



# The Crime of Sedition: What Comes Next for an Archaic Law?

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**TRIALWATCH FAIRNESS REPORT**

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## ABOUT THE AUTHORS

**TrialWatch** is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Index evaluating countries' justice systems.

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# INTRODUCTION



The fate of the colonial-era crime of sedition and its analogues is at an inflection point. While there has been significant recent momentum in favor of repealing or reforming sedition laws, including in India,<sup>1</sup> Malawi,<sup>2</sup> Pakistan,<sup>3</sup> Singapore,<sup>4</sup> and Uganda,<sup>5</sup> in other jurisdictions they remain a key part of the authoritarian playbook.

The offense of ‘sedition’ was introduced in the sixteenth century in England specifically to suppress dissent, yet it still remains on the books in many legal systems. While sometimes defended on the ground that it is meant to criminalize incitement to violent rebellion,<sup>6</sup> sedition laws have often been used to charge journalists, activists, and other members of the public for their comments on government policies or for speech that government authorities do not like.

This report updates prior TrialWatch reporting on sedition laws around the world.<sup>7</sup> It focuses on developments across five jurisdictions: India, Pakistan, Hong Kong, Malaysia, and Thailand. All five jurisdictions have similar,<sup>8</sup> vague sedition laws, which for instance

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<sup>1</sup> See The Economic Times, New Criminal Laws Get Parliament Nod, Rajya Sabha Passes Bills with Voice Vote, Dec. 22, 2023 (“Stating that the sedition law has been scrapped, [Home Minister] Shah said the new laws provide for punishment of acts against the sovereignty and integrity of the country but not against criticism of the state.”), *available at* <https://economictimes.indiatimes.com/news/india/new-criminal-laws-get-parliament-nod-rajya-sabha-passes-bills-with-voice-vote/articleshow/106189307.cms>. *But cf. infra* (discussing reported flaws in the law replacing sedition).

<sup>2</sup> MISA Malawi, Members of Parliament in Malawi Remove Sedition as Criminal Offence, Nov. 22, 2022, *available at* <https://malawi.misa.org/2022/11/22/members-of-parliament-in-malawi-remove-sedition-as-criminal-offence/>.

<sup>3</sup> See Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023.

<sup>4</sup> Ministry of Home Affairs, Commencement of the Sedition (Repeal) Act 2021, Nov. 1, 2022, *available at* <https://www.mha.gov.sg/mediaroom/press-releases/commencement-of-the-sedition-repeal-act-2021/>.

<sup>5</sup> Southern Africa Litigation Centre, Uganda: Repeals Vagrancy, Sedition, and False News Offences, July 11, 2023 (noting that this legislation implemented a prior Ugandan court decision finding the sedition law unconstitutional), *available at* <https://www.southernafricalitigationcentre.org/2023/07/11/uganda-repeals-vagrancy-sedition-and-false-news-offences/>; *cf.* Adam M. Smith et al., TrialWatch Report, The Crime of Sedition: At the Crossroads of Reform and Resurgence, Apr. 2022 (discussing Uganda’s court decision), *available at* <https://cfj.org/wp-content/uploads/2022/04/Sedition-Report-April-2022.pdf>.

<sup>6</sup> *Cf.* discussion below of sedition laws that are limited to the criminalization of violence. This report does not take a position on those laws.

<sup>7</sup> Adam M. Smith et al., TrialWatch Report, The Crime of Sedition: At the Crossroads of Reform and Resurgence, Apr. 2022 [hereinafter TrialWatch Sedition Report], *available at* <https://cfj.org/wp-content/uploads/2022/04/Sedition-Report-April-2022.pdf>.

<sup>8</sup> Four of the five jurisdictions (all except Thailand) have laws that share a colonial heritage.

purport to criminalize speech that excites ‘disaffection.’ In all five jurisdictions, the law either is, or has historically been,<sup>9</sup> used to suppress freedom of expression.<sup>10</sup>

Developments in these five jurisdictions in the first half of 2024 have the potential either to limit sedition’s reach—or to further enable its use to quash dissent.<sup>11</sup> In India, for instance, the Supreme Court is expected in early 2024 to take up a long-standing constitutional challenge to the sedition law, after the Court put all sedition cases on hold in May 2022 (the Court has clarified that the enactment of a new criminal law will not affect this challenge).<sup>12</sup> In Pakistan, courts outside of Punjab will have to wrestle with whether to apply—or disregard—a 2023 decision by the Lahore High Court finding Pakistan’s sedition law unconstitutional.<sup>13</sup> In Hong Kong, a Court of Appeal is poised to deliver its judgment in the appeal of the first sedition conviction in nearly fifty years in March 2024.<sup>14</sup> In Malaysia, all eyes will be on whether the government in fact takes concrete steps to realize its promise to narrow the application of its sedition law.<sup>15</sup> And in Thailand, a Court of Appeals could hear the appeal of a woman who was convicted of

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<sup>9</sup> In December 2023, the Indian parliament passed a new criminal law and repealed its sedition law; however, this new law has not yet come into effect. The new criminal law, the Bharatiya Nyaya Sanhita, 2023, replaces the Indian Penal Code, 1860. As per Section 1(2) of the Bharatiya Nyaya Sanhita, 2023, it will come into force on a date the Central Government will decide through notification in the Official Gazette, and different dates may be appointed for different provisions of the law.

<sup>10</sup> TrialWatch Sedition Report, *supra*.

<sup>11</sup> *Cf.* Florida State University International Human Rights Advocacy Clinic & Southern Africa Litigation Centre, Revitalizing the Campaign Against Sedition and Insult Offenses in Africa, Oct. 2023 (arguing that “these laws are not misused but used throughout the world precisely for the purpose for which they were created: to quash criticism and political opposition against the government”), *available at* <https://www.southernafricalitigationcentre.org/wp-content/uploads/2023/10/Sedition-Policy-Memo-Final.pdf>.

<sup>12</sup> *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, May 11, 2022, ¶¶ 7-8. In September 2023, the Supreme Court of India clarified that the enactment of the new criminal law would “not obviate the need to adjudicate upon the constitutional validity of Section 124A [sedition] for the simple reason that any new legislation of a penal character cannot have retrospective effect.” See *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, Sept. 12, 2023.

<sup>13</sup> *Haroon Farooq v. Federation of Pakistan & others*, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023.

<sup>14</sup> Mandy Cheng, Hong Kong Activist Tam Tak-chi Launches Appeal Bid Against Conviction and Sentence Under Sedition Law, Hong Kong Free Press, July 5, 2023 *available at* <https://hongkongfp.com/2023/07/04/hong-kong-activist-tam-tak-chi-launches-appeal-bid-against-conviction-and-sentence-under-sedition-law/>.

<sup>15</sup> *Cf.* Rhea Yasmine Alis Haizan, Malaysia to Review and Limit Sedition Act to Provocations Against Royal Institution, Channel News Asia, July 26, 2023, *available at* <https://www.channelnewsasia.com/asia/malaysia-review-sedition-act-royal-institution-rulers-race-religion-legislation-3655011>.

sedition in late 2023 for Facebook posts advertising protests<sup>16</sup>—one of the first convictions for sedition alone in recent years.<sup>17</sup>

At the same time, these jurisdictions do not operate in a vacuum. In October 2023, the Judicial Committee of the UK Privy Council (which serves as the highest court for certain Commonwealth countries) decided a challenge to Trinidad & Tobago’s colonial-era sedition law in *Attorney General of Trinidad & Tobago v. Vijay Maharaj*.<sup>18</sup> While the Privy Council found that Trinidad & Tobago’s particular constitutional arrangement precluded review of the law, it also cited a decision from the Supreme Court of India to support the notion that sedition at common law should be interpreted to require “an intention to create public disorder or a tendency to cause violence.”<sup>19</sup> Yet it is that very decision that is currently being re-evaluated by the Indian Supreme Court. In turn, the courts in Hong Kong have indicated that they intend to consider the applicability of the Privy Council’s judgment in ongoing sedition cases.<sup>20</sup>

These inter-linkages highlight the need for Courts and the legal community in these jurisdictions to be apprised of recent shifts and developments in the status, interpretation, and application of sedition laws.

This report is based on TrialWatch monitoring of recent sedition cases in Pakistan, Hong Kong, and Thailand, as well as review of publicly-available case materials in sedition cases in India and Malaysia. These cases show just how critical the next steps in these jurisdictions will be for the right to freedom of expression: a lawyer risks life imprisonment for criticism of the army in Pakistan<sup>21</sup>; the leaders of a now-shuttered outlet in Hong Kong, who already spent nearly a year in prison before trial, may yet be convicted and given

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<sup>16</sup> Prachatai English, *Activist Sentenced to Prison for Sedition*, Nov. 24, 2023, *available at* <https://prachataienglish.com/node/10733>.

<sup>17</sup> As discussed *infra* in other sedition cases resulting in convictions, sedition has been charged alongside *lèse-majesté*. There is at least one other recent ‘sedition only’ conviction. Thiwakorn Withiton was reportedly convicted of sedition and violating the Computer Crimes Act for a message supporting a referendum on the retention or abolition of the monarchy. Thai Lawyers for Human Rights, *Opening the Verdict in the Case of ‘Tiwakorn’ Section 116 Posted Inviting a Referendum to Maintain or Abolish the Monarchy*. The Court of Appeals, Region 5, Suspended the Prison Sentence, July 20, 2023, *available at* <https://tlhr2014.com/archives/57616>.

<sup>18</sup> *Attorney General of Trinidad and Tobago v. Vijay Maharaj*, Privy Council Appeal No 0099 of 2021, 2023 UKPC 36, Oct. 12, 2023.

<sup>19</sup> *Attorney General of Trinidad and Tobago v. Vijay Maharaj*, Privy Council Appeal No 0099 of 2021, 2023 UKPC 36, Oct. 12, 2023, ¶ 38; *see also id.* ¶¶ 41-42 (discussing Canada’s sedition law); *id.* ¶ 35 (discussing the common law)

<sup>20</sup> *See* Hans Tse, *Verdict in Sedition Case Against Hong Kong Outlet Stand News Further Postponed Pending Higher Court Ruling*, Hong Kong Free Press, Nov. 15, 2023, *available at* <https://hongkongfp.com/2023/11/15/verdict-in-sedition-case-against-hong-kong-outlet-stand-news-further-postponed-pending-higher-court-ruling/>.

<sup>21</sup> *See* Shakeel Qarar & Umer Burney, *Human Rights Lawyer Imaan Mazari, Ex-Lawmaker Ali Wazir Arrested: Islamabad Police*, DAWN, Aug. 20, 2023, *available at* <https://www.dawn.com/news/1771196>.

more prison time for publishing opinion pieces critical of the authorities<sup>22</sup>; in Malaysia, an opposition political figure reportedly faces sedition charges for criticising the Malaysian Anti-Corruption Commission (MACC)<sup>23</sup>; and in the event her appeal is rejected, a woman in Thailand faces two years in prison for her alleged role in calling for peaceful protests.

This report highlights how the vague and subjective nature of sedition laws make them a tool of repression. Since the laws reviewed in this report do not require, on their face or as applied, a direct nexus between the allegedly seditious speech and likely violence, as established by international human rights law, they are often used to target political speech and further state narratives, rather than to protect against genuine threats to public order. The report finds that efforts to read sedition laws down or insist on procedural protections have not worked at stymying their use to suppress protected speech. In this regard, this report's lessons are relevant not only for the five jurisdictions discussed, and their sedition laws, but also for other repressive legislation that has the potential to criminalize protected speech.

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<sup>22</sup> See Rhoda Kwan & Emma Graham-Harrison, Hong Kong Media Outlet Stand News to Close After Police Raid, *Guardian*, Dec. 29, 2021, *available at* <https://www.theguardian.com/world/2021/dec/29/hong-kong-police-arrest-six-journalists-from-independent-media-outlet-stand-news>.

<sup>23</sup> V. Anbalagan, Bersatu's Razali Idris Charged with Sedition, *Free Malaysia Today*, Nov. 24, 2023, *available at* <https://www.freemalaysiatoday.com/category/nation/2023/11/24/bersatus-razali-idris-charged-with-sedition/>.



## A. INTRODUCTION

In December 2023, the Indian Parliament passed a new criminal law, repealing the Indian Penal Code, 1860, in an effort towards ‘decolonization.’<sup>24</sup> The new law (which has not yet come into effect) replaces the offence of “sedition” with “acts endangering sovereignty, unity and integrity of India.”<sup>25</sup> Even when the law does come into force, cases pending under the existing sedition law (which are currently stayed by the Supreme Court) will remain alive.<sup>26</sup> Therefore, review of the application of the sedition law in India is relevant to ongoing cases, to how the new law may be interpreted and applied, and to how sedition is or will be interpreted and applied in other jurisdictions.

Section 124-A of the Indian Penal Code, 1860 criminalized:

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.

There is only minimal definition of these terms; the law simply clarifies that “disaffection” includes disloyalty and all feelings of enmity.<sup>27</sup>

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<sup>24</sup> See The Economic Times, New Criminal Laws Get Parliament Nod, Rajya Sabha Passes Bills with Voice Vote, *supra* n.1. Experts have criticized this move as ‘symbolism,’ stating that the new law largely borrows language from the old ones and the changes endanger civil liberties. See Mihir Sharma, India’s New Criminal Law Puts Symbolism above Good Sense, Washington Post, Aug. 17, 2023, *available at* [https://www.washingtonpost.com/business/2023/08/17/india-criminal-law-is-modi-putting-symbolism-above-good-sense/533cb898-3d4c-11ee-aefd-40c039a855ba\\_story.html](https://www.washingtonpost.com/business/2023/08/17/india-criminal-law-is-modi-putting-symbolism-above-good-sense/533cb898-3d4c-11ee-aefd-40c039a855ba_story.html); Anup Surendranath & Zeba Sikora, New Criminal Law Bills Endanger Civil Liberties, Indian Express, Dec. 14, 2023, *available at* <https://indianexpress.com/article/opinion/columns/new-criminal-law-bills-endanger-civil-liberties-9067305/>.

<sup>25</sup> Section 152, the Bharatiya Nyaya Sanhita, 2023. Several have argued that the new offence is as vague and in some ways more draconian than the sedition law. See P39A Criminal Law Blog, Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023, Sept. 29, 2023, *available at* <https://p39ablog.com/2023/09/criminal-law-bills-2023-decoded-8-sedition-recast-implications-of-clause-150-of-the-bns-2023/>; Sravasti Dasgupta, Modi Govt Unveils Controversial New Criminal Bills: ‘Sedition’ Law to Change But in Name Only, The Wire, Aug. 11, 2023, *available at* <https://thewire.in/government/sedition-law-repealed-three-new-bills-tabled-in-parliament-to-replace-criminal-laws>; Apurva Vishwanath, Sedition Law Repealed or Strengthened in a New Form? What the New IPC Bill Says, Indian Express, Aug. 13, 2023, *available at* <https://indianexpress.com/article/explained/explained-law/sedition-law-repealed-or-strengthened-in-a-new-form-ipc-bill-8887864>.

<sup>26</sup> Savings Clause, Section 358, Bharatiya Nyaya Sanhita, 2023. As per this clause, cases pending under the Indian Penal Code will continue despite repeal of the law.

<sup>27</sup> Section 124-A, Indian Penal Code, Explanation 1.



The law further stipulates that expressing disapprobation (disapproval)<sup>28</sup> of the measures or actions of the Government “with a view to obtain[ing] their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection” does not constitute sedition.<sup>29</sup> The law carried the potential of imprisonment for life.<sup>30</sup>

The Supreme Court of India upheld the constitutionality of the sedition law in 1962, while limiting its application to situations where the allegedly seditious words or acts have the “tendency or intention of creating public disorder or disturbance of law and order.”<sup>31</sup>

In 2021, a number of accused persons and groups filed petitions before the Indian Supreme Court, seeking review of this judgment and arguing, among other things, that this limitation had proven ineffectual, and thus that the law should instead be struck down as unconstitutional. On May 11, 2022, the Court stayed all “pending trials, appeals and proceedings with respect to the charge framed under Section 124A of IPC.”<sup>32</sup> The Court further directed that no First Information Reports (‘FIRs’)<sup>33</sup> be registered by Central or State Governments, and that Governments refrain from “continuing any investigation or taking any coercive measures by invoking Section 124A.”<sup>34</sup>

The Supreme Court of India is scheduled to take up the constitutionality of the sedition law again in early 2024. The Court indicated that the constitutionality of Section 124-A will be decided irrespective of the new law, since several cases remain pending under Section 124-A.<sup>35</sup>

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<sup>28</sup> Under Indian law, “[d]isaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval.” *Queen-Empress v. Jogendra Chunder Bose and Ors.*, (1892) ILR 19 Cal 35.

<sup>29</sup> Section 124-A, Indian Penal Code (IPC), Explanations 2 and 3.

<sup>30</sup> Section 124-A IPC may be punishable with (i) imprisonment for life, to which fine may be added; (ii) imprisonment for up to three years; or (iii) fine alone. The trial court has complete discretion over which of these punishments to impose.

<sup>31</sup> *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769, ¶ 26.

<sup>32</sup> *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, May 11, 2022.

<sup>33</sup> A First Information Report is a written document prepared by the police when they receive information about the alleged commission of a ‘cognizable’ offence (an offence where the police can arrest without warrant). It sets out the details of the offence as per information received, the charges, and the name of the accused person (if known). The police can only start an investigation in a cognizable case upon the registration of an FIR; it thus sets the criminal justice process in motion. See Commonwealth Human Rights Initiative, *First Information Report (FIR) and You*, available at <https://www.humanrightsinitiative.org/publications/police/fir.pdf>.

<sup>34</sup> *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, May 11, 2022 (framed as the Court’s ‘hope and expectation’).

<sup>35</sup> *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/202, Sept. 12, 2023.

This Part first surveys the history and application of the sedition law in India in greater depth, and then goes on to describe recent developments—both in the Supreme Court and Parliament.

## **B. HISTORY, GENERAL TRENDS & LEGAL INTERPRETATION OF THE SEDITION LAW IN INDIA**

During the British colonial regime, Section 124-A was “extensively employed by the British to suppress the Indian nationalist movement.”<sup>36</sup> Those prosecuted under the law included Mahatma Gandhi and India’s first Prime Minister, Jawaharlal Nehru.<sup>37</sup> During this time, Courts held that the mere attempt to excite *feelings* of “hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government” would be enough to constitute sedition, and that an intention or attempt to induce any *course of action*, such as “rebellion or outbreak or forcible resistance” was not necessary.<sup>38</sup>

The Constitution of India was adopted in 1950. Thereafter, Section 124-A was challenged before the Supreme Court of India on the ground that it violated the right to freedom of speech and expression guaranteed by Article 19 of the Constitution. In *Kedar Nath Singh v. State of Bihar*,<sup>39</sup> the Court held that a literal reading of the law—the approach of the Privy Council to that date—would violate Article 19, and therefore the “tendency or intention to create public disorder” had to be read into Section 124-A.<sup>40</sup> Thus, from that point forward, only speech that had the “tendency or intention of creating public disorder or disturbance of law and order” could constitute sedition.<sup>41</sup> Indeed, the Court specifically held that “comments, however strongly worded, expressing disapprobation of actions of the Government without exciting ... the inclination to cause public disorder by acts of violence” were not criminalized by the law.<sup>42</sup>

Since *Kedar Nath*, Indian courts have also offered additional guidance. In interpreting the ‘intention’ requirement for sedition, Courts have held that “the utterances or the speech

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<sup>36</sup> Law Commission of India, 279th Report on ‘Usage of the Law of Sedition,’ Apr. 2023, ¶ 4.1.

<sup>37</sup> Raghu Malhotra, Explained: What Tilak, Gandhi and Nehru Said About IPC Section 124A, the Law on Sedition, Indian Express, May 13, 2023, *available at* <https://indianexpress.com/article/explained/explained-tilak-gandhi-nehru-sedition-law-7914348/>; Utkarsh Anand, The Sedition Story: Complicated History of Sec 124A, Hindustan Times, July 19, 2023, *available at* <https://www.hindustantimes.com/india-news/the-sedition-story-complicated-history-of-sec-124a-101626370928612.html>.

<sup>38</sup> *Queen Empress v. Bal Gangadhar Tilak* (1898) ILR 22 Bombay 112, *upheld in* *King-Emperor v. Sadashiv Narayan Bhalero*, (1947) L.R. 74 I.A. 89.

<sup>39</sup> 1962 Supp (2) SCR 769.

<sup>40</sup> *Id.* ¶ 25.

<sup>41</sup> *Id.* ¶ 26.

<sup>42</sup> *Id.* ¶ 24.

made should be looked at holistically and fairly without giving undue weight to isolated passages.”<sup>43</sup>

Despite the restrictions imposed by *Kedar Nath* in 1962, Section 124-A has been used to target critics of the government for non-violent speech<sup>44</sup>—and at scale. According to the digital media company Article 14, the use of the sedition law has increased in the last decade: 13,000 individuals have faced sedition charges from 2010-2021 in India.<sup>45</sup> Their research shows that many of these cases were filed by the police in disregard of the Supreme Court ruling in *Kedar Nath*. Thus, for instance, sedition charges have been filed for holding a ‘Free Kashmir’ poster,<sup>46</sup> wearing t-shirts of the Pakistani cricket team,<sup>47</sup> raising ‘freedom’ slogans in a demonstration against the cancellation of student union elections,<sup>48</sup> not standing up for the national anthem,<sup>49</sup> and even for comments made in a private phone conversation.<sup>50</sup>

Moreover, people have been charged with sedition for criticizing individual politicians. Thus, 149 individuals were reportedly accused of sedition based on allegedly critical remarks about Prime Minister Modi, while 144 were accused for remarks about Chief Minister of the State of Uttar Pradesh, Yogi Adityanath.<sup>51</sup> In one such case, a complaint was filed against 50 celebrities who wrote to the Prime Minister expressing concerns

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<sup>43</sup> Pankaj Butalia v. Central Board of Film Certification and Ors., 221 (2015) DLT 29.

<sup>44</sup> Lubhyathi Rangarajan, A Decade of Darkness: Our New Database Reveals How A Law Discarded By Most Democracies Is Misused In India, Article 14, Feb. 4, 2022 [hereinafter Decade of Darkness], *available at* <https://article-14.com/post/a-decade-of-darkness-our-new-database-reveals-how-a-law-discarded-by-most-democracies-is-misused-in-india-61fcb8768d15c>.

<sup>45</sup> *Id.*

<sup>46</sup> Alithea Stephanie Mounika, Sedition Charges Filed Against Protester at Mysuru University for ‘Free Kashmir’ Poster, The News Minute, Jan. 9, 2020, *available at* <https://www.thenewsminute.com/karnataka/sedition-charges-filed-against-mysuru-university-students-holding-free-kashmir-poster-115803>.

<sup>47</sup> Muzamil Jaleel, UP Police Register Case Against 10 Boys for Wearing T-shirts of Pakistan Cricket Team, The Indian Express, Nov. 11, 2014, *available at* <https://indianexpress.com/article/india/india-others/up-police-register-case-against-10-boys-for-wearing-t-shirts-of-pakistan-cricket-team/>.

<sup>48</sup> The New Indian Express, UP: College Students Booked for Sedition for ‘Raising’ Anti-National Slogans, Dec. 28, 2020, *available at* <https://www.newindianexpress.com/nation/2020/Dec/28/up-college-students-booked-for-sedition-for-raisinganti-national-slogans-2242161.html>.

<sup>49</sup> India Today, Student Faces Life Imprisonment for Not Standing During National Anthem, Oct. 8, 2014, *available at* <https://www.indiatoday.in/india/story/kerala-student-life-in-jail-for-not-standing-during-national-anthem-209076-2014-10-08>.

<sup>50</sup> Bashaarat Masood, Ladakh Cong Councillor Booked over ‘Seditious Phone Conversation’, The Indian Express, June 20, 2020, *available at* <https://indianexpress.com/article/india/ladakh-police-congress-councillor-booked-for-leaked-phone-calls-6467506/>.

<sup>51</sup> Sakshi Rai & Nikita Bansal, India’s Spiralling Sedition Crisis & Why A Dilution of The Law Will Not Prevent Its Misuse, Article 14, Dec. 2, 2021, *available at* <https://www.article-14.com/post/india-s-spiralling-sedition-crisis-why-a-dilution-of-the-law-will-not-prevent-its-misuse-61a83b9694436>.

about the increase in mob-lynching; as per the complaint, this letter “tarnished the image of the country and undermined the impressive performance of the prime minister.”<sup>52</sup>

Persons targeted under the law have included journalists, activists, and protestors, particularly those from marginalized communities.<sup>53</sup> Sedition charges have been filed against indigenous communities (*adivasis*) for demanding land rights guaranteed to them under the Constitution,<sup>54</sup> against Muslim protestors raising their voices against a controversial citizenship law,<sup>55</sup> and against villagers protesting the construction of a nuclear power plant in their village.<sup>56</sup>

Among recent noteworthy cases, student activist Sharjeel Imam faces five sedition cases across different states for speeches he made against the controversial Citizenship Amendment Act and the treatment of Muslims in India.<sup>57</sup> Sedition cases were also filed against a former Minister and several prominent journalists across five different states for reporting and sharing tweets about the death of a farmer during the Delhi farmers’ protests in 2020-2021.<sup>58</sup> And in February 2021, 22-year old environmental activist Disha Ravi was

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<sup>52</sup> Hindustan Times, FIR Lodged Against 49 Celebrities Who Wrote Open Letter to PM Modi on Mob Lynching, Oct. 4, 2019, *available at* <https://www.hindustantimes.com/bollywood/fir-lodged-against-49-celebrities-who-wrote-open-letter-to-pm-modi-on-mob-lynching/story-CNtoaHMDf3oqbTHwvujbzH.html>.

<sup>53</sup> 39% of 279 sedition cases filed by the UPA II government (2010-2014) were against those protesting a nuclear plant in Tamil Nadu. The 519 sedition cases filed by the Modi government (2014-2020) “were largely against protest movements, journalists, intellectuals.” Decade of Darkness, *supra*.

<sup>54</sup> Supriya Sharma, 10,000 People Charged with Sedition in One Jharkhand District. What Does Democracy Mean Here?, Scroll.in, Nov. 19, 2019, *available at* <https://scroll.in/article/944116/10000-people-charged-with-sedition-in-one-jharkhand-district-what-does-democracy-mean-here>.

<sup>55</sup> Dharendra K Jha, The Law As A Communal Weapon Of The State: Why UP’s Muslim CAA Protestors Face Sedition Cases, Article 14, Feb. 7, 2022, *available at* <https://www.article-14.com/post/the-law-as-a-communal-weapon-of-the-state-why-up-s-muslim-caa-protestors-face-sedition-cases--62008af59e173>.

<sup>56</sup> Arun Janardhanan, 8,856 ‘Enemies of State’: An Entire Village in Tamil Nadu Lives Under Shadow of Sedition, Indian Express, Sept. 12, 2016, *available at* <https://indianexpress.com/article/india/india-news-india/kudankulam-nuclear-plant-protest-sedition-supreme-court-of-india-section-124a-3024655/>.

<sup>57</sup> India Today, Supreme Court Seeks Delhi Govt’s Response on Plea of Sharjeel Imam for Clubbing of 5 FIRs, May 1, 2020, *available at* <https://www.indiatoday.in/india/story/supreme-court-seeks-delhi-govt-s-response-on-plea-of-sharjeel-imam-for-clubbing-of-5-firs-1673219-2020-05-01>. These cases also include other charges such as ‘promoting enmity between groups.’ Since the Supreme Court stayed the sedition law in May 2022, these cases are presumably proceeding under these other charges.

<sup>58</sup> Journalists Paresh Nath, Rajdeep Sardesai, Mrinal Pande, Vinod Jose, Anant Nath, Zafar Agha and former Minister Shahshi Tharoor were implicated in FIRs filed across 5 different states – Delhi, Haryana, Uttar Pradesh, Madhya Pradesh and Karnataka. See Indian Express, R-Day Violence, Shahshi Tharoor, Rajdeep Sardesai Move SC over FIRs on ‘Misleading’ Tweets, Feb. 4, 2021, *available at* <https://indianexpress.com/article/india/r-day-violence-shashi-tharoor-rajdeep-sardesai-move-sc-over-firs-on-misleading-tweets-7172496/>.

arrested under sedition charges for sharing a ‘digital toolkit’ for the farmers’ protests on X (formerly Twitter).<sup>59</sup>

In 1973, Section 124-A became a cognizable offence, meaning that the police could register an FIR under the Section and arrest suspected persons<sup>60</sup> without permission from a magistrate.<sup>61</sup> This, coupled with the potential that police may not wish to decide whether allegedly seditious words or acts are protected by *Kedar Nath*—one policeman, for instance, reportedly said, “Let the courts decide if they are innocent or guilty of sedition. It is our job to file cases if there is a complaint”<sup>62</sup>—means FIRs may be filed, and arrests made, indiscriminately. According to Article 14, those arrested on sedition charges spend, on average, between 50 and 200 days in prison before getting bail.<sup>63</sup>

Since sedition is punishable with up to life imprisonment, magistrate courts, before whom arrested persons are produced, are not authorized to grant bail;<sup>64</sup> the accused must approach the higher-level Sessions Court in the first instance,<sup>65</sup> and procedural guarantees applicable for offences punishable with less than seven years’ imprisonment, such as the police having to serve a notice for appearance before arrest, do not apply.<sup>66</sup> Sessions courts often deny bail in sedition cases, compelling accused persons to

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<sup>59</sup> Columbia University, Global Freedom of Expression, The Case of Disha A. Ravi, *available at* <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-disha-a-ravi/>. The case sparked global outcry, and the trial court granted her bail relying on *Kedar Nath*, stating that the “‘offence of sedition cannot be invoked to minister to the wounded vanity of the governments.’” *Id.*

<sup>60</sup> As explained above, a cognizable offence is defined as one where the police can make arrests without warrant. See Section 2(c), Code of Criminal Procedure, 1973. For all cognizable offences, the police can register an FIR, commence investigations, and arrest persons during the investigation, without permission of a magistrate.

<sup>61</sup> Utkarsh Anand, The Sedition Story: Complicated History of Sec 124A, *Hindustan Times*, July 19, 2023 (“In the new Code of Criminal Procedure, 1973, which came into force in 1974 and repealed the colonial-era 1898 Code of Criminal Procedure, sedition was made a cognisable offence authorising the police to make arrests without a warrant.”), *available at* <https://www.hindustantimes.com/india-news/the-sedition-story-complicated-history-of-sec-124a-101626370928612.html>.

<sup>62</sup> Mohit M. Rao, Karnataka Has More Sedition Cases Based on Social-Media Posts Than Any State. Most Are Illegal, *Article 14*, July 13, 2021, *available at* [https://www.article-14.com/post/karnataka-has-more-sedition-cases-based-on-social-media-posts-than-any-state-most-are-illegal-60ecf64da7945\\_](https://www.article-14.com/post/karnataka-has-more-sedition-cases-based-on-social-media-posts-than-any-state-most-are-illegal-60ecf64da7945_).

<sup>63</sup> *Decade of Darkness*, *supra*. The former figure is based on the average time for a trial court to grant bail; the latter figure, where bail needs to be sought from a High Court.

<sup>64</sup> Section 437, Code of Criminal Procedure, 1973.

<sup>65</sup> The hierarchy of courts in India for criminal cases is: magistrate courts (which have the power to try and grant bail for offences punishable with up to 7 years); Sessions Courts (which have the power to try and grant bail for all offences); High Courts (which are appellate courts and have original power to grant bail for all offences); and the Supreme Court (which is the highest appellate court).

<sup>66</sup> In *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273, the Supreme Court laid down protections against arrest for offences punishable with less than seven years’ imprisonment.

approach the High Court. Indeed, long periods spent in custody is a common justification for High Courts to grant bail in sedition cases.<sup>67</sup>

The combination of little scrutiny at the initial stages, coupled with the difficulty in obtaining bail, has significant consequences. For instance, in November 2018, electrician Feroz Ahmad was reportedly arrested on charges including sedition for forwarding a WhatsApp message that allegedly hurt the feelings of a Hindu right-wing organization.<sup>68</sup> According to Article 14, “[w]hen the chargesheet was filed, the police dropped section 124A of the IPC [the sedition charge], thus clearing the way for his bail from the district court, but the 70-odd days that he had to spend in jail destroyed his business and pushed his family to penury.”<sup>69</sup>

Under India’s Code of Criminal Procedure, the central or a state government must ‘sanction’ sedition cases before they can go to trial.<sup>70</sup> Courts have held that the sanctioning authority must show “application of mind,” i.e., not rubberstamp a case, and that there is a “proper case to put a party on trial.”<sup>71</sup> Yet such rigor is not always applied, with the Delhi Government reportedly stating, for instance, that “[i]t is not for governments to decide on the merits of such cases” while permitting a politically-sensitive case to go forward.<sup>72</sup>

Most cases that go to trial end in acquittals. According to Article 14, the National Crime Records Bureau found that of 559 persons arrested for sedition from 2014-2020, only 1%

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<sup>67</sup> See <https://sedition.article-14.com/#> (“[T]rial courts tended to reject bail applications more than they allowed them. At the high court, for every bail application rejected, seven were granted.”).

<sup>68</sup> Dharendra K Jha, *The Law as a Communal Weapon of The State: Why UP’s Muslim CAA Protestors Face Sedition Cases*, Article 14, Feb. 7, 2022, *available at* <https://www.article-14.com/post/the-law-as-a-communal-weapon-of-the-state-why-up-s-muslim-caa-protestors-face-sedition-cases--62008af59e173>.

<sup>69</sup> Dharendra K Jha, *The Law As A Communal Weapon Of The State: Why UP’s Muslim CAA Protestors Face Sedition Cases*, Article 14, Feb. 7, 2022, *available at* <https://www.article-14.com/post/the-law-as-a-communal-weapon-of-the-state-why-up-s-muslim-caa-protestors-face-sedition-cases--62008af59e173>.

<sup>70</sup> As per Section 196 of the Code of Criminal Procedure, 1973, government sanction is only needed at the stage of ‘cognizance’. ‘Cognizance’ is a stage *after* the police conclude their investigation and submit the charge sheet before the Court. The Court has to determine whether to take ‘cognizance’ (judicial notice) of the offense in the charge sheet, after which it can issue summons to the defendant to answer the case against them. See Supreme Court of India, *R.R. Chari v. State of U.P.*, (1951) SCR 312, ¶ 7.

<sup>71</sup> Nishant Sirohi, *Sedition and State Sanction: Why the Metropolitan Magistrate Refused to Accept Charge-Sheet by Delhi Police against JNU Scholars Kanhaiya, Umar, Anirban, The Leaflet*, Jan. 29, 2019 (Courts have held that “for a valid sanction, it is necessary that the basic facts constituting the offence must be already placed before the sanctioning authority. The sanction must show the application of mind and should not amount to signing the order mechanically.”), *available at* <https://theleaflet.in/sedition-and-state-sanction-kanhaiya-kumar-jnu-delhi-police-government-indian-penal-code/>.

<sup>72</sup> Scroll.in, *JNU Sedition Case: Delhi Government Gives Permission to Prosecute Kanhaiya Kumar, Others*, Feb. 28, 2020, *available at* <https://scroll.in/latest/954667/jnu-sedition-case-delhi-government-gives-permission-to-prosecute-kanhaiya-kumar-others>.

had been convicted.<sup>73</sup> And yet accused persons suffer “years of legal expenses, a prolonged investigation by the authorities, multiple court appearances and even incarceration during the trial.”<sup>74</sup>

As a result, numerous cases alleging broad flaws in the law and its implementation have been heard by courts since the *Kedar Nath* decision was handed down.

## **C. RECENT DEVELOPMENTS: GUIDELINES, CONSTITUTIONAL CHALLENGE & STAY, REPEAL AND NEW LAW**

In November 2011, political cartoonist Assem Trivedi was charged with sedition for publishing cartoons on corruption, which allegedly mocked India’s national emblem and constitution.<sup>75</sup> While the police eventually dropped the sedition charge, a petition was filed before the Bombay High Court seeking to ensure the sedition law would not be invoked in an arbitrary manner.<sup>76</sup> The Court reiterated the *Kedar Nath* standards, and disposed of the petition based on the government’s undertaking that the police would obtain a legal opinion from the law officer of the district and the Public Prosecutor to ensure a case meets those standards, presumably after the registration of the FIR.<sup>77</sup>

In 2016, another affirmative challenge was filed by the NGO Common Cause before the Indian Supreme Court seeking guidelines requiring senior police officials to certify that any alleged “seditious act” had the tendency or intention to incite violence or disorder *before* an FIR could be registered or arrest made.<sup>78</sup> The Court refused to pass specific guidelines, but reiterated that the authorities must comply with *Kedar Nath*.<sup>79</sup>

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<sup>73</sup> Decade of Darkness, *supra*. Article 14 also found that of 126 people for whom trials were concluded, 98 were acquitted of all charges, 13 of charges of sedition only, and 13 were convicted. As per data maintained by the National Crime Records Bureau, the conviction rate for cognizable crimes more broadly during 2020 was 73.4%. See Press Information Bureau, Conviction Rate-Ministry of Home Affairs, Feb. 8, 2022, *available* at

<https://pib.gov.in/PressReleaselframePage.aspx?PRID=1796564#:~:text=As%20per%20data%20maintained%20by,66.6%2C%2066.4%20and%2073.4%20>.

<sup>74</sup> Jacob Mchangama & Raghav Mendiratta, Time to End India’s War on Sedition, *Lawfare*, June 25, 2021, *available* at <https://www.lawfaremedia.org/article/time-end-indias-war-sedition>.

<sup>75</sup> Human Rights Watch, India: Drop Sedition Charges Against Cartoonist, Oct. 12, 2012 (“Such as the one portraying the national emblem with blood-thirsty wolves instead of lions, and with the words ‘Corruption Triumphs’ instead of ‘Truth Alone Triumphs.’”), *available* at <https://www.hrw.org/news/2012/10/12/india-drop-sedition-charges-against-cartoonist>.

<sup>76</sup> *Sanskar Marathe v. State of Maharashtra and Ors.*, 2015 CriLJ 3561.

<sup>77</sup> *Sanskar Marathe v. State of Maharashtra and Ors.*, 2015 CriLJ 3561.

<sup>78</sup> *Common Cause v. Union of India*, (2016) 15 SCC 269.

<sup>79</sup> *Common Cause v. Union of India*, (2016) 15 SCC 269.

In 2020, the Supreme Court provided interim protection to two news channels that were implicated in a sedition FIR for airing criticism of the government's COVID-19 measures, remarking that "it is time we define the limits of sedition."<sup>80</sup>

In 2021, several petitions challenging the constitutionality of the sedition law were filed by individual journalists, journalists' bodies, civil society groups, politicians and others.<sup>81</sup> Broadly, these petitions allege that in light of developments in the Supreme Court's jurisprudence on fundamental rights and the right to freedom of expression—in particular the doctrines of overbreadth, arbitrariness and reasonableness—Section 124-A needed further review.<sup>82</sup> Some of the petitions specifically cited India's international obligations and important rulings on how vague laws can chill speech.<sup>83</sup> The petitions also point out that *Kedar Nath* had been ineffective in curbing the use of the sedition law to criminalize speech and dissent.<sup>84</sup>

The Government of India submitted an affidavit informing the Court that it was in the process of re-examining the sedition law. The affidavit stated that "[t]he Hon'ble PM believes that ... we need to, as a nation, work even harder to shed colonial baggage that has passed its utility, which includes outdated colonial laws and practices."<sup>85</sup>

Accordingly, in May 2022, the Court issued an order staying all sedition cases and stating that "Section 124A of IPC is not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime." While this order has been broadly complied with, many sedition cases also include other charges, and so those trials remain ongoing under those other charges.<sup>86</sup>

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<sup>80</sup> Radhika Roy, 'It's Time We Define Limits Of Sedition': Supreme Court Stays Coercive Actions Against Telugu Channels On Sedition FIR, LiveLaw, May 31, 2021, *available at* <https://www.livelaw.in/top-stories/its-time-we-define-limits-of-sedition-supreme-court-stays-coercive-actions-telugu-channels-on-sedition-fir-174948>.

<sup>81</sup> Saptarshi, Bhattacharya, The Law of Sedition and India: An Evolutionary Overview, The Hindu Center for Politics and Public Policy, Aug. 27, 2022, *available at* <https://www.thehinducentre.com/the-arena/current-issues/the-law-of-sedition-and-india-an-evolutionary-overview/article65721149.ece#forty40>.

<sup>82</sup> See Petition filed by Journalist Union of Assam before the Supreme Court of India, *available at* <https://www.scobserver.in/wp-content/uploads/2021/07/Journalist-Union-of-Assam-vs-Union-of-India-WPCrI-No.-498-of-2021-Public-Copy.pdf>

<sup>83</sup> See Petition filed by People's Union of Civil Liberties before the Supreme Court of India, *available at* [https://www.scobserver.in/wp-content/uploads/2021/09/Sedition\\_WritPetition\\_PUCL.pdf](https://www.scobserver.in/wp-content/uploads/2021/09/Sedition_WritPetition_PUCL.pdf).

<sup>84</sup> See Petition filed by Journalist Union of Assam, *supra*; Petition filed by Arun Shorie before the Supreme Court of India, *available at* [https://www.livelaw.in/pdf\\_upload/arun-shorie-moves-supreme-court-against-sedition-law-396717.pdf](https://www.livelaw.in/pdf_upload/arun-shorie-moves-supreme-court-against-sedition-law-396717.pdf).

<sup>85</sup> See *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, May 11, 2022.

<sup>86</sup> These include cases against Muslim journalist Siddique Kappan for reporting on the death and gangrape of a Dalit girl and against student activist Sharjeel Imam. See USCRIF, Siddique Kappan *available at* <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/siddique-kappan>; Times of



In April 2023, the Law Commission of India released a report on “Usage of the Law of Sedition.” The Report not only recommended the retention of the colonial-era provision, but also urged enhancing one of the alternative punishments from three years to seven years in prison.<sup>87</sup>

Soon thereafter, the government introduced a new law to replace the colonial-era penal code. The new law replaces the offence of sedition with another vague provision that criminalizes “acts endangering sovereignty, unity and integrity of India.”<sup>88</sup> There are concerns that this new provision could functionally replace the sedition law, with which it differs in its specifics, but with which it also shares certain features.<sup>89</sup>

First, the new provision replaces exciting “disaffection towards the Government established by law” with “encourag[ing] feelings of separatist activities or endanger[ing] sovereignty or unity and integrity of India” and further criminalizes exciting “subversive activities.” The provision does not define any of these terms, in particular what constitutes subversive activities or activities that encourage feelings of separatist activities or endanger the sovereignty, unity and integrity of India.

Second, while Section 124-A criminalized exciting disaffection by words, signs or by visible representation, the new provision expands this to include using “electronic communication” or “financial means” to engage in the prohibited activities. While social

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India, Sedition Case: 3.5 years in jail, Sharjeel Imam Seeks Statutory Bail, Aug. 30, 2023, *available at* <https://timesofindia.indiatimes.com/city/delhi/sedition-case-sharjeel-imam-moves-delhi-court-seeking-statutory-bail/articleshow/103188221.cms>.

<sup>87</sup> Section 124-A is punishable with life imprisonment, fine, or imprisonment of up to three years – the latter was suggested to be increased to seven years. Kaleeswaram Raj, Sedition Law Report: A Regressive Step by Law Commission, June 8, 2023, *available at* <https://frontline.thehindu.com/the-nation/sedition-law-report-a-regressive-step-by-law-commission/article66946834.ece>.

<sup>88</sup> Section 152, Bharatiya Nyaya Sanhita, 2023: “Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine. Explanation.—Comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in this section do not constitute an offence under this section.”

<sup>89</sup> P39A Criminal Law Blog, Criminal Law Bills 2023 Decoded #8: Sedition, Recast – Implications of Clause 150 of the BNS 2023, Sept. 29, 2023, *available at* <https://p39ablog.com/2023/09/criminal-law-bills-2023-decoded-8-sedition-recast-implications-of-clause-150-of-the-bns-2023/>; Sravasti Dasgupta, Modi Govt Unveils Controversial New Criminal Bills: 'Sedition' Law to Change But in Name Only, The Wire, Aug. 11, 2023, *available at* <https://thewire.in/government/sedition-law-repealed-three-new-bills-tabled-in-parliament-to-replace-criminal-laws>; Apurva Vishwanath, Sedition Law Repealed or Strengthened in a New Form? What the New IPC Bill Says, Indian Express, Aug. 13, 2023, *available at* <https://indianexpress.com/article/explained/explained-law/sedition-law-repealed-or-strengthened-in-a-new-form-ipc-bill-8887864>.

media posts were already a target of the sedition law, it is unclear whether the new provision will be used to target private messages.

Third, while sedition is punishable with life imprisonment, fine, or imprisonment of up to three years, the new provision is punishable with life imprisonment, or imprisonment of up to seven years. Given these changes, experts have called this new law 'more fearsome' than Section 124-A.<sup>90</sup>

In September 2023, the Supreme Court of India referred the sedition challenge to a constitutional bench to reconsider *Kedar Nath*. While the Government asked the Court to defer hearing on the ground of the potential repeal of the sedition law, the Court held that because the new law would not have retrospective effect, "the validity of the prosecutions which have been launched or would be launched so long as Section 124A continues to remain on the statute would have to be assessed under it."<sup>91</sup>

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<sup>90</sup> Lubhyathi Rangarajan, Home Minister Amit Shah Says Sedition Is Dead. But Its Replacement Is More Fearsome Than the Colonial Law Ever Was, Article 14, Aug. 14, 2023, *available at* <https://article-14.com/post/home-minister-amit-shah-says-sedition-is-dead-but-its-replacement-is-more-fearsome-than-the-colonial-law-ever-was-64d99ff8dc0d8>.

<sup>91</sup> *S. G. Vombatkere v. Union of India*, Supreme Court of India, Writ Petition (C) No. 682/2021, Sept. 12, 2023.



## A. INTRODUCTION

Section 124-A of the Pakistan Penal Code criminalizes:

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 Federal or Provincial Government established by law.

As in Indian law, there is only minimal definition of these terms, with the Penal Code providing simply that “disaffection includes disloyalty and all feelings of enmity”<sup>92</sup> while providing an exception in cases where comments express “disapprobation” of the government’s measures with a view to obtaining their alteration by lawful means.<sup>93</sup> This version, too, carries up to life imprisonment.

Courts in Pakistan have held that sedition does not require a nexus to violence or disorder.<sup>94</sup> Instead, according to the Supreme Court, an intent to produce ‘feelings’ such as hatred, contempt or disaffection or even an attempt to produce them is sufficient for a finding of sedition, regardless of whether the feelings have actually been caused.<sup>95</sup> When determining such an intent, Courts focus on “reading the speeches a whole and

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<sup>92</sup> Section 124-A, Pakistan Penal Code, Explanation 1.

<sup>93</sup> Section 124-A, Pakistan Penal Code, Explanation 2.

<sup>94</sup> *Mst. Tehmina Doltana and Others v. The State*, 2001 PCrLJ 1199, *quoted in* *Ali Raza and another v. Federation of Pakistan*, PLD 2017 Islamabad 64, ¶ 13 (Courts have also held that “truthfulness or falsity of the allegations leveled by the speakers is not relevant”).

<sup>95</sup> *Sardar Attaullah Khan Mangal v. The State*, PLD 1967 SC 78 (“[T]he only question for the Court to decide is to decide whether the effect of the language used is such that it is calculated to create in the minds of those, who see or hear it, a feeling of revolution towards the Government by law established, so strong as to amount to hatred or contempt, or in a still worse case, where the hatred or contempt, is so strong as to have the effect of seriously taking away from the Government the allegiance of the public or a section thereof, in other words, producing disaffection. It is of course not necessary that such feelings should have actually been caused: it is enough that the language used was calculated to produce this result or in the alternative that an attempt should have been to produce such a result.”); *Z.A. Sulleri v. The Crown*, PLD 1954 Sindh 80 (“The essence of the crime of sedition consists in the intention with which the language is used and such intention has to be judged primarily by the language used. In arriving at its conclusions as to the intention ... the court must have regard to the occasion on which and the circumstances in which the writing was published or representation made.”). See *also Ghulam Hussain Unnar v. The State*, 1996 PCr.LJ 414 Karachi (noting that sedition is made out where the words are “likely to create hatred or disaffection”).

[discerning] the true import of the words used, [which] has to be gathered from the context and the effect they are intended or likely to produce on the audience.”<sup>96</sup>

Similar to India, Pakistan requires that a complaint alleging sedition may be filed only with the approval of the federal government or a provincial government or someone empowered by such a government.<sup>97</sup>

In the past, sedition charges have been filed against “political leaders, activists, human rights defenders, students, journalists,” including at various junctions former prime ministers Nawaz Sharif, Benazir Bhutto, Zulfikar Ali Bhutto and Imran Khan, respectively leaders of major political parties the Pakistan Muslim League-N, Pakistan People’s Party and Pakistan Tehreek-e-Insaf.<sup>98</sup>

In 2023, however, the Lahore High Court held that Section 124-A was unconstitutional because it violates citizens’ right to free speech, including political dissenters and the press.<sup>99</sup> This Part first describes the use of the sedition law up to this decision and then analyzes the decision and its aftermath.

## **B. HISTORY, GENERAL TRENDS & LEGAL INTERPRETATION OF THE SEDITION LAW IN PAKISTAN**

Pakistan’s sedition law has been invoked with regularity over the years. In 2004, for instance, Makhdoom Javed Hashmi, a member of the political opposition at the time, was sentenced to 23 years in prison for sedition and mutiny for allegedly making statements at a press conference about the military losses Pakistan suffered in the Kargil war with India—he was eventually acquitted in 2010 by the Lahore High Court on the grounds that the police had not obtained sanction from the government for filing sedition charges, as required by Section 196 of the Code of Criminal Procedure.<sup>100</sup> In 2019, academics and student activists were charged with sedition, some in a case monitored by TrialWatch, for holding peaceful Student Solidarity Marches that demanded an end to surveillance of

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<sup>96</sup> Mst. Tehmina Doltana and Others v The State, 2001 PCrLJ 1199, *quoted in* Ali Raza and another v. Federation of Pakistan, PLD 2017 Islamabad 64, ¶ 13. *See also* Z.A. Sulleri v. The Crown, PLD 1954 Sindh 80.

<sup>97</sup> Section 196 of Code of Criminal Procedure, Act of 1898, Pakistan: “No Court shall take cognizance of any offence punishable under Chapter VI of the Pakistan Penal Code [this includes 124-A] ... unless upon complaint made by order of or under authority from, the Federal Government or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments.”

<sup>98</sup> Rizwan Shehzad, Sedition Law Haunts Subcontinent Since Colonial Era, Tribune, Mar. 31, 2023, *available at* <https://tribune.com.pk/story/2409219/sedition-law-haunts-subcontinent-since-colonial-era>.

<sup>99</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar. 30, 2023 [Right to Speech is listed under Article 19 of the Constitution. Additionally, the Lahore High Court held that the sedition law violated the Right to Information under Article 19A of the Constitution].

<sup>100</sup> Makhdoom Javed Hashmi v The State, 2010 PCr.LJ 1809 Lahore.

students, on-campus violence and sexual harassment, and restoration of student unions.<sup>101</sup> In 2021, police arrested and filed sedition charges against a 77-year-old member of the Awami Workers Party for claiming that the State had been “stealing gas from the province [Baluchistan] since 1953” and treating its people like “slaves.”<sup>102</sup>

There has been an uptick in the number of arrests under the sedition law in recent years, in particular in cases where sedition charges are clubbed together with charges under anti-terrorism legislation and the Pakistan Penal Code, and specifically for criticism of the Pakistan Army. Members of the Pashtun Tahaffuz Movement (PTM), which is critical “of the military for alleged illegal killings, forced disappearances, and collusion with Islamist militants,” have faced numerous court cases that “typically invoke sedition, rioting and even anti-terrorism clauses.”<sup>103</sup> In one case, Gulalai Ismail, a leading member of PTM—a group that routinely criticizes the treatment of ethnic Pashtuns by Pakistan’s military—gave a two minute speech and “participated in a protest condemning increasing sexual violence linked to militarization.”<sup>104</sup> Following this, sedition alongside terrorism charges were filed against her, forcing her to flee the country, after which further sedition and terrorism charges were filed against her mother and father, Muhammad Ismail, who is a prominent human rights activist.<sup>105</sup> The UN Working Group on Arbitrary Detention found that Mr. Ismail’s arrest and subsequent prosecution constituted a violation of numerous

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<sup>101</sup> Amnesty International, Pakistan: End Crackdown on Student Protests, Amnesty, Dec. 1, 2019, *available at* <https://www.amnesty.org/en/latest/press-release/2019/12/pakistan-end-crackdown-on-student-protests/>; Clooney Foundation for Justice, End Harassment of Dr. Ammar Ali Jan in Pakistan, Mar. 12, 2021, *available at* <https://cfj.org/wp-content/uploads/2021/03/End-Harrassment-of-Dr.-Ammar-Ali-Jan-in-Pakistan.pdf>.

<sup>102</sup> 77 Year Old Political Worker Arrested on Charges of Sedition for Speech at Gwadar Protest, Friday Times, Dec. 9, 2021, *available at* <https://thefridaytimes.com/09-Dec-2021/77-year-old-political-worker-arrested-on-charges-of-sedition-for-speech-at-gwadar-protest>.

<sup>103</sup> Abubakar Siddique, Leader’s Arrest Galvanizes Pashtun Rights Movement in Pakistan, Gandhara, Jan. 30, 2020, *available at* <https://gandhara.rferl.org/a/leader-arrest-galvanizes-pashtun-rights-movement-in-pakistan/30408778.html>.

<sup>104</sup> Opinions adopted by the Working Group on Arbitrary Detention at its ninety-first session, 6-10 September 2021, Opinion No. 37/2021, 1 Oct. 2021, A/HRC/WGAD/2021/37, ¶ 12. *See also* Civicus, Pakistan: Chronology of Harassment Against Human Rights Defender Muhammad Ismail, Updated Jan. 2023, *available at* <https://www.civicus.org/index.php/fr/medias-ressources/112-news/5018-pakistan-chronology-of-harassment-against-human-rights-defender-muhammad-ismail> [A full timeline of the numerous cases against Muhammad Ismail and his family is provided here]; Asad Hashim, Father of Pakistani Rights Activist Arrested on ‘Terror’ Charges, Al Jazeera, Feb. 3, 2021, *available at* <https://www.aljazeera.com/news/2021/2/3/father-of-pakistani-rights-activist-arrested-on-terror-charges>.

<sup>105</sup> Civicus, Pakistan: Chronology of Harassment Against Human Rights Defender Muhammad Ismail, Updated Jan. 2023, *available at* <https://www.civicus.org/index.php/fr/medias-ressources/112-news/5018-pakistan-chronology-of-harassment-against-human-rights-defender-muhammad-ismail> [A full timeline of the numerous cases against of Muhammad Ismail and his family is provided here].

articles of the UDHR and ICCPR.<sup>106</sup> After years of harassment, he was finally acquitted alongside his wife by an Anti-Terror Court in Peshawar in 2023.<sup>107</sup>

One tactic that appears common is to file multiple sedition cases against a single person in different jurisdictions across Pakistan. In a recent case, for instance, the accused posted on then-Twitter in 2022 a message critical of the Army Chief, stating that the latter had legitimized corruption, and that his “plan was really working and all criminals are getting free at [the] cost of this country.”<sup>108</sup> The initial complaint against the Twitter post was filed in Islamabad with the Federal Investigation Agency. However, five more FIRs were reportedly filed thereafter in five different cities in the province of Baluchistan on the basis of the same post – and two of these new FIRs were filed on the same day in different jurisdictions and included sedition charges. The Baluchistan High Court quashed the five new FIRs, stating that “it is neither possible nor convenient for the petitioner to obtain bail from various courts in various cities joining various investigations and finally defending himself before various Courts, that too, for one and the same offence.”<sup>109</sup> Likewise, in December 2020 Muhammad Ali Wazir, a former member of the National Assembly of Pakistan, was arrested on sedition charges (along with nine other provisions of the PPC) for giving a speech at a PTM rally. From December 2020 until February 2023, Mr. Wazir was kept in jail: whenever he would be granted bail in one case, another sedition case would be filed against him and he would be reimprisoned.<sup>110</sup> This tactic appears to be true for some cases in India as well, referenced above.

Another trend in the application of the sedition law in Pakistan is that charges are often brought without following the mandatory procedural requirements laid down by the Code of Criminal Procedure (‘Code’). Section 196 of the Code requires that in sedition cases, a ‘complaint’ should be filed with the sanction of the federal government, a provincial government or someone empowered by such a government.<sup>111</sup> Such a ‘complaint’ is to be filed before a magistrate and in cases of sedition, only by the government or their

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<sup>106</sup> Opinions adopted by the Working Group on Arbitrary Detention at its ninety-first session, 6-10 September 2021, Opinion No. 37/2021, 1 Oct. 2021, A/HRC/WGAD/2021/37, ¶ 101.

<sup>107</sup> Tribune, Gulalai Ismail’s Parents Acquitted in Sedition, Terror Case, Feb. 15, 2023, *available at* <https://tribune.com.pk/story/2401304/gulalai-ismails-parents-acquitted-in-sedition-terror-case>.

<sup>108</sup> Muhammad Azam Khan Swati v. Inspector General of Police, PLD 2023 Balochistan 85, ¶ 4 [The full tweet is reproduced below: “Mr. Bajwa congratulations to you and few with you. Your plan is really working and all criminals are getting free at cost of this country. With these thugs getting free You have legitimize corruption. How you predict now the future of this country?”].

<sup>109</sup> Muhammad Azam Khan Swati v. Inspector General of Police, PLD 2023 Balochistan 85, ¶ 7.

<sup>110</sup> Lack of Tolerance? Ali Wazir’s Never-Ending Slew of Sedition Cases, VoicePK, Nov. 16 2022, *available at* <https://voicepk.net/2022/11/lack-of-tolerance-ali-wazirs-never-ending-slew-of-sedition-cases/>; Tribune, Ali Wazir Released From Prison After 26 months, Feb. 14, 2023, *available at* <https://tribune.com.pk/story/2401124/ali-wazir-released-after-26-months>; RFERL, Pakistani Lawmaker Wazir Still in Jail Despite Being Granted Bail, Nov. 30, 2021, *available at* <https://www.rferl.org/a/pashtun-rights-legislator-bail/31586976.html>.

<sup>111</sup> Section 196, *supra*.

representative, which must also provide reasons before filing of the complaint.<sup>112</sup> This is distinct from an FIR (First Information Report), which is filed by the police in Pakistan; unlike in India, an FIR cannot be filed in sedition cases and the police can only investigate a sedition case if and after a magistrate gives an order upon receiving a complaint.<sup>113</sup> The Supreme Court clarified that this distinction ensures that persons can only be prosecuted for offences under Section 196, such as sedition, before courts, on the theory that courts, unlike the police, are “free from the Government’s influence.”<sup>114</sup> Yet, several reported judgments highlight a trend where the police have filed an FIR with sedition charges and arrested the accused only for the proceedings to be later declared illegal by a court because the mandatory sanction had not been sought (or obtained) from the government, or because an FIR instead of a complaint had been filed.<sup>115</sup> Even a Provincial Law Minister in 2020 declared erroneously in the Punjab Assembly that any citizen could file sedition charges, contrary to the text of the Code and several Supreme Court judgments.<sup>116</sup>

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<sup>112</sup> Section 4(h) Code of Criminal Procedure: “Complaint’ means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the reports of a police officer.” The Supreme Court of Pakistan has held “Section 196 of the Code mandates that no person or authority other than the Federal Government or the Provincial Government or any officer empowered by the respective Governments in this behalf is competent to file a complaint in respect of the offences mentioned in section 196. Chapter XVI of the Code provides a forum and procedure for filing of a complaint and authorizes the Court to conduct a preliminary inquiry and, if need be, to investigate the matter in order to ascertain its veracity ... Where the Court is of the opinion that there are sufficient grounds to take cognizance of the matter upon the complaint, only then the judicial proceedings can be commenced by adopting a method as provided under Chapter XVII of the Code.” *Ammad Yousaf v. The State*, Supreme Court of Pakistan, Criminal Petition No. 225 of 2023. See also *Ali Raza and another v. Federation of Pakistan*, PLD 2017 Islamabad 64; *Shahdana Gulzar Khan v. The State and Others*, Islamabad High Court, W.P. No. 419-2023, Mar. 24, 2023 (reasons must be provided for providing the sanction), available at [https://www.lawandpolicychambers.org/wp-content/uploads/2023/07/W.P\\_No.419-2023\\_638156868946865418.pdf](https://www.lawandpolicychambers.org/wp-content/uploads/2023/07/W.P_No.419-2023_638156868946865418.pdf).

<sup>113</sup> *Naveed Ahmad Khan Advocate v. Station House Officer Renala Khurd*, 1994 PCr.LJ 2381 Lahore; *Noor Ejaz Chaudhry & Omer Imran Malik*, *A Democratic Fundamental: Making the Case for Free Speech and Expression*, Media Matters for Democracy 44 (2020).

<sup>114</sup> *Ammad Yousaf v. The State*, Supreme Court of Pakistan, Criminal Petition No. 225 of 2023, ¶ 5, available at [https://www.supremecourt.gov.pk/downloads\\_judgements/crl.p.\\_225\\_2023.pdf](https://www.supremecourt.gov.pk/downloads_judgements/crl.p._225_2023.pdf).

<sup>115</sup> See *Muhammad Essa Rooshan v. The State*, 2021 PCr.LJ 1342 Balochistan, ¶¶ 4, 6; *Ali Raza and another v. Federation of Pakistan*, PLD 2017 Islamabad 64; *Muhammad Safdar v. Inspector General of Police, KPK*, 2022 PCrLJ 1342, Peshawar; *Makhdoom Javed Hashmi v. The State* 2010 PCrLJ 1809 Lahore (there was no concept of registration of case thereunder by police and cognizance can only be taken on a complaint); *Fayyaz Ahmad v. the State and Others*, 2003 YLR 3137; *Syed Nawaz Hussan and others v. The State and Others*, 2014 PCrLJ 1256; *The State v. Sufi Ali and Others*, Cr. Appeal No. 04/2011 in CPLA No. 13/2011, Supreme Appellate Court Gilgit Baltistan (2014), available at [https://sacgb.gov.pk/Judgments/\(10\).\\_Sufi\\_Ali\\_.PDF](https://sacgb.gov.pk/Judgments/(10)._Sufi_Ali_.PDF); *Atta Muhammad Deshani v. DPO, Haripur*, 2019 PCr.LJ 275 Peshawar.

<sup>116</sup> DAWN, Minister Tells PA: No Bar On Any Citizen to Have Sedition Case Registered, Oct. 14, 2020, available at <https://www.dawn.com/news/1584913>.

In 2023, the Supreme Court took note that “politically motivated FIRs” are being registered under Section 196, in cases such as sedition, “against politicians, political workers, media persons, and human rights activists,” calling them a “misuse of authority.”<sup>117</sup>

Such procedural violations are compounded by an apparent dispute between the Courts on *when* the government’s approval is required for sedition cases. The Islamabad High Court, for instance, stated in 2023 that “the stage to examine the legality or otherwise of the proceeding shall be when the Court will take cognizance and the objections raised regarding failure to take sanction might [be] material at the said time, if there does not exist any such approval or sanction.”<sup>118</sup> However, courts are divided on whether police actions before the stage of cognizance<sup>119</sup>—such as registration of a case, investigation, and submission of challan/chargesheet<sup>120</sup> to court—might constitute a violation in itself.<sup>121</sup>

Combined, this means that police can often file FIRs with sedition charges in violation of stipulated procedure, and it is only once the case goes before the court, often many months later, that there is recourse to quash the FIR on procedural grounds.

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<sup>117</sup> Ammad Yousaf v. The State, Supreme Court of Pakistan, Criminal Petition No. 225 of 2023, ¶ 7, available at [https://www.supremecourt.gov.pk/downloads\\_judgements/crl.p.\\_225\\_2023.pdf](https://www.supremecourt.gov.pk/downloads_judgements/crl.p._225_2023.pdf).

<sup>118</sup> Muhammad Shahbaz Shabeer v. Additional Sessions Judge, 2023 PCr.LJ 810, Islamabad, ¶ 17.

<sup>119</sup> Cognizance is a later stage in a criminal process when the court for the first time takes notice of an offence on a police report or on a complaint by a private person. See Zeehsan Anjum v. The State 2022 MLD 1091 Lahore (The Supreme Court has stated that the Court must first consider any police report, all documents, statements of witnesses presented and then determine whether it has jurisdiction to take cognizance of the matter. In the case of Section 196 Cr.PC, this means assessing if the complaint has or does not have sanction of government; “he should not issue process in a mechanical manner, rather, should refrain himself from initiating judicial proceedings”); see Ammad Yousaf v. The State, Supreme Court of Pakistan, CrI. Petition No. 225 of 2023, available at [https://www.supremecourt.gov.pk/downloads\\_judgements/crl.p.\\_225\\_2023.pdf](https://www.supremecourt.gov.pk/downloads_judgements/crl.p._225_2023.pdf).

<sup>120</sup> Challan or chargesheet (used interchangeably) is the investigation report that recommends that one or more persons stand trial, and is filed by the police before the court when they are satisfied that there is enough evidence against the accused. See Guidelines for Scrutiny of Police Reports, Public Prosecution Department, available at <https://ppd.punjab.gov.pk/system/files/Guidelines%20on%20scrutiny%20of%20ploice%20reports%20173.pdf>.

<sup>121</sup> Atta Muhammad Deshani v. DPS Haripur 2019 PCrLJ 275 Peshawar (Under Section 196 Cr.P.C, it is only after submission of Challan that the Court takes cognizance of the case and thus, the proceedings taken prior to this, cannot be held to be violative of Section 196 Cr.P.C); Muhammad Shahbaz Shabeer v. Additional Sessions Judge, 2023 PCr.LJ 810, Islamabad (196 does not hamper the investigation of a report by police or any investigation agency); Makhdoom Javed Hashmi v. The State 2010 PCrLJ 1809 Lahore (The “entire proceedings started from the registration of the case, investigation, submission of challan in the court, proceedings before the court and culminating in the impugned conviction were not sustainable in the eyes of the law” because the government had not taken a decision to file the complaint).



## C. RECENT DEVELOPMENTS: REPEAL EFFORTS, LAHORE HIGH COURT DECISION & AFTERMATH

On March 30, 2023, the Lahore High Court declared Pakistan's sedition law unconstitutional, stating that "the offence of sedition and seditious libel is a relic of autocracies and colonial subjugation. It is time that it finds its permanent resting place and suffers a condemnation that it deserves."<sup>122</sup>

Specifically, the Court found that the sedition provision violated the right to free speech as it was "a broadly worded provision which gives wide leeway" to restrict expression.<sup>123</sup> This in turn also "infringes the right to a free press to publish freely what is necessary to do so in order to inform the general public which has a right to know and be informed of the different issues in order to make a more informed decision regarding political matters."<sup>124</sup> Furthermore, the Court held that there is a "wide margin of appreciation for terms [hatred, contempt, excite disaffection]," and due to the subjective nature of their interpretation ultimately "the decision to prosecute depends on who wield[s] the authority."<sup>125</sup> Finally, the Court held that the provision demands "allegiance and loyalty by all opposition parties and their members, by the citizens and members of the press towards the Federal or Provincial Governments of the day" rather than the state, which "is antithetical to the very concept of democracy and constitutionalism."<sup>126</sup> Currently, the government of Punjab has filed an intra-court appeal against the judgment on the grounds that Section 124-A imposes a reasonable restriction on freedom of expression as envisioned in the Constitution while also requesting that the effect of the judgment be suspended during the pendency of the appeal.<sup>127</sup>

Following the judgment, on August 7, 2023, a private member bill was introduced in Pakistan's Senate to repeal Section 124-A, stating that "it is a draconian provision" used "to suppress and bar common people from expressing their opinion regarding biased and unjust policies of Federal and provincial Governments from time to time" while noting that the Lahore High Court too had "deliberated upon the said subject, and after extensive

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<sup>122</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023, ¶ 75.

<sup>123</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023, ¶¶ 54-55.

<sup>124</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023, ¶ 69.

<sup>125</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023, ¶ 60.

<sup>126</sup> Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023. ¶ 61.

<sup>127</sup> I.C.A. No. 36563 of 2023 in W.P.No. 59599 of 2022, Lahore High Court.

deliberations” declared it unconstitutional.<sup>128</sup> In December 2023, the Senate Standing Committee on Interior unanimously recommended that the bill should be passed, stating that “there is no need for Section 124-A” since “it belonged to a neo-demographic era” and that “in present times, the concept of rebellion did not exist.”<sup>129</sup>

Despite these positive developments, in the months following the judgment of the Lahore High Court, sedition cases have still been filed, perhaps because of a lack of clarity regarding the effect of the High Court judgment. According to the Constitution of Pakistan, a High Court’s decision is binding only on subordinate courts within its territorial jurisdiction and is not binding on the High Courts or subordinate courts in other provinces.<sup>130</sup> While it is common for a High Court to rule on the constitutionality of a law,<sup>131</sup> against this backdrop, it is unclear how a constitutional ruling applies in a situation where no other High Court has ruled on the federal statute in question.<sup>132</sup>

Thus, in one instance, five months after the Lahore High Court judgment, sedition charges were filed against prominent human rights lawyer Imaan Hazir Mazari and co-founder of the PTM Ali Wazir for participating in a PTM rally in Islamabad and giving speeches that

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<sup>128</sup> Report of The Senate Standing Committee on Interior on The Criminal Law (Amendment) Bill 2023, Private Member Bill Introduced by Senator Fawzia Arshad, Aug. 7, 2023, Annexure A, pg. 5, *available at* [https://www.senate.gov.pk/uploads/documents/1698662235\\_792.pdf](https://www.senate.gov.pk/uploads/documents/1698662235_792.pdf).

<sup>129</sup> Tribune, Senate Panel Passes Bill to Remove Sedition Law, Dec. 15, 2023, *available at* <https://tribune.com.pk/story/2450090/senate-panel-passes-bill-to-remove-sedition-law>.

<sup>130</sup> Article 201, Constitution of Pakistan.

<sup>131</sup> On January 4, 2021, for instance, the Lahore High Court ruled that the two-finger rape test was in violation of the right to life and dignity under Articles 9 and 14 of the Constitution and directed that Federal and Provincial governments should revise the guidelines and protocols that controlled its implementation. Similarly, on April 9, 2022, the Islamabad High Court declared the PECA ordinance expanding the reach of PECA’s online defamation provision unconstitutional. See Rana Bilal, LHC Does Away With Archaic Two-Finger Test for Sexual Assault Survivors, Terms Them ‘Illegal,’ DAWN, Jan. 4, 2021, *available at* <https://www.dawn.com/news/1599672>; Sadaf Aziz v. Federation of Pakistan, WP No. 13537 of 2020, *available at* <https://sys.lhc.gov.pk/appjudgments/2020LHC3407.pdf>; TrialWatch, Section 20 of Pakistan’s Prevention of Electronic Crimes Act: Urgent Reforms Needed, Oct. 9, 2023, *available at* <https://cfj.org/reports/section-20-of-pakistans-prevention-of-electronic-crimes-act-urgent-reforms-needed/>.

<sup>132</sup> Huazima Bukhari & Dr. Ikramul Haq, Law of Binding Precedents, TNS, Sept. 26, 2021, *available at* <https://www.thenews.com.pk/tns/detail/895247-law-of-binding-precedents> (“In case of federal statutes if only one judgement of a High Court is available then all adjudication and appellate authorities, including those working outside the territorial jurisdiction of the said Court, are bound to follow the said judgement [Atlas Bank v CIT etc 2005 PTD 2586 (High Court Karachi)].”). See also Awais Yousafzai, IHC Dismisses Shireen Mazari’s Plea Seeking Revocation of Sedition Law, The News, Sept. 24, 2022, *available at* <https://www.thenews.com.pk/latest/994212-ihc-dismisses-shireen-mazaris-plea-seeking-revocation-of-sedition-law> (Islamabad High Court dismissed a plea challenging the constitutionality of 124-A due to not being maintainable). Furthermore, the Lahore High Court judgment on sedition also does not clarify if the federal government should repeal the sedition provision from the Penal Code. This is different from a prior case, where the Lahore High Court expressly ordered the Federal and Provincial Government to implement changes in policy due to the unconstitutionality of the two-finger rape test. It is therefore currently unclear if the judgment of the Lahore High Court is binding on provinces other than Punjab.

condemned alleged harassment of Pashtuns by the army.<sup>133</sup> Ms. Mazari also uploaded videos and pictures of the rally on her social media page on X (formerly known as Twitter). One such video depicts her stating: “You are being stopped, as if you are terrorists while the real terrorists are sitting in GHQ [Pakistan's military headquarters].”<sup>134</sup> A day after the rally, both were arrested on sedition charges, alongside terrorism charges. Furthermore, in October 2023, podcaster Imraan Noshad was “picked up” and later sedition charges were reportedly filed against him that appeared “to be linked to his recent interview with human rights activist and lawyer Imaan Mazari.”<sup>135</sup> And on November 27, 2023, it was reported that police in Swat filed FIRs invoking sedition, among other penal provisions, and terrorism charges against 2500 workers of the political party PTI.<sup>136</sup> Sedition charges, among other charges, were also filed in Islamabad against journalists and workers of PTI for their “alleged involvement in the violence and vandalism that was witnessed amid protests that erupted in the wake of PTI Chief Imran Khan’s arrest.”<sup>137</sup>

This effectively means that in 2023, despite the Lahore High Court declaring sedition unconstitutional, and despite legislative attempts to repeal sedition law, cases under Section 124-A continue to be filed. Furthermore, in practice, these cases often go forward without sanction from the government, at least until the stage that the court takes cognizance of the case. The upshot is that there is still the threat of arrest and significant periods of detention for sedition in Pakistan, based only on the filing of allegations with the police.

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<sup>133</sup> Shakeel Qarar and Umer Burney, Human Rights Lawyer Imaan Mazari, Ex-Lawmaker Ali Wazir Arrested: Islamabad Police, DAWN, Aug. 20, 2023, *available at* <https://www.dawn.com/news/1771196>.

<sup>134</sup> Farhat Javed, Imaan Mazari-Hazir: Lawyer Who Called Pakistan Army ‘Terrorists’ Re-arrested, BBC, Aug. 28, 2023, *available at* <https://www.bbc.com/news/world-asia-66637600>.

<sup>135</sup> Friday Times, Podcaster Imran Noshad 'Picked Up' From Lahore, Oct. 31, 2023, *available at* <https://thefridaytimes.com/31-Oct-2023/podcaster-imran-noshad-picked-up-from-lahore>.

<sup>136</sup> DAWN, 2500 PTI Workers Booked for Holding Convention in Swat, Nov. 28, 2023, *available at* <https://www.dawn.com/news/1793128>.

<sup>137</sup> DAWN, Amnesty International, RSF Call Out Pakistani Authorities Over Cases Filed Against Journalists to Silence Critics, Jan. 15, 2023, *available at* <https://www.dawn.com/news/1759895> (Sedition, among other cases, were also filed earlier against journalists and workers of PTI for their “alleged involvement in the violence and vandalism that was witnessed amid protests erupted in the wake of PTI Chief Imran Khan’s arrest.”).



## A. INTRODUCTION

The sedition law in Hong Kong criminalizes conduct or speech having a ‘seditious intention.’ In turn, a seditious intention is defined as an intention:

- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty,<sup>138</sup> or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty’s dominions or of any territory under Her Majesty’s protection as by law established; or
- (b) to excite Her Majesty’s subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
- (d) to raise discontent or disaffection amongst Her Majesty’s subjects or inhabitants of Hong Kong; or
- (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or

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<sup>138</sup> In anticipation of the handover of Hong Kong to China, the authorities adopted an Interpretation and General Clauses Ordinance, which sought to handle how laws that referred to ‘Her Majesty’s Government’ would be handled in post-handover Hong Kong. Section 1 of Schedule 8 provided that “[a]ny reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision—(a) relates to title to land in the Hong Kong Special Administrative Region; (b) involves affairs for which the Central People’s Government of the People’s Republic of China has responsibility; (c) involves the relationship between the Central Authorities and the Hong Kong Special Administrative Region, shall be construed as a reference to the Central People’s Government or other competent authorities of the People’s Republic of China.” *HKSAR v. Lai Man-ling*, [2022] HKDC 981, ¶ 54. By contrast, Section 2 of Schedule 8 provided that “[a]ny reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) in contexts other than those specified in section 1 shall be construed as a reference to the Government of the Hong Kong Special Administrative Region.” Since the sedition law refers to ‘Her Majesty’s Government,’ one question that the courts have had to address is whether and how these provisions should be applied. *Cf. id.* ¶¶ 57-58 (summarizing defense counsel’s arguments as to why Section 1 should not apply). The question has consequences, since many of the allegedly seditious acts or publications that have recently been charged were directed at the PRC authorities, and not the government of the HKSAR.

(f) to incite persons to violence; or

(g) to counsel disobedience to law or to any lawful order.<sup>139</sup>

There are several exceptions, including that it is not sedition to “show that Her Majesty has been misled or mistaken in any of Her measures,” “to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects,” or “to persuade Her Majesty’s subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established.”<sup>140</sup> Unlike in India and Pakistan, the maximum punishment for sedition in Hong Kong is two years’ imprisonment.

This colonial-era law had not been used for more than fifty years until 2020.<sup>141</sup> But in recent years, the Hong Kong authorities have not only revived, but are now ever-more frequently invoking, this law. In fact, between July 2020 and September 2023, at least 50 individuals have faced sedition charges.<sup>142</sup>

At the same time, the UN Human Rights Committee has urged Hong Kong to repeal the law, finding that many “have been arrested and charged with seditious offences for having legitimately exercised their right to freedom of speech by, for example, chanting slogans in public, clapping in courts and expressing criticism of government activities.”<sup>143</sup>

This Part first describes the origins of the sedition law in Hong Kong and general trend lines in sedition cases. It then summarizes the state of the law, including how the law has been interpreted, based on review of the five cases (against ten defendants) in which detailed judgments of conviction have been issued, as well as TrialWatch’s monitoring of the ongoing sedition case against two former editors of *Stand News*. Finally, it concludes with a short update on the current state-of-play following the Privy Council’s decision in the *Attorney General of Trinidad & Tobago v. Vijay Maharaj* case.

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<sup>139</sup> See Crimes Ordinance, Section 9 (1).

<sup>140</sup> See Crimes Ordinance, Section 9 (2).

<sup>141</sup> Candice Chau, Explainer: Hong Kong’s Sedition Law – A Colonial Relic Revived After Half a Century, Hong Kong Free Press, July 30, 2022, available at <https://hongkongfp.com/2022/07/30/explainer-hong-kongs-sedition-law-a-colonial-relic-revived-after-half-a-century/>.

<sup>142</sup> Data on file with TrialWatch. Cf. Hong Kong Democracy Council, Twitter, Jan. 19, 2023, available at [https://twitter.com/hkdc\\_us/status/1616039677328326658?cxt=HHwWhIC84cfhq0sAAAA](https://twitter.com/hkdc_us/status/1616039677328326658?cxt=HHwWhIC84cfhq0sAAAA) (identifying 73 individuals as having been arrested, of whom 47 were charged, as of January 2023).

<sup>143</sup> UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/4, Nov. 11, 2022, ¶ 15.

## B. HISTORY & GENERAL TRENDS

The sedition law in Hong Kong traces its origin to the 1938 Seditious Offences Ordinance,<sup>144</sup> after which it was folded into the Hong Kong Crimes Ordinance. Earlier versions of the Ordinance had contained a provision (which still exists in Malaysian legislation, *see infra*) stating that “[i]n determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.” But this provision was repealed in 1991.<sup>145</sup> Other than that change, the sedition law had remained on the books—but unused—until recently.

One of the most important recent developments in the law of sedition is that Hong Kong courts have concluded that sedition is a ‘national security law’ within the meaning of the National Security Law (NSL). Specifically, the Court of Final Appeal (Hong Kong’s apex court) has held that “[w]here the NSL refers to ‘offence[s] endangering national security’ without distinguishing between those offences which it creates and other offences of that nature . . . it lends itself to the construction that it is referring to all such offences without distinction.”<sup>146</sup> As a result, there is a presumption against bail,<sup>147</sup> and trials can be conducted without juries, and hand-picked ‘national security judges’ preside.<sup>148</sup>

Since the revival of the law, several trends in its application can also be discerned from a survey of the cases: (1) many of those recently accused of sedition are ‘ordinary people,’ neither journalists nor long-time activists; (2) many of those accused are now choosing to plead guilty, given the lengthy time they are likely to spend in pre-trial detention as measured against the maximum potential punishment were they to go to trial; and (3) the

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<sup>144</sup> Pui-yin Lo, *Reactivated and Re-energized: The Seditious Offences in ‘New Era’ Hong Kong*, (2022) HKLJ 913, 914.

<sup>145</sup> Elizabeth Wilmshurst KC & TrialWatch, Fairness Report: HKSAR v. Tam Tak-Chi, May 2022, n. 12, available at <https://cfj.org/wp-content/uploads/2022/05/Tam-Tak-Chi-Fairness-Report-May-2022.pdf>.

<sup>146</sup> HKSAR v. Ng Hau Yi Sidney, [2021] HKCFA 42, ¶ 27, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=140898&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=140898&currpage=T).

<sup>147</sup> *Cf.* HKSAR v. Lai Chee Ying, [2021] HKCFA 3, ¶¶ 70(b), 70(e) (“NSL 42(2) creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imports a stringent threshold requirement for bail applications. . . . If, having taken into account all relevant material, the judge concludes that he or she does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused.”), available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=133491&QS=%2B&T=P=JU&ILAN=en](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133491&QS=%2B&T=P=JU&ILAN=en).

<sup>148</sup> *See generally* TrialWatch Submission to the UN Human Rights Committee, 135th Session, July 2022: Review of Hong Kong Special Administrative Region, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2F CSS%2FHKG%2F48796&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2F CSS%2FHKG%2F48796&Lang=en).

Hong Kong authorities have begun to charge Hong Kongers for speech made outside of Hong Kong.

Further, and critically, in handing down sentences in the numerous cases in which the accused have pled guilty, the courts have tended to emphasize the *potential* for speech to harm Hong Kong's social fabric—even speech that the prosecution agrees did not advocate violence; in particular, in sentencing decisions the courts have repeatedly stressed the volatile nature of the environment and people's putative susceptibility to influence. In some cases, the authorities have even charged 'attempted sedition'—even further removed from any impact on public order.

*First*, it appears that the majority of the 50 cases in which individuals have been charged with sedition involve neither journalists nor long-time activists.<sup>149</sup> In many of these cases, the accused were simply charged with publishing allegedly seditious statements on social media. For instance, Danny Kong, a martial arts coach,<sup>150</sup> pled guilty to sedition for social media posts critical of the Chinese Communist Party and Hong Kong authorities.<sup>151</sup> Likewise, a chef was prosecuted for posting slogans such as 'Liberate Hong Kong, Revolution of our Times' and 'Hong Kong Independence.'<sup>152</sup>

*Second*, out of the more than 50 cases, in the majority (at least 34) the accused pled guilty.<sup>153</sup> As described in a recent *AFP* report on sedition cases, "[p]rominent activists

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<sup>149</sup> The occupations of some of the defendants are unknown.

<sup>150</sup> Brian Wong, Hong Kong Martial Arts Coach Jailed 3 Months for Sedition over 'Radical' Comments Attacking Communist Party and Calling Taiwan Independent Country, *South China Morning Post*, July 27, 2023, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3229145/hong-kong-martial-arts-coach-jailed-3-months-sedition-over-radical-comments-attacking-communist>.

<sup>151</sup> [2023] HKMagC 11, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=154143&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=154143&currpage=T).

<sup>152</sup> [2022] HKMagC 7, [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=147378&QS=%2B&T=P=RS](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=147378&QS=%2B&T=P=RS).

<sup>153</sup> Those who pled guilty include: Hui Pui-ye, see Kelly Ho, Hong Kong Woman Jailed for Inciting Arson Via Messaging App During 2019 Protests, *Hong Kong Free Press*, Apr. 20, 2021, available at <https://hongkongfp.com/2021/04/20/hong-kong-woman-jailed-for-inciting-arson-via-messaging-app-during-2019-protests/>; Tong Cheuk-him (sedition charge changed to public order offense as part of guilty plea), Brian Wong, Hong Kong Protests: Man, 20, Admits Taking Part in Illegal Demonstration after Sedition Charge Changed to Unlawful Assembly, *South China Morning Post*, Nov. 2, 2022, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3198168/hong-kong-protests-man-20-admits-taking-part-illegal-demonstration-after-sedition-charge-changed>; Shum Ka-hon (charges changed to unlawful assembly), Tracking The Impact of Hong Kong's National Security Law, *ChinaFile*, Jan. 5, 2024, available at <https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law>; Edmund Wan Yiu-sing ('Giggs'), see *infra*; Chloe Cho Suet-sum & Wong Chun-wai, Brian Wong, Hong Kong Man, Woman Jailed on Sedition Charges for Insulting Judges, Advocating Independence, *South China Morning Post*, Jan. 31, 2022, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3165409/hong-kong-man-jailed-8-months-over-seditious-posters>; Chan Tai-sum, Brian Wong, Hong Kong Protests: Delivery Worker Jailed for a Year for Trying to Start 'Revolution', Publishing Seditious Statements, *South China Morning Post*, Nov. 15, 2022, available at <https://www.scmp.com/news/hong-kong/law-and>

and journalists charged with sedition have put up high-profile legal defences, but most residents accused of the crime choose not to fight after they are denied bail, due to the perceived slim chance of success.”<sup>154</sup> In part, this may be due to the fact that the sedition law in Hong Kong provides for a maximum sentence of two years in prison. With a significant backlog of ‘national security’ cases in the judiciary,<sup>155</sup> and facing a presumption

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crime/article/3199719/hong-kong-protests-delivery-worker-jailed-year-trying-start-revolution-publishing-seditious; six former employees of Apple Daily (pled guilty to NSL charges; sedition charges remain on file), Jessie Pang, Six Former Staff of Hong Kong Newspaper Plead Guilty to Conspiracy to Collude, Reuters, Nov. 22, 2022, available at <https://www.reuters.com/world/asia-pacific/six-former-staff-hong-kong-newspaper-plead-guilty-conspiracy-commit-collusion-2022-11-22/>; Tommy Yuen, see *infra*; Hau Wing-yan & Lam Yuen-yi, Brian Wong, Taiwanese Drinks Shop Owners Jailed for up to 7 Months Over Social Media Posts Calling on Others to Flout Hong Kong’s Covid-19 Curbs, South China Morning Post, June 28, 2022, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3183395/taiwanese-drinks-shop-owners-jailed-7-months-over>; Dennis Wong Tak Keung & Cheung Man-Ji (initially charged with sedition, but pled guilty to NSL and illegal possession of a firearm), Ng Ting Hong, Hong Kong Court Jails Martial Artist for Recruiting Band of ‘Subversive’ Fighters, Radio Free Asia, Feb. 24, 2023, available at <https://www.rfa.org/english/news/china/combat-taichi-02242023162941.html>; Chan Sze-lok & Lee Ho-yuen, Peter Lee, 2 Hongkongers Set to Plead Guilty to Conspiring to Wound over Telegram Messages about Killing Police, Hong Kong Free Press, June. 13, 2023 (updated), available at <https://hongkongfp.com/2023/04/04/2-hongkongers-set-to-plead-guilty-to-conspiring-to-wound-over-telegram-messages-about-killing-police/>; Chan Kwun Yuk, see *infra* (discussion of chef case); Chan Wai Lun, see *infra* n. 154 (discussing IT technician case); Luk Ting-fung, Kelly Ho, Hong Kong Civil Servant Jailed for 6 Months over ‘Seditious’ Online Posts, Hong Kong Free Press, Oct. 26, 2022, available at <https://hongkongfp.com/2022/10/26/hong-kong-civil-servant-jailed-for-6-months-over-seditious-online-posts/>; Choi Chun-nok and Wong Chun-kit, Brian Wong, Court Convicts Hong Kong Man of Sedition over Social Media Posts Including Footage of Anthem Blunder at Overseas Rugby Match, South China Morning Post, Dec. 16, 2022, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3203609/court-convicts-hong-kong-man-sedition-over-social-media-posts-including-footage-anthem-blunder>; Chui Hoi-chun, see *infra* (second overseas case); Danny Kong, see *infra*; Zeng Yuxuan, Brian Wong, Mainland Chinese Student Admits to Sedition in Hong Kong over Plan to Hang Banner Criticising Seizure of Tiananmen Square Crackdown Statue, South China Morning Post, Sept. 11, 2023, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3234168/mainland-chinese-student-admits-sedition-hong-kong-over-plan-hang-banner-criticising-seizure>; Wong Ho Cheong, Brian Wong, University Graduate Gets 5 Months’ Jail in Hong Kong for Seditious Online Comments Magistrate Likens to ‘Setting a Time Bomb’, South China Morning Post, Mar. 27, 2023, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3215026/university-graduate-gets-5-months-jail-hong-kong-seditious-online-comments-magistrate-likens-setting>; Alan Keung Ka Wai, Alex Lee Lung Yin, Cannis Chan Sheung Yan, see *infra* (discussion of ‘time bomb’ case); Yuen Ching-ting, see *infra*; Law Oi-wah, Sedition Clampdown Hits ‘Ordinary’ Hong Kongers, France24, July 26, 2023, available at <https://www.france24.com/en/live-news/20230726-sedition-clampdown-hits-ordinary-hong-kongers>; Wong Chun-kit, Brian Wong, Hong Kong Man Jailed for 8 Months over Seditious Social Media Posts Praising National Anthem Blunder, Promoting Separatism, South China Morning Post, Jan. 5, 2023, available at <https://www.scmp.com/news/hong-kong/politics/article/3205713/hong-kong-man-jailed-8-months-over-seditious-social-media-posts-praising-national-anthem-blunder>.

<sup>154</sup> Sedition Clampdown Hits ‘Ordinary’ Hong Kongers, France24, July 26, 2023, available at <https://www.france24.com/en/live-news/20230726-sedition-clampdown-hits-ordinary-hong-kongers>.

<sup>155</sup> For instance, the 2022 U.S. State Department human rights report on Hong Kong asserted that “[a]s of October, at least 44 individuals charged with ‘national security’-related offenses were in custody and



against pre-trial release on bail,<sup>156</sup> those accused of sedition may end up spending nearly the entire potential sentence in prison awaiting trial if they choose to contest the charges against them, creating an incentive to plead guilty (in particular as a guilty plea can lead to a sentence discount of up to one-third<sup>157</sup>).

*Third*, in at least two cases, Hong Kongers have been charged with sedition in part for speech outside of Hong Kong. For instance, Yuen Ching-ting, a student, reportedly posted messages while studying abroad in Japan along the lines of “I am a Hongkonger; I advocate for Hong Kong independence,” and “Hong Kong independence, the only way out.” Upon her return to Hong Kong, she was charged with sedition, ultimately pled guilty, and was given a two-month jail sentence.<sup>158</sup> In another case, the defendant—sixteen at the time the alleged offenses began<sup>159</sup>—stated that he had posted at least some of the videos for which he was charged from outside Hong Kong.<sup>160</sup>

*Finally*, one key through-line of courts’ reasoning for issuing prison sentences in guilty-plea cases has been the asserted volatility of the environment in Hong Kong and the hypothesized notion that people can be ‘easily incited.’ Thus, for instance, in sentencing the martial arts coach, the magistrate’s court noted that even though things were calmer now in Hong Kong, the defendant’s speech “may easily arouse emotions and resonance, leading to the risk of resurgence, which cannot be ignored” and that since those who read

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awaiting trial more than one year after being denied bail.” 2022 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet) – Hong Kong, *available at* <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/china/hong-kong/>. *See also* Erin Hale, For Hong Kong’s Arrested Pro-Democracy Activists, Justice Must Wait, Al Jazeera, Nov. 28, 2023 (reporting that “drawn-out proceedings have become a feature of the city’s British-inherited legal system since the imposition of the national security law following anti-government protests in 2019”), *available at* <https://www.aljazeera.com/news/2023/11/28/hong-kongs-arrested-pro-democracy-activists-face-long-wait-for-judgement>.

<sup>156</sup> *See supra*.

<sup>157</sup> Community Legal Information Centre (“If it is appropriate to sentence the accused to imprisonment, then usually the court will give a one-third discount to the length of imprisonment (e.g. an original sentence of 3 years imprisonment will become two years) if the accused pleads guilty at the earliest reasonable opportunity (e.g. at the first hearing or well in advance of the trial).”), *available at* [https://www.clic.org.hk/en/topics/policeAndCrime/court\\_procedure/q4](https://www.clic.org.hk/en/topics/policeAndCrime/court_procedure/q4).

<sup>158</sup> Jessie Pang, Hong Kong Student Jailed for 2 Months under Sedition over Social Media Posts in Japan, Reuters, Nov. 3, 2023, *available at* <https://www.reuters.com/world/asia-pacific/hong-kong-student-jailed-2-months-under-sedition-over-social-media-posts-japan-2023-11-03/>. Most, but not all, of the posts were reportedly made while she was abroad.

<sup>159</sup> Kelly Ho, Hong Kong Teenager Sentenced to Training Centre for Sedition over ‘Extremely Insulting’ Online Posts, Hong Kong Free Press, Dec. 14, 2022, *available at* <https://hongkongfp.com/2022/12/14/hong-kong-teenager-sentenced-to-training-centre-for-sedition-over-extremely-insulting-online-posts/>.

<sup>160</sup> [2022] HKMagC 13, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=149551&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149551&currpage=T).

the defendant's posts were likeminded, they might be "prone to emotional fluctuations."<sup>161</sup> In sentencing Tommy Yuen, a former pop singer (who pled guilty not only to sedition but also to "dealing with property known or believed to represent proceeds of an indictable offence" based on an alleged scam to raise money for a fictitious protester),<sup>162</sup> the District Court said "I believe that the purpose of his post is to rekindle the dissatisfaction and uneasiness that have gradually subsided in society; and in doing so, he does so at the expense of social peace for his own benefit."<sup>163</sup> In the case of the chef, the court said that "when someone instigates someone who is not completely emotionally calm, the risk of resurgence cannot be underestimated."<sup>164</sup> And in a case of three individuals who operated a book stall selling allegedly seditious materials, the court opined that "[t]o this day, although the chaos, violence, illegal and impactful behavior at that time has subsided, for some people, the mood has not completely calmed down, and some are

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<sup>161</sup> [2023] HKMagC 11, ¶ 5, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=154143&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=154143&currpage=T). See also Brian Wong, Hong Kong Martial Arts Coach Jailed 3 Months for Sedition Over 'Radical' Comments Attacking Communist Party and Calling Taiwan Independent Country, South China Morning Post, July 27, 2023 (quoting the magistrate to the effect that the posts "are prone to galvanise like-minded people"), available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3229145/hong-kong-martial-arts-coach-jailed-3-months-sedition-over-radical-comments-attacking-communist>. The defense and court agreed that the speech at issue in that case did not advocate violence. On the other hand, in some cases, the authorities have alleged that the speech at issue incited violence. Cf. Hans Tse, Hong Kong Clerk Jailed for 4 months After Calling for Downfall of China's Communist Party on Online Forum, Hong Kong Free Press, Nov. 24, 2023 ("Chief magistrate Victor So said Chow's online comments had incited violence . . . against government officials[.]"), available at <https://hongkongfp.com/2023/11/24/hong-kong-clerk-jailed-for-4-months-after-calling-for-downfall-of-chinas-communist-party-on-online-forum/>.

<sup>162</sup> Chin Victoria Ip, Hong Kong Singer Given 26-Month Sentence for Sedition and Money Laundering, Jurist, Sept. 3, 2023, available at <https://www.jurist.org/news/2023/09/hong-kong-singer-handed-26-month-sentence-for-sedition-and-moneylaundering/#:~:text=Hong%20Kong%20singer%20given%2026,and%20money%20laundering%20%2D%20JURIST%20%2D%20News&text=Hong%20Kong%20District%20Court%20judge,to%2026%20months%20of%20imprisonment>.

<sup>163</sup> [2023] HKDC 1218, ¶ 19 [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=154722&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=154722&currpage=T); see also Brian Wong, Hong Kong Singer Jailed for More than 2 Years Over Social Media Posts Insulting Police, Officials and Laundering HK\$718,788 Raised by Fake Story About Protester Facing Riot Trial, South China Morning Post, Aug. 31, 2023 ("The purpose of his messages was to reignite the dissatisfaction and anxiety in society that have already subsided," said [the judge], who was approved by city leader John Lee Ka-chiu to hear the case. "He did so for his own benefits at the expense of social harmony."), available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3232927/hong-kong-singer-jailed-more-2-years-over-social-media-posts-insulting-police-officials-and>.

<sup>164</sup> [2022] HKMagC 7, ¶ 11 [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=147378&QS=%2B&T P=RS](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=147378&QS=%2B&T P=RS). The court took the same approach in the case of an IT technician who pled guilty on the basis of similar slogans. [2022] HKMagC 8, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=147687&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=147687&currpage=T).

even still brooding about it,”<sup>165</sup> suggesting the populace could easily be riled up, and likening the defendants’ actions to planting a ‘time bomb.’<sup>166</sup>

In so ruling the courts also seem to believe that Hong Kongers would be very easy to excite. Thus, the magistrate’s court that sentenced Yuen Ching-ting specifically noted that the defendant’s messages “may have caused ignorant people to be subtly incited.”<sup>167</sup> In sentencing Kurt Leung, a 38-year-old clerk who pled guilty to importing allegedly seditious children’s books (three of which were the subject of the speech therapists’ case described below), the magistrate’s court found that “[s]ince the minds of the younger generation are immature and are easily influenced and instigated by others, inflammatory ideas and thoughts are easy to take root and penetrate among children with fragile minds, gradually sprouting and becoming deep-rooted, which may cause cross-generational consequences.”<sup>168</sup> The court further noted that the sentence in the case should have a preventive effect—“preventing and eradicating the resurgence of inflammatory ideas.”<sup>169</sup> And in sentencing ‘Giggs,’ a DJ and political commentator, the District Court approvingly cited the following language in support of the seriousness of the offense: “It is scarcely necessary to point out that to accomplish treasonable purposes, and to delude the weak, the unwary, and the ignorant, no means can be more effectual than a seditious press.”<sup>170</sup>

This notion—that these are ‘dangerous’ times and Hong Kongers could easily be moved to violence—is also evident in the prosecution’s arguments in the *Stand News* case. That case was brought against Pui-Kuen Chung (Editor-in-Chief of *Stand News* until November

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<sup>165</sup> [2023] HKMagC 5, ¶ 19

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=151452&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=151452&currpage=T).

<sup>166</sup> See Kelly Ho, Hong Kong’s ‘Pastor Keung’ and 2 Others Jailed for up to 10 Months Over ‘Seditious’ Book, Hong Kong Free Press, Mar. 21, 2023, *available at* <https://hongkongfp.com/2023/03/21/hong-kongs-pastor-keung-and-2-others-jailed-for-up-to-10-months-over-seditious-book/>.

<sup>167</sup> [2023] HKMagC 13, ¶ 16

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=156030&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=156030&currpage=T).

<sup>168</sup> [2023] HKMagC 14, ¶ 8

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=156043&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=156043&currpage=T).

<sup>169</sup> *Id.* ¶ 10.

<sup>170</sup> [2022] HKDC 958, ¶ 26, (quoting *R v. Sullivan*; *R v. Piggott* (1868) 11 Cox 44),

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=147812&QS=%2B&T P=RS](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=147812&QS=%2B&T P=RS).

1, 2021)<sup>171</sup> and Shiu-Tung (Patrick) Lam (Acting Editor-in-Chief after Mr. Chung's resignation).<sup>172</sup>

*Stand News* was widely known for livestreaming the 2019 protests in Hong Kong.<sup>173</sup> On December 29, 2021, over 200 national security police officers were reportedly deployed to the *Stand News* offices,<sup>174</sup> and Mr. Chung and Mr. Lam were arrested along with a former director and three former Board members. Shortly thereafter *Stand* announced on Facebook that “[b]ecause of the situation, *Stand News* is now stopping operations” and “Acting editor in chief, Patrick Lam, has resigned and all *Stand News* employees are dismissed.”<sup>175</sup>

The ongoing sedition case against Mr. Chung and Mr. Lam turns on seventeen *Stand News* articles (comprising interviews, blog commentaries, and news reporting).<sup>176</sup> These articles concerned: (1) an unofficial democratic primary for the Legislative Council organized in Hong Kong in July 2020; (2) the arrest of individuals seeking to flee Hong Kong by boat; (3) individuals who allegedly encouraged sanctions against Hong Kong; and (4) articles critical of the National Security Law (NSL) or judicial proceedings in Hong Kong. Evidence in the case is closed, and the trial court has reserved its judgment.

During the proceedings, the prosecution repeatedly characterized the situation in Hong Kong as volatile. For instance, the prosecution asked of Mr. Chung, “Isn’t it dangerous

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<sup>171</sup> Chung Pui-kuen announced his resignation on November 7, 2021, but “said the deputy chief of *Stand News*, Patrick Lam, had taken over the position from November 1.” Chen Qingqing, *Stand News Editor-in-Chief Steps Down, Signaling End of Anti-Govt Media*, *Global Times*, Nov. 7, 2021, *available at* <https://www.globaltimes.cn/page/202111/1238333.shtml>; Sophie Hui, *Stand News Chief Quits*, *The Standard*, Nov. 8, 2021, (“Stand News editor-in-chief Chung Pui Kuen announced that he resigned last Monday [November 1], citing family reasons.”), *available at* <https://www.thestandard.com.hk/section-news/section/47146897/235813/Stand-news-chief-quits>.

<sup>172</sup> The third defendant in the case is the parent company of *Stand News*; that entity did not appear at trial. See Kanis Leung, *Sedition Trial Begins for Closed Hong Kong News Site Editors*, *AP News*, Oct. 31, 2022, *available at* <https://apnews.com/article/asia-hong-kong-newspapers-government-and-politics-4076d4c4810fae4cb411bf2a2115aff8>.

<sup>173</sup> Mary Hui, *The Hong Kong Protests Are the Most Live-Streamed Protests Ever*, *Quartz*, Nov. 11, 2019 (noting that *Stand* might have “10 live signals simultaneously”), *available at* <https://qz.com/1737197/hong-kong-protests-are-most-live-streamed-ever>.

<sup>174</sup> Hong Kong Free Press, *Over 200 Hong Kong National Security Police Raid *Stand News* Newsroom, 6 Arrested Inc. Acting Editor*, Dec. 29, 2021, *available at* <https://hongkongfp.com/2021/12/29/breaking-hong-kong-national-security-police-arrest-stand-news-senior-staff-as-200-officers-raid-newsroom/>.

<sup>175</sup> Rhoda Kwan & Emma Graham-Harrison, *Hong Kong Media Outlet *Stand News* to Close After Police Raid*, *Guardian*, Dec. 29, 2021, *available at* <https://www.theguardian.com/world/2021/dec/29/hong-kong-police-arrest-six-journalists-from-independent-media-outlet-stand-news>.

<sup>176</sup> The articles were retrieved from the web archive and reviewed for purposes of writing this report. A list of the articles can be found here: Hong Kong Free Press, *Hong Kong’s *Stand News* Trial*, *available at* <https://hongkongfp.com/hong-kongs-stand-news-trial/>. For simplicity, this report refers to all of them as ‘articles,’ although some of them were opinion pieces/blog posts or interviews.

to let these people report with such a strong stance?”, during questioning regarding the alleged private beliefs of journalists at *Stand News*.<sup>177</sup> Likewise, the prosecution challenged Mr. Chung over a series of comics *Stand News* had published, asking “You have rights to create political comics and you have your freedom of speech, but when we are in an extreme situation, should you not tone it down?”<sup>178</sup> In cross-examining Mr. Chung about one of the seventeen articles at issue in the case, the prosecution focused on the fact that young people might read it and asked, “Did you think of those people, young people, people affected by fanaticism, and the unstable social situation?”<sup>179</sup>

While on the stand, Mr. Chung aptly summarized this aspect of the prosecution’s theory: “The prosecution always assumes that Hong Kongers are naive and easily incited. We would never make such an assumption as the media. Every citizen has their free wills, rights, and speech freedom, they could reach consensus themselves through discussion.”<sup>180</sup>

### C. LEGAL INTERPRETATION

There have been five significant judgments in sedition cases in which the accused pled not guilty and contested the charges: Tam Tak-chi; Koo Sze-Yiu; the five speech therapists; Pang Moon-yuen (“Pastor Moon”) and Chiu Mei-ying; and Chui Chun-man. The judgments in these cases show the direction of the law in Hong Kong.

Tam Tak-chi, the first person to go to trial for sedition, is a well-known radio host and opposition politician. He was convicted, following a trial monitored by TrialWatch, for reciting political slogans such as “Liberate Hong Kong, Revolution of our Times,” criticizing the 2020 National Security Law, and insulting and criticizing the Chinese Communist Party and the police.<sup>181</sup> Koo Sze-Yiu, at the time a 75-year-old activist, was convicted of attempted sedition for his alleged plans to “carry a homemade wooden coffin to China’s Liaison Office in the city on the opening day of the [Olympic] Games.”<sup>182</sup> In that case, the prosecution alleged that it had found materials for a mock funeral during a search of his home, including banners that read “down with the Communist Party,” “end one-party rule,” “democracy and human rights over the Winter Olympics,” “Hong Kong National Security Law, eat shit” and “shame for 10,000 years on the butcher’s regime.”<sup>183</sup>

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<sup>177</sup> Trial Monitoring, Jan. 27, 2023.

<sup>178</sup> *Id.*

<sup>179</sup> Trial Monitoring, Feb. 20, 2023.

<sup>180</sup> Trial Monitoring, Jan. 27, 2023.

<sup>181</sup> See Elizabeth Wilmshurst KC & TrialWatch, Fairness Report: HKSAR v. Tam Tak-Chi, May 2022, available at <https://cfj.org/wp-content/uploads/2022/05/Tam-Tak-Chi-Fairness-Report-May-2022.pdf>.

<sup>182</sup> Kathleen Magramo, Hong Kong Court Jails Veteran Activist for Plan to Protest Beijing Olympics, CNN, July 13, 2022, available at <https://www.cnn.com/2022/07/13/asia/hong-kong-koo-sze-yiu-jailed-sedition-intl-hnk/index.html>.

<sup>183</sup> HKSAR v. Koo Sze-yiu, [2022] HKMagC 4, ¶ 4.

(Koo Sze-Yiu has since reportedly been rearrested, again for attempt or preparation to engage in sedition, reportedly for a planned protest against perceived unfairness in a District Council election.<sup>184</sup>)

The speech therapists case involved a series of allegorical children’s books published by the Union of Speech Therapists<sup>185</sup> that depicted sheep trying to defend their village from wolves. The Pang Moon-yuen and Chiu Mei-ying case concerned YouTube videos critical of the Hong Kong judiciary, which Mr. Pang allegedly created and uploaded, and allegations that the two defendants had clapped and criticized a judge in court (for instance, Pastor Moon allegedly said “you have lost your conscience”).<sup>186</sup> Finally, Chui Chun-man was convicted for allegedly saying online that a policewoman who had drowned following a crash during a boat chase ‘deserved to die.’<sup>187</sup>

Across these five cases, the courts have had occasion to consider three interrelated issues: (1) whether the sedition law is constitutional—specifically, whether it is unduly vague and whether it is a necessary and proportionate restriction; (2) how to decide whether speech is ‘seditious’ and whether and what kind of ‘seditious intent’ is required; and (3) what entities the law is meant to protect. In several cases, the question of whether there was, or needed to be, a likelihood of violence was specifically argued and decided—in relation to necessity and proportionality as well as in relation to intent.

### **Constitutionality of Sedition Law: Vagueness and Necessity**

Across multiple cases, the courts in Hong Kong have found that the sedition law is not unduly vague, and is necessary and proportionate, and on this basis have held that it is constitutional.

For instance, in Tam Tak-chi’s case, counsel argued that “the ordinances relating to the charge of uttering seditious words lack precise definitions, including the wording ‘hatred’,

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<sup>184</sup> Kelly Ho, Hong Kong Activist Koo Sze-yiu Arrested for Sedition Over Plan to Protest Against ‘Unfair’ District Council Race – Reports, Hong Kong Free Press, Dec. 8, 2023, *available at* <https://hongkongfp.com/2023/12/08/hong-kong-activist-koo-sze-yiu-arrested-for-sedition-over-plan-to-protest-against-unfair-district-council-race-reports/>.

<sup>185</sup> See Simone McCarthy and Kathleen Magramo, Hong Kong Court Sentences Speech Therapists to 19 Months in Prison Over ‘Seditious’ Children’s Books, CNN, Sept. 11, 2022, *available at* <https://www.cnn.com/2022/09/10/asia/hong-kong-speech-therapists-sedition-childrens-books-intl-hnk/index.html>.

<sup>186</sup> Hong Kongers Who Clapped In Court Found Guilty of Sedition, VOA, Oct. 27, 2022, *available at* <https://www.voanews.com/a/hong-kongers-who-clapped-in-court-found-guilty-of-sedition/6807551.html>.

<sup>187</sup> The defendant also allegedly referred to higher up ‘dog officials.’ See HKSAR v. Chan Chui-man, [2023] HKMagC 3; *cf. id.* at ¶ 211 (“Similarly, the Defendant was just venting his emotions. As he heard in the canteen, dog officials referred to the people who caused Inspector Lam to die, i.e. those commanding officers who saw Inspector Lam went into mainland waters but did not call her to stop and cease chasing.”).

‘contempt’, ‘disaffection’, ‘dissatisfaction’, ‘ill will’, and ‘hostility.’”<sup>188</sup> The District Court rejected this argument, holding that “the offenses in ordinances cannot be strictly provided for because the ordinances move together with the times following changes in the environment, era, or the general mood of society (unless they are continuously revised). This makes the court able to explain and interpret . . . [these] words as appropriate to the situation.”<sup>189</sup> Likewise, in the speech therapists’ case, the court held that “‘hatred’, ‘contempt’, ‘disaffection’, and ‘discontent’ both in English and Chinese are just words with ordinary meaning, and these concepts are best left to the trial judge or jury to be applied in their ordinary meaning to the time, place and circumstances of the conduct in question.” On this basis, the court concluded that “[f]rom daily living experience, a judge or a jury is in a position to decide whether the acts done or the words uttered (which are proved by objective evidence) will lead to the kind of subjective feelings or emotions referred to.”<sup>190</sup> Finally, in the Pastor Moon case, the defendants also challenged the sedition law as vague and noted that “other common law jurisdictions have already abolished Sedition, or limited its application to situations where violence is incited.”<sup>191</sup> The court in rejecting the challenge explicitly cited the decision in *Tam Tak-chi* and held that “the meaning and scope of ‘seditious intention’ is sufficiently certain.”<sup>192</sup>

In *Tam Tak-chi*, the District Court also found that the law was necessary and proportionate, relying in part on the Court of Final Appeals’ decision to classify sedition as a ‘national security offense’ (and seeing this as support for the view that the sedition law was necessary to protect national security).<sup>193</sup> Likewise, the court in the speech therapists’ case concluded that “there is a strong pressing need to safeguard national security in HKSAR to prevent riots and civil unrests of any magnitude from happening again. It is also essential to protect the constitutional order of HKSAR under the ‘One Country, Two Systems’ policy and to restore national unity as soon and as fullest as possible.”<sup>194</sup> The court further noted that “[a]lthough the situation in HKSAR has more or less calmed down after the promulgation of the NSL, it is clear that these people have little change in their attitude. They just go underground and the seeds of unrest are still there. The political situation appears to be calm on the surface but very volatile underneath.”<sup>195</sup> The court in the Pastor Moon case agreed.<sup>196</sup>

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<sup>188</sup> HKSAR v. Tam Tak-chi, [2022] HKDC 208, ¶ 44.

<sup>189</sup> *Id.* ¶ 54.

<sup>190</sup> HKSAR v. Lai Man-ling, [2022] HKDC 981, ¶ 94.

<sup>191</sup> HKSAR v. Pang Moon-yuen et al., [2022] HKMagC 9, ¶ 12.

<sup>192</sup> *Id.* ¶ 17.

<sup>193</sup> HKSAR v. Tam Tak-chi, [2022] HKDC 208, ¶ 57.

<sup>194</sup> HKSAR v. Lai Man-ling, [2022] HKDC 981, ¶ 105.

<sup>195</sup> *Id.* ¶ 104.

<sup>196</sup> HKSAR v. Pang Moon-yuen et al., [2022] HKMagC 9, ¶ 25.

## Intent

Unlike with respect to the law's constitutionality, the courts in Hong Kong are divided on the question of whether a 'seditious intention' must be proved or whether proving the use of 'seditious words' is sufficient.

On the one hand, the court in the speech therapists' case explicitly stated that the prosecution would have to prove a 'seditious intention'.<sup>197</sup> In *Koo Sze-yie*, by contrast, the magistrate focused on whether the *words* had a seditious intent (rather than whether the defendant had such an intent).<sup>198</sup> And likewise in Pastor Moon's case, the court held that "'seditious intention' refers to the type of 'words' that would amount to an offence, not the *mens rea*."<sup>199</sup>

## Scope of Application

The Hong Kong courts have broadly construed the law's scope of application. In Tam Tak-chi's case, for instance, the defense argued that criticism of entities like the Chinese Community Party did not come within the ambit of the law, as the law only protected the government of Hong Kong.<sup>200</sup> The court rejected this argument (while declining to rule on the outer limits of the sedition law's scope of application).<sup>201</sup>

In the *Chan Chui-man* case, the court also implicitly found that criticism of the police could be seditious, holding that "the Defendant was not just targeting [the policewoman] herself, but all the police officials in the Police Force. . . . [He] described police officials in the animalistic term 'dogs.' The Defendant clearly had an intention of hatred, contempt and disaffection towards police officials."<sup>202</sup> The court went on to find that "[t]he Police Force is part of the government and the administration of justice, while the police are part of the citizenry, a class that engages in a specific occupation," and that on this basis the defendant's alleged Facebook posts met the test for exciting disaffection "against the Government of the HKSAR and/or the administration of justice in Hong Kong, and/or to

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<sup>197</sup> HKSAR v. Lai Man-ling, [2022] HKDC 981, ¶ 95 ("[A] seditious intention does not depend on the subjective feeling of the target institutions or persons, *but depends on the subjective intention of the person uttering the words or printing the publication.*") (emphasis added).

<sup>198</sup> HKSAR v. Koo Sze-yiu, [2022] HKMagC 4, ¶¶ 41, 43.

<sup>199</sup> HKSAR v. Pang Moon-yuen et al., [2022] HKMagC 9, ¶ 45.

<sup>200</sup> HKSAR v. Tam Tak-chi, [2022] HKDC 208, ¶ 49 ("[T]he Communist Party is only the leading faction in the central government, and . . . writing about the Communist Party should not constitute the 'seditious words' in Article 9.")

<sup>201</sup> *Id.* ¶ 73 ("The status of the Chinese Communist Party as the constitutional government in the Chinese Constitution is well known. Even if the words regarding the Communist Party were removed, I believe that the defendant still had seditious intent in attacking the Government of the SAR.")

<sup>202</sup> HKSAR v. Chan Chui-man, [2023] HKMagC 3, ¶ 256.



promote feelings of ill-will and enmity between different classes of the population of Hong Kong.”<sup>203</sup>

In the speech therapists’ case, the court further held that the sedition law covered ‘central authorities,’<sup>204</sup> and not just the government of Hong Kong, finding that “any reference to ‘Her Majesty’ in section 9 of the Crimes Ordinance shall be construed as a reference to ‘the Central People’s Government or other competent authorities of the People’s Republic of China.’”<sup>205</sup>

## Nexus to Violence

In both the speech therapists’ case, and the *Koo Sze-yiu* case, the courts specifically held that sedition did not require a likelihood of violence, despite noting that such limits had been imposed in different contexts. The court in the Pastor Moon case also appeared to agree. For instance, in the speech therapists’ case, the court explained that “[i]t is argued strongly by counsel for all defendants that . . . a seditious intention must also include ‘an intention to incite persons to violence or to create public disturbance or disorder for the purpose of disturbing constituted authority’ formulated by case law in various common law jurisdiction (“the Common Law Intention”). In my judgment, there is no legal basis to incorporate the Common Law Intention into the statutory definition of ‘seditious intention’ stipulated in section 9 of the Crimes Ordinance.”<sup>206</sup> Likewise, in *Koo Sze-yiu* case’s, the court specifically found that the law was constitutional “[e]ven without the element of violence,” concluding that “the offence of sedition strikes a balance between protection of national security and social order and the protection of individual rights and freedoms.”<sup>207</sup>

From these five cases, the general direction of the jurisprudence in Hong Kong seems to have been, at least to date: (1) that the sedition law is not unduly vague because courts can interpret it according to changing circumstances; (2) that the law is necessary and proportionate, at least in Hong Kong at the present time, due to ongoing risks to national security; (3) that courts disagree over whether intent is required (or whether it is the intent ‘of the words’); (4) that the law sweeps broadly, protecting a wide variety of entities; and (5) that a likelihood of violence is generally not required.

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<sup>203</sup> *Id.* at ¶ 264.

<sup>204</sup> HKSAR v. Lai Man-ling, [2022] HKDC 981, ¶ 4.

<sup>205</sup> *Id.* ¶ 62.

<sup>206</sup> *Id.* ¶ 81. The court’s logic was that in earlier years, violence was the main way in which risk to government manifested. Today, the risk could derive from “[s]preading rumour, hatred and disinformation.” *Id.* ¶ 85.

<sup>207</sup> HKSAR v. Koo Sze-yiu, [2022] HKMagC 4, ¶ 27. Notably, in the *Tam Tak-Chi* case, the Court did not explicitly address the question of any requirement of violence.

## D. RECENT DEVELOPMENTS: PRIVY COUNCIL DECISION, TAM TAK-CHI'S APPEAL, AND JUDGMENT IN STAND NEWS

In July 2023, Tam Tak-chi appealed his conviction for sedition to the Court of Appeals.<sup>208</sup> The court indicated that it would rule within nine months, i.e. by March 2024. In October 2023, the Privy Council delivered its judgment in the *Maharaj* case.<sup>209</sup> The trial court considering the *Stand News* case requested supplemental submissions on the impact of the *Maharaj* decision and ultimately decided to defer judgment until after the Court of Appeals decision in *Tam Tak-chi*.<sup>210</sup>

In court, the defense in the *Stand News* case argued: “[t]he law should be rational and reasonable. Even people who don’t have any legal knowledge would be able to understand the law. And if people without the knowledge are not able to understand it, then it is not a good law. Both are points that I have always emphasised, and this Privy Council judgement confirms my argument.”<sup>211</sup> The defense further argued that “there should be public disorder”<sup>212</sup> at a minimum (that is, that without showing a likelihood of violence or disorder, speech could not be prosecuted as seditious).

By contrast, the prosecution asserted that the text of the sedition laws of Trinidad & Tobago and Hong Kong were different—specifically, since Hong Kong’s sedition law refers to the intent to cause ‘incitement to violence’ in sub-section (f) as one of many definitions of ‘seditious intention.’ The prosecution argued on this basis that legislative drafters did not understand a requirement of violence to apply across all sedition offenses.<sup>213</sup> Further, the prosecution argued that the political context in Hong Kong was different from Trinidad & Tobago.<sup>214</sup> The prosecution further asserted that “Hong Kong has a national security law, incitement to violence is not an element that needs to be

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<sup>208</sup> Mandy Cheng, Hong Kong Activist Tam Tak-chi Launches Appeal Bid Against Conviction and Sentence Under Sedition Law, Hong Kong Free Press, July 4, 2023, available at <https://hongkongfp.com/2023/07/04/hong-kong-activist-tam-tak-chi-launches-appeal-bid-against-conviction-and-sentence-under-sedition-law/>.

<sup>209</sup> Attorney General of Trinidad and Tobago v. Vijay Maharaj, Privy Council Appeal No 0099 of 2021, 2023 UKPC 36, Oct. 12, 2023.

<sup>210</sup> Hans Tse, Verdict in Sedition Case Against Hong Kong Outlet Stand News Further Postponed Pending Higher Court Ruling, Hong Kong Free Press, Nov. 15, 2023, available at <https://hongkongfp.com/2023/11/15/verdict-in-sedition-case-against-hong-kong-outlet-stand-news-further-postponed-pending-higher-court-ruling/>.

<sup>211</sup> Trial Monitoring, Nov. 15, 2023.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

proved in the national security law. The national security law has a much heavier punishment than sedition, and it can go up to life imprisonment.”<sup>215</sup>

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<sup>215</sup> *Id.*



## A. INTRODUCTION

Section 116 of the Thai Criminal Code (Thailand’s sedition law)<sup>216</sup> is included in a subcategory of offences related to the security of the Kingdom and criminalizes any public words or writings that are meant to:

- bring about a change in the laws of the country or the government by the use of force or violence;
- raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country; or
- cause the people to transgress the laws of the country.

Importantly, in order to prove sedition, the prosecutor must show that the defendant had the requisite intent (depending on the subsection charged in the indictment) at the time the offence was committed.<sup>217</sup> Section 116 excludes “act[s] within the purpose of the Constitution or for expressing an honest opinion or criticism.” Unlike in Malaysia (see below), Thailand has a separate law criminalizing insulting royalty (Section 112 of the Thai Criminal Code, which criminalizes *lèse-majesté*<sup>218</sup>).

Section 116 carries a penalty of up to seven years’ imprisonment. There are no specific rules regarding the initiation of sedition cases or regarding the availability of bail.

There has been a significant uptick in sedition cases over the last several years. Thai Lawyers for Human Rights, for instance, has reported that at least 147 individuals have been accused of violating Thailand’s sedition law since 2020.<sup>219</sup>

This Part briefly sketches the historical application of the sedition law in Thailand and then describes in greater detail how the law was applied in two cases monitored by TrialWatch—one of which ended in acquittal and the other in conviction.

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<sup>216</sup> Thailand Criminal Code, Section 116. Instigator to violate Constitution (Sedition).

<sup>217</sup> Thailand Criminal Code, Section 59, Criminal Liability; see also Jompom Pitaksantayothin and Bongchul Kim, Sedition Law and Expression on the Internet in Thailand: A Critical Analysis, 7 J. of Global & Area Studies 79, 87 (2023).

<sup>218</sup> This law is also significantly flawed. See, e.g., Kevin Bell, Thailand’s Lese-Majeste Cases Are a Travesty of Justice, The Diplomat, Apr. 5, 2023 (describing some of TrialWatch’s work on these laws), available at <https://thediplomat.com/2023/04/thailands-lese-majeste-cases-are-a-travesty-of-justice/>.

<sup>219</sup> Thai Lawyers for Human Rights, October 2023: A Total of 1,930 People Have Been Politically Prosecuted in 1,253 Cases, available at <https://tlhr2014.com/archives/61163>.

## B. HISTORY & LEGAL INTERPRETATION OF THE SEDITION LAW IN THAILAND

Since the 1932 Siamese Revolution, in which Thailand transitioned from an absolute monarchy to a constitutional monarchy, the domestic political landscape has been characterized by a lack of stability, alternating between military rule and civilian governments with very frequent coups d'état (14 in total from 1933 - 2023).<sup>220</sup> Sedition and other political crimes, such as *lèse-majesté*, have been a constant feature of legal and political life in Thailand in what one scholar terms “a state whose very mentality and central impulse are defined by its understanding and use of [such] laws.”<sup>221</sup>

There have only been a handful of recent sedition cases that have reached Thailand's Supreme Court. In one, though, the Court did consider whether the allegedly seditious speech had a nexus to actual violence, although in other cases, that appears not to have been a central focus of analysis.<sup>222</sup>

## C. RECENT DEVELOPMENTS

While sedition is often charged alongside *lèse-majesté*, making it difficult to untangle the speech or acts underlying the sedition charges, two recent cases monitored by TrialWatch and involving only allegations of sedition show how broadly the sedition law can be applied.

In one case, 13 student protesters were charged with sedition for speeches at a protest that, according to the indictment, “contained messages that attacked the government by announcing that they would not comply with the arrest warrant issued by the Military Court and would not accept the current administration and its formation rooted from coup d'état . . . . [and] also criticized the impact of coup d'état in the past year on human rights, resources, and right to expression.”<sup>223</sup> The theory was that the speeches were likely to ‘create disaffection’ or, by impeding efforts to execute military court arrest warrants, were likely to cause individuals to ‘transgress the country's laws.’

But neither the indictment nor the prosecution witnesses at trial were able to recount the words actually used by the defendants, much less how and why the asserted potential

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<sup>220</sup> See, Eugenie Mérieau, *The 1932 Compromise Constitution: Matrix of Thailand's Permanent Constitutional Instability*, in *Constitutional Foundings in Southeast Asia* (Kevin YL Tan & Ngoc Son Bui eds., 2019) (arguing that the still unresolved compromise that resulted in the 1932 Constitution impacts Thai constitutional ideas and practices today).

<sup>221</sup> David Sreckfuss, *Truth on Trial in Thailand: Defamation, Treason and Lèse-Majesté*, pg. 5 (2011).

<sup>222</sup> Jompom Pitaksantayothin and Bongchul Kim, *supra*, at 90-91.

<sup>223</sup> *Public Prosecutor v. Rattapon Supsophon*, Indictment (Informal Translation), Aug. 4, 2022.

consequences were likely.<sup>224</sup> In fact, the prosecution witnesses admitted that the protest at which the speeches were made was peaceful,<sup>225</sup> and one witness testified that the police hoped to arrest those subject to arrest warrants *at the end of the protest*,<sup>226</sup> belying any argument that the speeches and protest had prevented the execution of arrest warrants.<sup>227</sup>

On December 18, 2023, the trial court acquitted the defendants, finding in particular that their speeches had not incited violence or disturbance.<sup>228</sup> The Court stated that when considering the overall content of the speeches, even though they may have contained impolite or inappropriate words, they did not rise to the level of causing unrest in the Kingdom. The Court affirmed that the protesters' actions were an exercise of rights in accordance with the objectives of the Constitution.

In a second case, a woman was charged with sedition (along with computer crimes) for allegedly posting announcements of two protests to the Pan Thalu Fah (an opposition, pro-democracy group) Facebook page along the following lines: for the first protest: “#Mob11Aug Drive away tyrants 15:00 onward. Meet at the Victory Monument, Phayathai Islands, March to follow, Heading Prayuth’s home. #Thalufah #Mob11Aug #PrayuthGetsOut #PeopleRevolution”; and for the second protest: “Call for action! Friday 13 Drive away tyrants #Mob13Aug, Victory Monument, Phayathai Islands, 15:00 onward. We will march arm in arm to Prayuth’s home. Experience every form of fight from the people. Though in the past, we had few people and Thalufah’s mission did not go very far because the police dispersed the gathering brutally and monstrosly to protect the tyrants. Let’s come out to boost the people’s power for the peaceful fight against the tyrants and bring back democracy. #Thalufah #PrayuthGetsOut #PeopleRevolution.”<sup>229</sup>

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<sup>224</sup> Seven of the nine witnesses called by the prosecution stated affirmatively that they could not remember the content of the speeches given on that day. Of the other two witnesses who testified for the prosecution, one was not present at the protest, only being assigned to gather evidence on the case in 2018, and the other was not asked this question.

<sup>225</sup> Trial Monitoring, Aug. 22, 2023 (Defense counsel asked, “Finally, the protest ended peacefully, no incidents of violence and armed conflicts?” and the prosecution witness responded, “Yes.”).

<sup>226</sup> *Id.*

<sup>227</sup> In fact, prosecution witnesses suggested that other individuals—not accused in the case—had been mainly responsible for helping certain persons subject to the warrants escape the police. *Id.* (Defense counsel colloquy with witness to the effect that “you filed a legal charge against Thanathorn and Sulak [not defendants in the case], on the offense of aiding other persons to escape from lawful custody”).

<sup>228</sup> Thai Lawyers for Human Rights, *The Court Dismissed the Case! The Case of 13 NDM Activists Protesting Against the NCPO in 2015 After Fighting for 4 Years Indicates That the Protest Against the NCPO Falls Within the Framework of Constitutional Rights and Freedoms and Does Not Fall Under Section 116*, Dec. 18, 2023 (“Nor does it appear that there was any violence or incitement to the people as per the lawsuit.”), available at <https://tlhr2014.com/archives/62386>.

<sup>229</sup> Public Prosecutor v. Katanyu Muenkhamruang, Indictment (Informal Translation), Oct. 18, 2022.

The indictment alleged that these communications were likely to cause people to ‘transgress the laws of the country.’

Notably, the second call for protest specifies that the fight should be ‘peaceful.’ Further, the main prosecution witness admitted under cross-examination that ‘there was no language in the invitation that showed an intention to cause public unrest’ (the witness was asked “Was there any language in the invitation that showed an intention to cause public unrest?” and responded, “None.”).<sup>230</sup> A prosecution witness alleged however that the protests in fact turned violent, with protesters burning police cars and setting off firecrackers that caused injuries to police.<sup>231</sup>

The defendant alleged that she had not made the posts in question, and the prosecution did not present a witness to testify that she had (only that she, among numerous others, was an administrator of the relevant Facebook page).<sup>232</sup> The prosecution further alleged that she had ‘live-streamed’ herself from the protest, although the defense argued that they did not have a clear screen capture identifying her as participating in the live-stream.

On November 22, 2023, the defendant in the Thalu Fah case was convicted of two counts of sedition and one count of computer crimes, and given a two-year sentence.<sup>233</sup> According to her lawyers, she plans to appeal her conviction. In the judgement, the court referred to the defendant’s history of committing crimes related to organizing demonstrations.<sup>234</sup> The Court noted that based on the evidence provided, it could not determine that she was responsible for posting the original message to publicize the gathering on Facebook, but stated that even if she did not publish the posts, she evidently knew about them as she was able to attend the protests, implying that even having knowledge of such posts is criminal.<sup>235</sup>

In explaining its decision to convict, the Court relied heavily on images (from various camera angles) provided by the prosecution to prove the defendant livestreamed the protest to Facebook<sup>236</sup>, although the defense asserted that the images were unreliable and unclear. The Court also pointed out the Royal Decree that had been in place during the time of the alleged offense prohibiting gatherings of five or more people due to the

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<sup>230</sup> Trial Monitoring, Sept. 5, 2023. The witness admitted the same as to the second invitation, although added that it turned out ‘chaotic in reality.’ *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *See, e.g., id.* (police witness asked “the witness does not know who made the posts in the Thalu Fah group” and the witness responded “Correct.”).

<sup>233</sup> Pursuant to Section 90 of the Criminal Code, only the penalty under Section 116 applied (“When any single act is an offense against several provisions of law, the provision which prescribes the most severe punishment shall apply to inflict a punishment on the offender” - commonly called the “principal offence rule”).

<sup>234</sup> Public Prosecutor v. Katanyu Muenkhamruang, Final Judgment (Informal Translation), Nov. 22, 2023.

<sup>235</sup> *Id.*, pg. 13.

<sup>236</sup> *Id.*, pg. 12-13.

ongoing COVID-19 pandemic, and she asserted that the protest caused disruption, violence and “rebelliousness among the people.”<sup>237</sup> It thus appears that the Court relied on the alleged consequences of the protest to convict the defendant of sedition, without analyzing the words at issue themselves—or even finding that she had spoken them.

The Thalu Fah case is something of an exception. In fact, in numerous cases, the accused are ultimately acquitted. According to TLHR, there were 53 sedition cases between the 2014 coup and the end of the NCPO order in 2019. Of those, 26 ended in acquittal,<sup>238</sup> the public prosecutor decided not to proceed in another 13 cases and in only eight were there convictions and prison sentences (in three out of the eight, the defendants were also charged with *lèse-majesté*).<sup>239</sup>

The different verdicts in the Thalu Fah and student protest cases, despite being pronounced within a month of each other, reflect the subjective and vague nature of sedition laws. In the event an appeal is filed in the Thalu Fah case, the court has an opportunity to bring greater clarity to the sedition law in Thailand.

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<sup>237</sup> *Id.*, pg. 15-17.

<sup>238</sup> See Thai Lawyers for Human Rights, In Section 116 Cases from the NCPO Era, the Court Dismissed the Charges and Prosecutors Ordered not to Prosecute More Than 73.5% of the Cases, But Had to Fight the Case for a Long Time, Dec. 19, 2023, *available at* <https://tlhr2014.com/archives/62406>. In some, the defendant was acquitted of sedition but convicted on other charges.

<sup>239</sup> Of the remaining six cases, the status of five is unknown and one is still ongoing.





## A. INTRODUCTION

In Malaysia, the Sedition Act 1948 criminalizes speech “having a seditious tendency.” A ‘seditious tendency’ is then defined as, among other things, a tendency “to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government” and “to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State.” As in Hong Kong, there are enumerated exceptions for certain kinds of criticism of government, such as words or acts showing that a ruler has been misled or mistaken.

The Sedition Act 1948 carries a potential sentence of up to three years in prison. As in India and Pakistan, the Sedition Act does require a specific governmental sanction: “No person shall be prosecuted for an offence under section 4 without the written consent of the Public Prosecutor.”<sup>240</sup>

Sedition in Malaysia is a non-bailable offense, which means that the court has discretion to grant or deny bail (and it is often granted).<sup>241</sup>

While the volume of cases under the Sedition Act has ebbed and flowed, numbers released by the government in 2023 revealed that there had been 367 investigations launched under the Act over the previous five years.<sup>242</sup>

This Part briefly describes the application of the sedition law in Malaysia and then goes on to explain how it was used in the case of preacher Wan Ji, as well as the government’s recent pledge to narrow the sedition law.

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<sup>240</sup> Section 5 of Sedition Act 1948.

<sup>241</sup> In Malaysia, offenses are classified as bailable, which means the accused is entitled to bail; non-bailable, which means the court has discretion whether to grant bail; and unbailable, which means that the court cannot grant bail. In 2015, Parliament considered an amendment that would have made bail in sedition cases significantly harder to obtain. See International Commission of Jurists, Malaysia: Stop Amendments Strengthening Sedition Act (“The amendment specifically states that if the Public Prosecutor certifies in writing that it would not be ‘in the public interest’ to grant bail to the person charged with sedition, the person shall therefore not be released on bail, a matter otherwise normally determined by the courts in each case.”), July 4, 2015, *available at* <https://www.icj.org/malaysia-stop-amendments-strengthening-sedition-act/>. This amendment was not adopted.

<sup>242</sup> SUARAM, Malaysia Human Rights Report 2022, 2023, pg. 44, *available at* [https://www.suaram.net/\\_files/ugd/359d16\\_652d7c44f55841689970f68f0d83debd.pdf](https://www.suaram.net/_files/ugd/359d16_652d7c44f55841689970f68f0d83debd.pdf)

## B. HISTORY & LEGAL INTERPRETATIONS

The Sedition Act 1948 has been interpreted not to require a risk of violence but merely risk of an adverse reaction, which encompasses much more minute disruptions to public order and sets a low threshold for criminal prosecution and punishment.<sup>243</sup> Further, Section 3 of the Act states that “[f]or the purpose of proving the commission of any offence against this Act the intention of the person charged . . . shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.”<sup>244</sup> (This is the provision that was eliminated from Hong Kong law in the 1990s.)

In a 2015 decision, Malaysia’s Federal Court (its highest court) upheld the constitutionality of the Sedition Act,<sup>245</sup> although it did not appear to fully address all of the potential arguments against the law. In fact, after extensive discussion of the applicable test, the only thing the Court said about the merits of the challenge to the law was the following:

One thing is clear, this section is directed to any act, word or publication having a “seditious tendency” as defined in s. 3(1) paras. (a) to (f) of the Act. This in our view is consistent with art. 10(2)(a) and art. 10(4) of the Constitution, as it cannot be said that the restrictions imposed by s. 4(1) are too remote or not sufficiently connected to the subjects/objects enumerated in art. 10(2)(a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions as provided in s. 3(2) of the Act. As legislated, it is not seditious to show that any Ruler has been misled or mistaken in any of his measures, or to point out errors or defects in any Government or Constitution as by law established. Upon close analysis, we agree with the plaintiff’s submission that the restrictions imposed in s. 4(1) fall squarely within the ambit or parameter of art. 10(2)(a) of the Constitution.<sup>246</sup>

The Federal Court in this regard appeared to rely almost entirely on the existence of identified exceptions to the definition of sedition, despite the fact that as pointed out by the Canadian Supreme Court in *R. v. Boucher*<sup>247</sup> the colonial understanding would have

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<sup>243</sup> PP v. Wan Ji Bin Wan Hussin, Shah Alam Sessions Court, Judgment, ¶ 22 (“There is no necessity to prove that the accused’s speech has caused an act of violence or actual adverse reaction. The prosecution need only prove under the second ingredient that the words uttered by the accused have one or more of the six tendencies.”)

<sup>244</sup> As described in prior TrialWatch reporting, this provision was struck down as unconstitutional by the Court of Appeal, but that decision was set aside on procedural grounds by the Federal Court. See TrialWatch Sedition Report pg. 15.

<sup>245</sup> PP v. Azmi Sharom, [2015] 8 CLJ.

<sup>246</sup> See *id.* ¶ 43.

<sup>247</sup> *R. v. Boucher*, [1951] SCR 265 (Kellock, J.) (“If, on the one hand, the ruler is regarded as the superior of the subject, and being by the nature of his position presumably wise and good, the rightful ruler and

been that even mistakes should be “pointed out with the utmost respect, and that whether mistake or not no censure should be cast upon [a ruler] likely or designed to diminish his authority,”<sup>248</sup> leaving the contours of the exceptions unclear in the more rough-and-tumble style of contemporary politics.<sup>249</sup>

At the same time, as described in a recent letter to Malaysian ministers, successive Malaysian governments have promised to repeal or reform the Sedition Act on the grounds that it violates the right to freedom of expression,<sup>250</sup> in line with civil society reporting that the “Sedition Act [was] being used to suppress political dissent and restrict press freedom on the Internet,” and was being “applied to articles or posts written online by Human Rights Defenders or critics of the government.”<sup>251</sup> And yet the law remains on the books.

### C. RECENT DEVELOPMENTS

Among the prominent recent examples of the continued use of the sedition law is the conviction of independent preacher Wan Ji Bin Wan Hussin, which was upheld by the Court of Appeal in 2023.<sup>252</sup> He was ultimately given a nine-month prison sentence.

Wan Ji was charged with sedition for allegedly insulting the Sultan of Selangor on Facebook, in particular through posts that called an appearance at a University “foolish” and criticized the Sultan for reportedly owning a Hard Rock Café and serving alcohol, despite ostensibly being the religious leader of the state. In convicting Wan Ji, the Sessions Court relied on testimony from members of the public regarding ‘how they felt’ when reading his posts to find that “the words used . . . [were] unjustified and insulting”

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guide of the whole population, it must necessarily follow that it is wrong to censure him openly; that even if he is mistaken, his mistakes should be pointed out with the utmost respect; and that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. On the other hand, if the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because, being a multitude, he cannot use it himself, it is obvious that the result must be the opposite. In this view, every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant.”).

<sup>248</sup> Sir James Fitzjames Stephen, *A History of The Criminal Law of England* (New York: Burt Franklin), 299.

<sup>249</sup> *Cf. Mwenda & Ors v. Attorney General* [2010] UGCC 5, Aug. 25, 2010.

<sup>250</sup> Letter from Article 19 et al. to Datuk Seri Saifuddin Nasution Ismail & Dato' Sri Azalina Binti Othman Said, May 25, 2023, *available at* <https://www.ibanet.org/document?id=IBAHRI-joint-letter-on-Malaysia-Sedition-Act-25May2023>.

<sup>251</sup> Suaram, *Malaysia Human Rights Report 2021*, *available at* [https://www.suaram.net/\\_files/ugd/359d16\\_a65ec707b2c745bd8f4aeb7630a3f2fb.pdf](https://www.suaram.net/_files/ugd/359d16_a65ec707b2c745bd8f4aeb7630a3f2fb.pdf); Suaram, *Malaysia Human Rights Report 2022*, *available at* [https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16\\_652d7c44f55841689970f68f0d83debd.pdf](https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16_652d7c44f55841689970f68f0d83debd.pdf).

<sup>252</sup> The Court of Appeals relied on the Federal Court decision in *Azmi Sharom* to reject a new constitutional challenge to the Sedition Act 1948 in Wan Ji's case. *Wan Ji Bin Wan Hussin v. Public Prosecutor*, Case No. B-09-383-07/2019, Court of Appeal, Oct. 25, 2023, ¶ 36.

and concluded that they “may lead to a hateful sentiment,”<sup>253</sup> although the trial court never specified the particular limb of the Sedition Act applicable to Wan Ji’s speech.

Most recently, however, in July 2023, the government promised to narrow the Sedition Act, committing to bring charges only in cases of insulting royalty.<sup>254</sup> However, in late 2023, an opposition politician was reportedly charged with sedition for speech that criticized the anti-corruption commission, not the royalty, belying the pledge to limit the law’s scope to royalty.<sup>255</sup> And there has yet to be any introduction of legislative amendments to the Sedition Act. The civil society organization Lawyers for Liberty has questioned how these actions are consistent with pledges to move forward with revision.<sup>256</sup>

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<sup>253</sup> Wan Ji Bin Wan Hussin v. Public Prosecutor, Case No. B-09-383-07/2019, Court of Appeal, Oct. 25, 2023, ¶ 15(c). See PP v. Wan Ji Bin Wan Hussin, Shah Alam Sessions Court, Judgment, ¶ 19 (“The testimonies given by SP1, SP2, and SP7 above clearly shows how they felt after they all read the Accused’s publication about the King of Selangor on Facebook. SP1, SP2 and SP7 as members of the public are of the opinion that the words used by the Accused in the publication are inappropriate and insulting the King of Selangor.”).

<sup>254</sup> See, e.g., Rhea Yasmine Alis Haizan, Malaysia to Review and Limit Sedition Act to Provocations Against Royal Institution, Channel News Asia, July 26, 2023, available at <https://www.channelnewsasia.com/asia/malaysia-review-sedition-act-royal-institution-rulers-race-religion-legislation-3655011>. It is not entirely clear how the current government intends to address the Sedition Act’s potential application to criticism of the government. Prime Minister Anwar Ibrahim has previously said that the Sedition Act would not be used to criminalize criticism of officials, but this is belied by the bringing of charges against Razali Idris. Compare Ida Lim, PM Anwar Justifies Sedition Act in Cases Involving Royalty, Malay Mail, July 18, 2023 (“Anwar replied that the Sedition Act would not be used when it is about criticism against the prime minister.”), available at <https://www.malaymail.com/news/malaysia/2023/07/18/pm-anwar-justifies-sedition-act-in-cases-involving-royalty/80362>, with Lawyers for Liberty, The Sedition Charge Against Opposition Politician Razali Idris Is in Outright Breach of PH and Anwar’s Promise to Repeal the Sedition Act 1948, Nov. 25, 2023 (noting that the charges are based on criticism of the judiciary), available at <https://www.lawyersforliberty.org/2023/11/25/lfl-the-sedition-charge-against-opposition-politician-razali-idris-is-in-outright-breach-of-ph-and-anwars-promise-to-repeal-the-sedition-act-1948/>.

<sup>255</sup> V. Anbalagan, Bersatu’s Razali Idris Charged with Sedition, Free Malaysia Today, Nov. 24, 2023, available at <https://www.freemalaysiatoday.com/category/nation/2023/11/24/bersatus-razali-idris-charged-with-sedition/>.

<sup>256</sup> Nabil Khairuddin, Sedition Charge Against Opposition Politician Breaches Promise to Repeal Sedition Act, Aliran, Nov. 29, 2023 (“Given that the Pakatan Harapan-led government has repeatedly promised that the oppressive Sedition Act will be abolished, the Attorney General’s Chambers’ conduct in prosecuting Razali under the Sedition Act is unacceptable.”), available at <https://aliran.com/civil-society-voices/sedition-charge-against-opposition-politician-breaches-promise-to-repeal-sedition-act>.

# CONCLUSION



Across these five jurisdictions several of the key flaws in these kinds of sedition laws, and how they have been used in recent times, can be identified. First, they are extremely broad and vague—a concern identified by several regional human rights courts as well.<sup>257</sup> This vagueness allows prosecutors and courts to advance their subjective assessments of whether speech could be harmful. Second, in many cases, these laws do not require, or have not been understood to require, a likelihood of inciting violence or harm or criminal intention, as required by international human rights law. Third, neither procedural rules, nor lower potential sentences, have been practically effective in stymying the use of the law to suppress dissent.

Importantly, sedition cases also provide a forum for governments to advance their view of the ‘state’; thus, in some jurisdictions, the laws are used to insulate the monarchy from criticism, in others, they protect the person of a leader, and in yet others, political parties or the military. Further, the prosecution can use sedition cases to seek court endorsement of their view of current events.

Against this backdrop, how courts in these five jurisdictions deal with their sedition laws in the coming months will be relevant not just for those laws themselves, but other key legislation that shares similar features and, in some cases, sedition laws in other jurisdictions.

## A. VAGUENESS AND SUBJECTIVITY

As the UN Human Rights Committee has noted, “the principle of legality in the field of criminal law” includes “the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place.”<sup>258</sup> This aspect of the principle of legality—relating to clarity and precision—has been applied by regional and national courts around the world to require that criminal laws be formulated in a way that would allow individuals to know whether their conduct is prohibited or not.<sup>259</sup> Indeed, as early as 1935, the Permanent

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<sup>257</sup> See for instance East African Court of Justice, *Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania*, EACJ Reference No. 2 of 2017, Mar. 28, 2019, ¶ 99 (noting that Tanzania’s sedition law is “hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible . . . to predict and thus, plan [potential defendants’] actions.”); ECOWAS Court, *Federation of African Journalists and Ors. v. The Gambia*, ECW/CCJ/JUD/04/18, Mar. 13, 2018, p. 40 (stating that The Gambia’s colonial sedition law “espouses expressions of inexactitude.”).

<sup>258</sup> UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), Aug. 31, 2001, CCPR/C/21/Rev.1/Add.11, ¶ 7.

<sup>259</sup> Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52, May 30, 1999, ¶ 121 (The principle of legality requires “a clear definition of the criminalized conduct, establishing its

Court of International Justice held that “[i]t must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”<sup>260</sup> Article 19 of the ICCPR also requires that any law restricting freedom of expression be formulated with sufficient precision, such that it does “not confer unfettered discretion” on the authorities for restricting free speech.<sup>261</sup>

Sedition laws in each of the five jurisdictions covered by this report use similar vague provisions, such as ‘disaffection,’ without providing sufficient—or in some cases any—clarity regarding what that term means.<sup>262</sup> This has been recognized both by courts that have struck down these laws, as well as by those that have upheld them.

This was one of the bases for the Lahore High Court’s decision striking down Pakistan’s sedition law. And the constitutional court in Uganda struck down a similar colonial-era sedition law, finding that it contained “an endless catchment area,”<sup>263</sup> and that the “wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one’s right.”<sup>264</sup> On the other hand, the Hong Kong courts have relied on the theory that sedition’s meaning may change with the times to uphold sedition laws.

In addition to the laws’ lack of definition, courts in some jurisdictions base their decisions on subjective notions of how people would respond or react to the speech in question. Thus, for instance, in the Wan Ji case in Malaysia, the Sessions Court relied on the testimonies of three witnesses to conclude that the Facebook post at issue ‘may lead to a hateful sentiment’; while in Hong Kong, courts assume that the public, particularly young people, are easily excitable.

Even in jurisdictions like India, where the ‘reasonable person’ standard has been read into the sedition law,<sup>265</sup> trial courts still apply what appear to be subjective standards. For

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elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment.”); Supreme Court of India, *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 59 (“[A] penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.”).

<sup>260</sup> Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at pg. 56-57.

<sup>261</sup> UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression (General Comment 34), Sept. 12, 2011, CCPR/C/GC/34, ¶ 25.

<sup>262</sup> In India and Pakistan, the Penal Code provides that “disaffection includes disloyalty and all feelings of enmity.” It does not define disloyalty or feelings of enmity, both of which appear on their face to be feelings.

<sup>263</sup> *Mwenda & Ors v. Attorney General* [2010] UGCC 5, Aug. 25, 2010, pg. 23.

<sup>264</sup> *Id.*

<sup>265</sup> In *Niharendu Dutt Majumdar v. the King Emperor* AIR 1942 FC 22, the Federal Court interpreted the offence of sedition by holding that “the acts or words complained of must either incite disorder or must be

example, in the order directing student activist Sharjeel Imam to face trial for sedition, the court observed that his speeches alleging discrimination against Muslims in India had ‘no relevance for the protest,’ ‘appear to be completely pessimistic’ and sought to divide religious groups on ‘emotive issues.’<sup>266</sup>

The East African Court of Justice recognized this as a ground for striking down Tanzania’s sedition law, stating, “[t]he definitions of sedition . . . are hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible . . . to predict and thus, plan [potential defendants’] actions.”<sup>267</sup> Likewise, the Ugandan constitutional court noted that “[o]ur people express their thoughts differently depending on the environment of their birth, upbringing and education.”<sup>268</sup> As a result, different speakers may not appreciate the potential reaction of their audience in the same way.

## B. NEXUS TO VIOLENCE

As Article 19 of the ICCPR permits restrictions on freedom of speech and expression on the following limited grounds—to protect the rights or reputations of others, national security, public order (*ordre public*), public health or morals.<sup>269</sup> Therefore, sedition laws that do not require allegedly seditious speech to pose an actual threat to public order would violate international standards. In fact, even the *Kedar Nath* requirement that speech must have the ‘tendency’ to cause public disorder falls short of international standards.

The UN Human Rights Committee has held there must be “a direct and immediate connection between the expression and the [specific] threat” that the state says is the reason for a restriction on speech.<sup>270</sup> Under the Johannesburg and Siracusa Principles, speech should only be punished on the grounds it is a threat to national security if the government can show that “(a) the expression is intended to incite imminent violence; (b) is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”<sup>271</sup> Likewise,

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of such nature as to satisfy a *reasonable man* that that is their intention or tendency.” This was cited with approval in *Kedar Nath*.

<sup>266</sup> Court of Additional Sessions Judge, Karkardooma Court, Delhi, *State v. Sharjeel Imam* [FIR No. 22/2020 PS Crime Branch], Order on Charge dated 24 January 2022. It may be noted that the trial for the sedition charge in this case has been stayed as a result of the Supreme Court order; hence the trial is proceeding under the other charges.

<sup>267</sup> *Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania*, EACJ Reference No. 2 of 2017, Mar. 28, 2019, ¶ 99.

<sup>268</sup> *Mwenda & Ors v. Attorney General* [2010] UGCC 5, Aug. 25, 2010, p. 23.

<sup>269</sup> Article 19(3) ICCPR.

<sup>270</sup> *Id.*, ¶ 35.

<sup>271</sup> *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, Freedom of Expression and Access to Information, [hereinafter *Johannesburg Principles*], Mar. 22, 1996,

the Rabat Plan of Action—adopted through expert workshops convened by the Office of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred— advises that incitement “refers to statements about national, racial or religious groups which create an *imminent risk* of discrimination, hostility or violence against persons belonging to those groups.”<sup>272</sup> A ‘tendency’ is a far cry from these international standards.

These standards have been highlighted in the petitions before the Indian Supreme Court, and form one of the grounds for seeking review of *Kedar Nath*. The petitions highlight that while Indian law otherwise requires a “proximate and direct nexus” between allegedly criminal expression and disorder, akin to “a spark in a powder keg,”<sup>273</sup> the ‘tendency’ standard criminalizes speech that merely has a tendency to disturb public order, even when it may not in fact be likely to do so.<sup>274</sup>

In some jurisdictions, sedition laws have indeed been framed more narrowly, with a direct nexus to violence. In Australia, for instance, provisions of federal criminal law that previously used the word “sedition” have been amended to now refer to “urging violence” to better reflect the “plain English description of the elements of the offence” and to discard the “historical meaning” of the term “sedition.”<sup>275</sup>

The offense of ‘seditious conspiracy’ has also recently been charged in the U.S in the context of the attack on the U.S. Capitol on January 6, 2021. This offense criminalizes conspiracies “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>276</sup> In particular, each sub-component includes a requirement of force. Cases of

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U.N. Doc. E/CN.4/1996/39, Annex, Principle 6; see also United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights [hereinafter Siracusa Principles], Sept. 28, 1984, U.N. Doc. E/CN.4/1985/4, Annex, ¶¶ 29-32.

<sup>272</sup> Report of the UN High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious hatred (Appendix: “Rabat Plan of Action”), Jan. 11, 2013, U.N. Doc. A/HRC/22/17/Add.4, ¶ 21 & n. 5.

<sup>273</sup> Supreme Court of India, *S. Rangarajan v. P. Jagjivan Ram* 1989 SCR (2) 204; Supreme Court of India, *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

<sup>274</sup> See Petition filed by Journalist Union of Assam before the Supreme Court of India, ¶ 11(b)-(c), available at <https://www.scobserver.in/wp-content/uploads/2021/07/Journalist-Union-of-Assam-vs-Union-of-India-WPCrI-No.-498-of-2021-Public-Copy.pdf>

<sup>275</sup> Government Response to Recommendations, *Fighting Words: A Review of Sedition Laws in Australia*, Australian Law Reform Commission, Sep. 13, 2016, available at [https://www.alrc.gov.au/wp-content/uploads/2019/08/government\\_response\\_to\\_fighting\\_words\\_a\\_review\\_of\\_sedition\\_laws\\_in\\_australia.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/government_response_to_fighting_words_a_review_of_sedition_laws_in_australia.pdf); see also Chapter 5, *Criminal Code Act 1995*.

<sup>276</sup> 18 U.S. Code § 2384.



‘seditious conspiracy’ involving “largely protected speech” have been thrown out by the courts.<sup>277</sup>

## C. CRIMINAL INTENTION

Except for Thailand, the jurisdictions reviewed do not necessarily require criminal intention to be specifically proved to convict someone for sedition. In Malaysia, the law itself deems intention ‘irrelevant’ if the speech has a ‘seditious tendency.’ While this provision is no longer on the books in Hong Kong, at least some courts in Hong Kong have suggested looking only to the words spoken to prove ‘seditious intention,’ rather than seeking to discern the intent of the speaker. In Pakistan and India, intention is just one factor that could result in a sedition conviction—as per *Kedar Nath*, the tendency or intention of creating public disorder is sufficient, while in Pakistan, courts have found that intent or an attempt to produce ‘feelings’ of disaffection would be sufficient.<sup>278</sup>

Recently, several human rights organizations, including TrialWatch, wrote to Malaysian ministers arguing that Malaysia’s provision making intention irrelevant is inconsistent with international human rights norms.<sup>279</sup> The European Court of Human Rights, for instance, has held that Article 7 of the Convention, which establishes the principle of legality (no punishment without law), requires a mental link with the offence in order for a court to impose punishment.<sup>280</sup> The Court has also held that intent is a relevant factor to consider when imposing criminal sanctions relating to the exercise of the right to freedom of

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<sup>277</sup> See, e.g., Mary B. McCord, The Government Was Right to Charge Seditious Conspiracy, Just Security, Dec. 7, 2022 (“[T]he trial judge dismissed the case after trial, concluding that the government’s evidence of speeches by the group’s leader and participation in military-style training were largely protected speech and association.”), available at <https://www.justsecurity.org/84399/the-government-was-right-to-charge-seditious-conspiracy/>. It also bears noting that these cases are rarely prosecuted, unlike in India after *Kedar Nath*. See Alanna Durkin Richer & Lindsay Whitehurst, What Seditious Conspiracy Means in Proud Boys’ Jan. 6 Case, AP, May 4, 2023 (“The convictions of Oath Keepers Rhodes and Meggs were the first seditious conspiracy guilty verdicts in decades.”), available at <https://apnews.com/article/proud-boys-seditious-conspiracy-explained-207f7ca08d7c30d3cb28127eb9992bca>.

<sup>278</sup> *Sardar Attaullah Khan Mangal v. The State* (PLD 1967 SC 78), *supra*.

<sup>279</sup> Letter from Article 19 et al. to Datuk Seri Saifuddin Nasution Ismail & Dato’ Sri Azalina Binti Othman Said, May 25, 2023, available at <https://www.ibanet.org/document?id=IBAHRI-joint-letter-on-Malaysia-Sedition-Act-25May2023>.

<sup>280</sup> European Court of Human Rights, *G.I.E.M. S.R.L. and others v. Italy*, App. No. 1828/06, June 28, 2018, ¶¶ 242-246.

expression.<sup>281</sup> At the international level, the Rabat Plan of Action asserts that intent must be considered when speech or expression is criminalized.<sup>282</sup>

## D. THE FAILURE OF LIMITATIONS

In several of the jurisdictions discussed in this report, there have been efforts to limit the use of sedition laws to suppress speech, yet none of them have proven to be effective.

In India, although the Supreme Court imposed a substantive limit on the reach of the law in *Kedar Nath*, the law continued to be used to suppress speech (until the Supreme Court stayed sedition cases in May 2022). Similarly in Malaysia, pledges to restrict the law's application to criticism of the royalty have seemingly yet to be followed.

In both India and Pakistan, the requirement of government sanction is meant to check the law's misapplication. But this has not necessarily proven effective in practice. The cases in Pakistan appear to demonstrate that the police regularly bypass these procedures, and by the time the matter reaches court, the accused person has already suffered a police investigation and in some cases, pre-trial detention. In India, government sanction can be a rubber-stamp, failing to meaningfully restrict police arbitrariness.<sup>283</sup>

Further, sedition laws create a chilling effect, whether they carry a life sentence or only a two-year sentence, as in Hong Kong. Thus, for instance, despite the lower tariff in Hong Kong, once an accused person is arrested, there is a perverse incentive for them to plead guilty and serve a reduced sentence, rather than fight the charges in court. Conversely in India, while accused persons are rarely convicted and sentenced to imprisonment, the possibility of life punishment on the books restricts the grant of bail and leads to prolonged pretrial detention.<sup>284</sup>

In view of the documented experience of use of these laws to restrict speech, several commonwealth countries have repealed sedition laws.<sup>285</sup> The United Kingdom, the State

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<sup>281</sup> European Court of Human Rights, *Handzhiyski v. Bulgaria*, App. No. 10783/14, Apr. 6, 2021, ¶ 55 (“[T]he question whether it can be ‘necessary in a democratic society’ to impose sanctions . . . becomes more nuanced. In such situations, the precise nature of the act, the intention behind it, and the message sought to be conveyed by it cannot be matters of indifference. For instance, acts intended to criticise the government or its policies, or to call attention to the suffering of a disadvantaged group cannot be equated to acts calculated to offend the memory of the victims of a mass atrocity.”).

<sup>282</sup> Rabat Plan of Action, *supra*, ¶ 29(c).

<sup>283</sup> *See supra*.

<sup>284</sup> *See supra*.

<sup>285</sup> As of May 2022, legislatures in eight Commonwealth States had repealed their sedition laws, namely: Kenya (1997), Ghana (2001), New Zealand (2007), the United Kingdom (2009), Jamaica (2013), Maldives (2018), Sierra Leone (2020), and Singapore (2021). *See TrialWatch Sedition Report, supra*. Uganda and Malawi have since followed suit.

<sup>285</sup> *Id.*

where this criminal offense originated, repealed offenses of sedition over a decade ago in 2009.<sup>286</sup> Commenting on this decision, Parliamentary Under Secretary of State at the Ministry of Justice, Claire Ward noted that sedition and seditious libel “are arcane offenses – from a bygone era when freedom of expression wasn’t seen as the right it is today...”<sup>287</sup>

## E. SEDITION CASES AS POLITICAL NARRATIVE

In addition to their use in quashing dissent, sedition laws play a role in reifying narratives of what is the ‘state.’ For instance, in India, the law has been used against those criticizing individual officials, such as Prime Minister Modi and Chief Minister of the State of Uttar Pradesh, Yogi Adityanath. Pakistan’s law is used to shield the military from criticism. Hong Kong has applied the law against those critical of the Chinese Communist Party, while Malaysia has focused on protecting the image of the royalty. In Thailand, the fact that sedition and *lèse-majesté* are so often tried together (despite the fact that they are ostensibly meant to protect different entities—the government and the monarchy) suggests that prosecutors see the two as one. Sedition cases thus serve as vehicles for litigating nationalism. Per a leading scholar on sedition in India, the use of sedition to clamp down on protest movements “reveal[s] the political function performed by the police through the use of the law.”<sup>288</sup>

## F. ‘SEDITION 2.0’

The fate of sedition laws is not only important on its own merits, but will also likely have consequences for other repressive legislation. In Hong Kong, the National Security Law introduced in 2020 has a provision criminalizing ‘subversion,’ which is defined as including “undermining the basic system of the People’s Republic of China established by the Constitution of the People’s Republic of China” through “unlawful means” “with a view to subverting the State power.”<sup>289</sup> In India, the new criminal code replaces sedition with an

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<sup>286</sup> See Coroners and Justice Act 2009 (UK), § 73.

<sup>287</sup> Criminal Libel and Sedition Offences Abolished, *PressGazette*, Jan. 13, 2010, *available at* <https://pressgazette.co.uk/criminal-libel-and-sedition-offences-abolished/>.

<sup>288</sup> Anushka Singh. Sedition and Its Political Functions - The Law of the Executive, *Economic & Political Weekly*, Vol. 57, Issue No. 26-27, June 25, 2022, *available at* <https://www.epw.in/journal/2022/26-27/perspectives/law-executive.html>.

<sup>289</sup> Article 22 of the NSL defines ‘subversion’ as the act of: (i) overthrowing or undermining the basic system of the PRC established by its Constitution; (ii) overthrowing the body of central power of the PRC or the body of power of the HKSAR; (iii) seriously interfering in, disrupting or undermining the performance of the duties and functions by the body of central power of the PRC or body of power of the HKSAR; or (iv) attacking or damaging the premises and facilities used by the body of power of the HKSAR to perform its duties and functions, rendering it incapable of performing its normal duties and functions. See Stephenson Harwood, Briefing Note: Hong Kong’s National Security Law *available at* [https://www.shlegal.com/docs/default-source/news-insights-documents/2020/hong-kong-national-security-laws.pdf?sfvrsn=93a1ec5b\\_6](https://www.shlegal.com/docs/default-source/news-insights-documents/2020/hong-kong-national-security-laws.pdf?sfvrsn=93a1ec5b_6).

offence criminalizing “acts endangering sovereignty, unity and integrity of India.” As explained above, the new law is vague, like the sedition law, and also uses the term ‘subversive activities,’ like Hong Kong’s NSL, although without any definition.

The risks posed by these new laws make it clear that mere repeal or reform of sedition laws without a meaningful commitment to promoting freedom of speech will be meaningless.

But the courts have a real opportunity: The same doctrine of ‘void for vagueness’ that has been increasingly applied to sedition laws is equally applicable to new, vague laws. A first test will be how the Indian Supreme Court decides the sedition case, and whether its decision may provide broader guidance regarding the need for clarity in criminal law. The persuasive value of the *Kedar Nath* decision, as seen in the judgment in the Privy Council, and in turn, the interest in the Privy Council’s decision in Hong Kong, demonstrates that a positive ruling by the Indian Supreme Court could have ripple effects in other jurisdictions.

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