 FC 22.

that violent words by themselves did not make a speech or written document seditious and in order to constitute sedition, "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." The judges emphasized that if there is no incitement to violence, there is no sedition. However, the Privy Council over-ruled the decision in *Sadashiv case*[21] and reaffirmed the view expressed in Tilak's case to the effect that "the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small." Thus, according to the Privy Council, incitement to violence was not a necessary ingredient of the offence of the sedition.

Sedition and the Constituent Assembly

Ironically the sedition law which was used against our nationalist leaders continued to be the part of the draft of the Indian Constitution. While 'sedition' was included in the draft Constitution as a basis on which laws could be framed limiting the fundamental right to speech, in the final draft the Constituent Assembly moved an amendment to drop sedition from the list of restrictions on this fundamental right (Article 19(2)). This amendment was the result of the initiative taken by KM Munshi who said, "A line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State."[22] The framers of our Constitution were well aware that if sedition laws remained in force, it would lead to the death of free speech in independent India. Therefore, moving away from the colonial order, they removed sedition as a restriction to free speech under Article 19(2).

<u>After Independence</u>

The final draft of the Constitution did not contain sedition under the restrictions to the right under Article 19(1)(a). Jawaharlal Nehru was aware of the problems posed by the sedition laws to independent India. In the debates surrounding the First Amendment to the Indian Constitution, Nehru was severely

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21 King Emperor v. Sadashiv Narayan Bhalerao, (1947) L.R. 74 I.A. 89.

22 Constituent Assembly of India Part I Vol. VII, 1-2 December 1948, http://parliamentofindia.nic.in/ls/debates/vol7p16b.htm , accessed on 22nd March 2016.

criticized by the opposition leaders for compromising the right to free speech and opinion. Stung by two court decisions in 1949 that upheld the right to freedom of speech of opinions from the far left and the far right of the political spectrum, Nehru asked his Cabinet to amend Article 19(1)(a).

The two cases that prompted Nehru to do this were the Romesh Thapar case[23], in which the Madras government, after declaring the Communist party illegal, banned the left leaning magazine Crossroads as it was sharply critical of the Nehru government. The court held that banning a publication on the grounds of its threat to public safety or public order was not supported by the constitutional scheme since the exceptions to 19(1)(a) were much more specific and had to entail a danger to the security of the state. The second case related to an order passed by the Chief Commissioner, Delhi asking Organiser, the RSS mouthpiece, to submit all communal matter and material related to Pakistan to scrutiny. Nehru's government decided to amend the Constitution inserting the words 'public order' and 'relations with friendly states' into Article 19(2) and the word 'reasonable' before 'restrictions', which was meant to provide a safeguard against misuse by the government. However, sedition laws remained on the statute books post independence and was used repeatedly by both central and state governments.

In *Ram Nandan's Case*[24] the constitutional validity of section 124A of the IPC was challenged in an Allahabad High Court, where the court overturned the defendant's conviction and declared Section 124- A as unconstitutional.

However, this decision was overruled in 1962 by the Supreme Court in *Kedar Nath Singh v. State of Bihar*,[25] which held that the sedition law was constitutional. The 5 judges Constitutional bench made it clear that seditious speech and expression may be punished only if the speech is an 'incitement' to 'violence', or 'public disorder'. Thus the Supreme Court upheld the constitutionality of the sedition law, but at the same time curtailed its meaning and limited its application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. The judges observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality.

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23 Romesh Thapar v. Union of India, AIR 1950 SC 124.
24 Ram Nandan v. State, AIR 1959 All 101.
25 Kedar Nath Singh v. State of Bihar, 1962 AIR 955.

Recent Developments and Current Position of the Law of Sedition

Through the landmark judgement of Kedar Nath Singh, the Supreme Court made it clear that seditious speech and expression may be punished only if the speech is an 'incitement' to 'violence', or 'public disorder'. Lately, the Supreme Court has upheld the judgement in several cases.

In *Indra Das* v. *State of Assam*[26] and *Arup Bhuyan* v. *State of Assam*[27], the Supreme Court unambiguously stated that only speech that amounts to "incitement to imminent lawless action" can be criminalised. In *Shreya Singhal* v. *Union of India*[28], the famous 66A judgment, the Supreme Court drew a clear distinction between "advocacy" and "incitement", stating that only the latter could be punished. Also, advocating revolution or advocating even violent overthrow of the State, does not amount to sedition, unless there is incitement to violence, and more importantly, the incitement is to 'imminent' violence.[29]

Even after the above decisions by the Supreme Court, Section 124-A continues to be used against artists, social activists, intellectuals, cartoonists, media persons etc for criticising the governments, irrespective of whether the alleged seditious act or words constitute a tendency to cause public disorder or incitement to violence.

The conviction of Dr. Binayak Sen by the Raipur trial court; the charges of sedition threatened against Arundhati Roy, Varavara Rao and S.A.R. Geelani, who spoke at a seminar titled 'Azadi, the Only Way' organised by the Committee for the Release of Political Prisoners in Delhi; the charges against Manoj Shinde for accusing the then CM Narendra Modi for failure to tackle the flood situation in Gujrat and recently, the charges against the students of JNU for raising incendiary slogans at public meetings organised at the campus.

These instances have given an urgent call for the debate on the relevance of the law on Sedition. The particular injustice of convicting a person who has merely exercised his constitutional

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26 (2011) 3 SCC 380
27 (2011) 3 SCC 377
28 (2013) 12 SCC 73
29 Balwant Singh v. State of Punjab, AIR 1987 SC 1080

right to freedom of expression has attracted the nation's attention to the draconian colonial legacy.

While the SC has stayed firm in its opinion on sedition from Kedar Nath onwards,[30] the lower courts have continuously disregarded this interpretation of the law, most recently seen in the verdict against Dr Binayak Sen. A great divide has been seen to exist between the Supreme Court and the lower courts, and the judges seem ignorant of the position of law in many parts of the country. The Hindu while discussing cases under sedition in 2010 also highlights the bizarre case of a lecturer in Srinagar being arrested under section 124A because he added questions on the unrest in Kashmir Valley in an examination.[31] Another is the instance when, The Times of India's resident editor at Ahmedabad, Bharat Desai, faced charges along with a senior reporter and a photographer, for questioning the competence of police officials and alleging links between them and the mafia.[32] Back in 2012, award-winning political cartoonist Aseem Trivedi was arrested on sedition charges for running his website "Cartoons Against Corruption" as a critique of the corrupt practices followed by government officials. These are the instances where a distinction needs to be drawn between "anti-national incitement" and "mere political dissent."

The rampant misuse of the sedition law despite the Kedar Nath pronouncement has meant that there is a serious case for repealing this law. The above examples demonstrate that Article 19(1)(a) continues to be held hostage by Section 124A and there is completely no justification for a draconian law of this nature, created to suppress the voice of the largest democracy.

Conclusion

The above discussion makes it clear that, in an age of unenlightened patriotism, the danger to the life and liberty of Indian citizens who speak out against the government of the day is too real, as is evident from some of the recent happenings. Today, the sedition law seems to be colonial bogey which expects citizens not to show enmity, contempt or hatred towards the government established by law. Despite the strict construction

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30 Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3483; Balwant Singh v. State of Punjab, AIR 1995 SC 1785.

31 Priscilla Jebaraj, "Binayak Sen Among Six People Charged With Sedition in 2010", The Hindu, 1 Jan., 2011.

32 "Modi Throttling Freedom of Expression" , DNA India, 7 Jun., 2008.

adopted by the Supreme Court, the law enforcement agencies have always used it against artists, media personnel, intellectuals, *etc* for criticising the governments. In fact the Supreme Court itself did not apply these strict principles to the speech of Kedar Nath and his conviction. This hypocrisy of the Courts has led to the continued existence of the Sedition law in India.

Though, there is a need for such law to deter the activities that promote violence and public disorder, slapping sedition charges on mere spoken or written words is just not constitutional. In its current form, there is a grey area which lies between actual law and its implementation.

Words such as "excites or attempts to excite disaffection" or "brings into or attempts to bring into hatred or contempt" are unacceptably vague, and the further explanation that 'disaffection' includes "disloyalty and all feelings of enmity" compounds the problem. The provision in effect appears to demand 'affection' towards the government, except for a general exception allowing disapproval of governmental measures. Therefore, it is evident that often in penal law, vague and 'over-broad' definitions of offences result in mindless prosecutions based merely on the wording of the act that seems to allow both provocative and innocuous speeches to be treated as equally criminal, such provisions should be either narrowed down or struck down immediately.

At this juncture, it is important to point out that there is an urgent need to review the Supreme Court's judgement and declare Sedition unconstitutional as there is no need of a law which would oppress and suppress the democratic voices of the largest democracy of the world.

The following suggestions are made to bring this aspect of Indian laws in tune with most modern democratic frameworks including the United Kingdom, USA, and New Zealand.

1. Repeal Section 124A of the Indian Penal Code, 1860
2. Amend Section 95 of the Code of Criminal Procedure, 1973 and accordingly remove references to section 124A
3. Repeal the Prevention of Seditious Meetings Act, 1911
4. Amend Section 2(o) (iii) of the Unlawful Activities (Prevention) Act, 1967 to remove references to 'disaffection'
5. Repeal the Criminal Law Amendment Bill, 1961.