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**REWRITING DISSENT IN THE POST-COLONIAL PENAL MATRIX:
A CRITICAL REVIEW OF SARKAR'S COMMENTARY ON THE
BHARATIYA NYAYA SANHITA (SECTION 152)**

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Book Name: *Sarkar's Commentary on the Bharatiya Nyaya Sanhita, 2023 (2 Vols.) Revised by S. C. Sarkar et al. New Delhi: LexisNexis, 2023. cxxviii, 2450 pp. INR 4,995 ISBN: 978-93-94163-XX-X*

**INTRODUCTION: THE ILLUSION OF DECOLONIZATION AND THE
ENDURANCE OF STATE SURVEILLANCE**

The Union legislature has characterised the legislative shift from the *Indian Penal Code, 1860 (IPC)* to the *Bharatiya Nyaya Sanhita, 2023 (BNS)* as a significant step towards decolonising India's criminal justice environment.² At the heart of this de-colonial narrative was the explicit abrogation of Section 124A of the IPC which criminalized "*Sedition*" – a notorious statutory weapon employed by the British Raj to stifle political opposition.³ However, scholarly analysis suggests that the joyful language accompanying this deletion conceals a more nuanced and potentially regressive reality. But the subject matter of the offence has not been extinguished; it has been structurally re-engineered, expanded and re-located under Chapter VII of the BNS as Section 152, which criminalizes "*acts endangering sovereignty, unity and integrity of India.*"⁴ It is within this volatile paradigm of statutory transition that *Sarkar's Commentary on the Bharatiya Nyaya Sanhita* emerges as an indispensable work of doctrinal and structural analysis. This review provides a scholarly and careful analysis of the treatment of the profound alteration of political speech crimes in India

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² Ministry of Home Affairs, Government of India, *Report of the Parliamentary Standing Committee on Home Affairs on the Bharatiya Nyaya Sanhita, 2023*, 2.1.

³ Abhinav Chandrachud, *Sedition, Censorship, and the Constitution*, 14 Nat'l L. Sch. India Rev. 112, 115 (2002).

⁴ The Bharatiya Nyaya Sanhita, 2023, s. 152, No. 45, Acts of Parliament, 2023 (India).

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in *Sarkar's Commentary*. The central thesis of this review is that while Sarkar provides an unprecedented, meticulous textual roadmap of the transition, he suffers from an academic tension: he vacillates between a traditional, literal reading of state authority and the urgent, contemporary demands of constitutional civil liberties. This analysis will then discuss whether the language manages to uncover the systematic legislative 'loopholes' and ambiguities purposely built into *Section 152*, or whether it unwittingly lends support to the extension of the state's punitive net.

THE HISTORICAL TRAIL: FROM COLONIAL SEDITION TO CONTEMPORARY SOVEREIGNTY OFFENCES

To appreciate the analytical depth that *Sarkar's Commentary* demands, one must trace the historical evolution of the laws of state protection in India. *Macaulay's initial draft of 1860* did not have *section 124A of the IPC*. It was added in 1870 to repress the *Wahabi movement*, and later the swelling tide of the Indian national movement.⁵ Its basic wording condemned any speech or conduct that produced or sought to bring "*hatred or contempt*" or stirred "*disaffection*" toward the Government established by law.⁶ The statutory transformation enacted by *Section 152 of the BNS* alters the language and the original target of protection. The new section omits the words "*Sedition*" and "*Government established by law*" entirely. Instead, it criminalizes activities that harm the "*sovereignty, unity and integrity of India*".⁷ *Sarkar* traces this process with meticulous care, pointing out the modifications in successive draft laws. Yet, a closer reading of this section of the comments indicates a potential for deeper academic examination overlooked. The editors see the movement from preserving the *government* to protecting *the state* (or the integrity of the nation) as a progressive, nationalist development. But in constitutional theory, this move broadens the net of punishment. A well-established democratic right is criticism of a government. An accusation of "*endangering the sovereignty or integrity of the nation*" pushes the discussion into the area of existential threat, where constitutional courts have typically been more receptive to the executive.⁸

⁵ K.M. Munshi, *The Indian Penal Code: A Historical and Critical Introduction* 84 (1942).

⁶ Indian Penal Code, 1860, s. 124A (repealed).

⁷ The Bharatiya Nyaya Sanhita, 2023, s. 152.

⁸ UpendraBaxi, *The Crisis of the Indian Legal System* 145 (1982).

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THEMATIC SYNTHESIS AND STRUCTURAL ANATOMY OF SARKAR'S COMMENTARY

Sarkar's Commentary is different from the usual section-by-section commentary in that it groups the provisions of *Chapter VII, "Offences Against the State"*, into an integrated conceptual matrix. The editors do not consider Section 152 in isolation, but rather compare it with the newly defined rules on *organized crime (Section 111)* and *terrorist activities (Section 113)*.⁹ This structural design allows researchers to trace the intellectual synthesis taking place within the BNS. The commentary breaks down its analysis of *Section 152* into four major subject categories:

1. *The Legislative Intent and the Change from "Government" to "State"*: The reasons why the legislature dropped the words "Government established by law" and the legislature's choice to protect the abstract entities of "*Sovereignty, Unity and Integrity*".¹⁰
2. *The Lowered Mental Element (Mens Rea)*: Discussion of the substitution of the conventional standard of "*intention*" by the statutory phrases "*purposely*" and "*knowingly*".¹¹
3. *Digitalization of subversive activities*: Analysis of the clear statutory definition of "*electronic communication*" and "*financial means*" as contemporary vectors of state-endangering crimes.¹²
4. *The Procedural Convergence with Extraordinary Laws*: Tracing the incorporation of the terminology of the *Unlawful Activities (Prevention) Act, 1967 (UAPA)* in *Section 152* without matching institutional safeguards.¹³

Sarkar systematically keeps track of each amendment and legislative committee report that shaped the final text. A perfect comparison table is given to the researchers which show the *old IPC* wording and the current BNS draft. But the real value of an academic commentary is in interpretation. The next sections analyze how *Sarkar* deals with the legal grey areas and loopholes that characterize *Section 152*.

THEORETICAL CRITIQUE OF THE STATUTORY LOOPHOLES IN SARKAR'S INTERPRETATION

⁹*Sarkar's Commentary on the Bharatiya Nyaya Sanhita*, Vol. 1, 412 (S.C. Sarkar et al. eds., LexisNexis 2023).

¹⁰*Id.* at 415.

¹¹*Id.* at 419.

¹² *The Bharatiya Nyaya Sanhita*, 2023, s. 152, Explanation.

¹³ *Sarkar's Commentary on the Bharatiya Nyaya Sanhita*, *supra* note 8, at 422.

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The ambiguity of '*subversive activities*' and the widening of the penal net The most concerning loophole in *Section 152 of the BNS* is the criminalization of any person who excites or attempts to excite "*secession, armed rebellion or subversive activities.*" While the terms "*secession*" and "*armed rebellion*" have well-defined parameters in domestic and international jurisprudence, the term "*subversive activities*"¹⁴ is left completely undefined in the *BNS*. *Sarkar's Commentary* tries to remove this ambiguity by trying to create a definition from the legal precedents of civil service regulations and preventive detention cases.¹⁵ However this analytical decision indicates a serious doctrinal gap in the analysis of the commentary. In borrowing the meaning of "*subversion*" from the fields of employment law or administrative detention, where the burden of proof is much lower, *Sarkar* may be in danger of sanctioning an overly expansive use of the term in more rigorous criminal trials. It should be noted that the term "*subversive activities*" is not defined in any statute. This is a hazardous loophole that the executive branch can use. This point must be stressed in an academic analysis. If the radical critique of macroeconomic policy by the state, or the prolonged intellectual denunciation of court decisions, may be understood as an effort to '*subvert*' the institutional framework of the state, then the distinction between political dissent and criminality collapses. *Sarkar* acknowledges the risk of excessive executive power, but does not raise a strong constitutional challenge to the constitutionality of the expression under the vagueness concept of Article 19(1)(a).¹⁶

Transitive Conjoining of UAPA Terminology and the Displacement of Procedural Safeguards

A major contribution of the existing literature on national security is to look at *Section 152 BNS* as a bridge between the regular penal law and the special anti-terror law.¹⁷ The Section blatantly borrows language such as "*separatist activities*" and "*subversive activities*", which was before available only under special statutes such as the *UAPA*.¹⁸ *Sarkar* meticulously documents this crossover but does not properly investigate the procedural flaw it causes. There are severe administrative and institutional checks to invoke

¹⁴ The Bharatiya Nyaya Sanhita, 2023, s. 152.

¹⁵ *Sarkar's Commentary on the Bharatiya Nyaya Sanhita*, supra note 8, at 426 (citing *State of M.P. v. Ramashanker Raghuvanshi*, (1983) 2 S.C.R. 393).

¹⁶ *Id.* at 428.

¹⁷ Gautam Bhatia, *The Offence of "Sedition" and the New Penal Code*, 58 Econ. & Pol. Weekly 12, 14 (2023).

¹⁸ *Compare* The Unlawful Activities (Prevention) Act, 1967, § 2(1)(o), No. 37, Acts of Parliament, 1967 (India), with The Bharatiya Nyaya Sanhita, 2023, s. 152.

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charges of “*unlawful or separatist activities*” under the UAPA. Section 45 of the UAPA, for instance, provides that no court shall take cognizance of any offence, unless the Central Government has given a specific prior sanction, which again is subject to an independent review by an entity constituted by the state.¹⁹ By incorporating these same offences within the ordinary criminal framework of the BNS, Section 152 essentially circumvents the procedural safeguards embedded in the UAPA. An SHO of a local police station can register a FIR under Section 152 for subversive speech at his own discretion, and can authorise immediate arrest and custodial interrogation without clearing any independent administrative review. Sarkar’s Commentary downplays the structural threat posed by this legislative arrangement to procedural due process and civil freedoms and reads the situation as mainly a statutory arrangement.

The Reduction of the Doctrinal Threshold of Criminal Intent

Speech-Based Offenses and the High Threshold of *Mens Rea* as a Safeguard of the Democratic Right to Dissent in Classical Criminal Jurisprudence.²⁰ It was for the prosecution to prove beyond reasonable doubt that the accused had an active and specific intention to inspire disaffection or hatred towards government under Section 124A of IPC.²¹ By adding the words “*purposely or knowingly*” to section 152 BNS, this paradigm is changed completely.²² Sarkar extensively discusses the purpose, knowledge divide, relying primarily on comparative criminal law, including the *American Model Penal Code*.²³ The commenter accurately observes that “*knowledge*” is that the actor knows that a specific consequence is practically guaranteed to occur, even if it was not the actor’s primary objective.²⁴ But the text makes no mention of the stifling effect that this lower threshold has on political expression and investigative journalism. An editor can publish a detailed investigative report of systemic corruption in military procurement or deep-seated social unrest in a border region, knowing that it will create significant political resentment and perhaps even civil upheaval. But under the literal framework which was recognized by Sarkar, the editor might still be declared guilty of a crime under Section 152 since he acted “*knowingly*” without any

¹⁹ The Unlawful Activities (Prevention) Act, 1967, s. 45(1)(ii).

²⁰ Glanville Williams, *Criminal Law: The General Part* 31 (2nd ed. 1961).

²¹ Indian Penal Code, 1860, s. 124A (repealed).

²² The Bharatiya Nyaya Sanhita, 2023, s. 152.

²³ Sarkar’s *Commentary on the Bharatiya Nyaya Sanhita*, *supra* note 8, at 431 (referencing Model Penal Code s. 2.02 (Am. L. Inst. 1985)).

²⁴ *Id.* at 432.

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malafide “purpose” to damage the national sovereignty. *Sarkar’s Commentary* does not argue for a rigorous protective interpretation of mens rea, unique to speech violations, thereby exposing media professionals and public intellectuals to strategic state prosecutions.

Modernizing the Means: Electronic Communication and Financial Infrastructure

Another key structural expansion *Sarkar documents* is the specific attention *Section 152* gives to the infrastructure of modern discourse. The law applies to acts “by words, either spoken or written, or by signs, or by visible representation, or by electronic communication, or by use of financial means.”²⁵ *Sarkar* rightly points out that this inclusion updates the penal code to respond to contemporary digital realities, but the article does not offer a critical analysis of the surveillance implications. The inclusion of “electronic communication” and “financial means” explicitly allows internet service providers, social media companies and banks to become active agents of governmental monitoring. Crowdfunding an activist cause, posting a controversial video on an encrypted messaging app, or hosting a virtual panel on regional self-determination can now be directly classified as using “financial means” or “electronic communication” to undermine sovereignty. The opinion does not consider how digital metadata will be used in criminal prosecutions to get convictions under this section; it focuses on the utilitarian necessity of these current extensions.

JUDICIAL PRECEDENTS AND THE KEDAR NATH SINGH FILTER BYPASS

The touchstone for any contemporary commentary on Indian criminal law is how it evaluates the role of new statute text in relation to well-established constitutional precedents. The fate of *sedition law in India for nearly sixty years* was left solely to the judicial sieve created by the Constitution Bench of the Supreme Court in *KedarNathSingh v. State of Bihar (1962)*.²⁶ The court held that speech offenses against the state are constitutional *only* if the remarks employed have a direct, imminent likelihood to bring about public disorder or violence.²⁷ *Section 152 BNS* does not speak of ‘public disorder’ or ‘incitement to violence’ but instead refers to the broad objective of punishing anything that ‘endangers the sovereignty, unity, and integrity of India’.²⁸ This change creates a significant jurisprudential crisis: does the *KedarNath Singh* requirement of ‘imminent violence’ automatically apply to *Section 152*,

²⁵ The Bharatiya Nyaya Sanhita, 2023, s. 152.

²⁶ *KedarNath Singh v. State of Bihar*, A.I.R. 1962 S.C. 955 (India).

²⁷ *Id.* at 24.

²⁸ The Bharatiya Nyaya Sanhita, 2023, s. 152.

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or does the new language create a loophole for the state to circumvent it? This topic has been dealt with in great detail historically in *Sarkar's Commentary*. The argument has been that the constitutional core of *KedarNath Singh* remains obligatory on all courts since a legislative amendment cannot override a constitutional limitation imposed by the Supreme Court.²⁹ The commentary cites initial judicial use of the new code such as *Tejender Pal Singh v. State of Rajasthan*³⁰ where the High Court invalidated a *FIR* issued under *Section 152 BNS* in support of its view. The court in that decision specifically cautioned that *Section 152* had to work as a "shield for national security rather than a sword to suppress political dissent," stressing that an imminent connection to violence still remains essential.³¹

While *Sarkar* notes these defensive adaptations, it also demonstrates an academic unwillingness to confront the underlying danger. The text does not attack the legislative decision to leave out "public disorder" from the statutory text. *Sarkar* depends on courts to read these protections into the legislation after the arrest has already taken place. In thus doing, *Sarkar* underplays the way that the procedure itself operates as a punishment in contemporary Indian political prosecutions.³²

COMPARATIVE JURISPRUDENTIAL PERSPECTIVES: INDIA - A GLOBAL OUTLIER

In order to do academic justice to *Sarkar's Commentary*, it is necessary to place it in the context of worldwide legislative tendencies. India has extended its ordinary criminal law to safeguard state sovereignty, although international democratic tendencies have been moving toward limiting or eliminating political speech crimes altogether. The United Kingdom, which gave India its original sedition legislation, has repealed the penalty entirely in *Section 73 of the Coroners and Justice Act 2009*, arguing that speech-based offenses against the state are colonial relics that inhibit modern-day democratic discussion.³³ In the United States, too, the Supreme Court found in *Brandenburg v. Ohio* that the state may not penalize promotion of illegal activity unless it is geared to encouraging "imminent lawless action."³⁴ *Sarkar* mentions these international trends in the introductory chapters but does not use them as a

²⁹*Sarkar's Commentary on the Bharatiya Nyaya Sanhita*, *supra* note 8, at 438

³⁰*Tejender Pal Singh v. State of Rajasthan*, (2024) 4 W.L.N. 112 (Raj.)(Unreported).

³¹*Id.* at 18.

³²Abhinav Sekhri, *The Process as Punishment: Procedural Hurdles in State-Security Trials*, 22 *Indian J. Const. L.* 45, 49 (2021).

³³*Coroners and Justice Act 2009*, c. 25, s. 73 (UK).

³⁴*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

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critical framework to evaluate *Section 152 BNS*.³⁵ Instead of employing comparative jurisprudence to illustrate the disjuncture between outlier statutes like *Section 152* and global norms of human rights, the commentary dismisses international developments as historical trivia. Such insularity diminishes the text's relevance for scholars seeking to attack the democratic legitimacy of the BNS framework on the world stage.

PROCEDURAL ISSUES DEVELOPING UNDER THE BNSS AND BSA

Any assessment of *Sarkar's examination of Section 152* would be inadequate without looking at how the book ties substantive law to the new procedural statutes: *Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)* and *Bharatiya SakshyaAdhiniyam, 2023 (BSA)*. The interaction of these legislations further widens the gaps in *Section 152*.

BNSS and Extended Police Detention

Before the adoption of the new *Code of Criminal Procedure, 1973 (CrPC)*, the period of police custody was usually confined to the first fifteen days after arrest, and was a vital safeguard against custodial torture and forced confessions.³⁶ *Section 187 of the BNSS* breaks this protection timetable by allowing police custody to be sought in tranches over a sixty-day or ninety-day period.³⁷ *Sarkar's Commentary* explains the working of *Section 187*, but does not discuss its particular risk when combined with *Section 152 BNS*. Understandably, the investigations are lengthy, because *section 152* includes ambiguous charges like as “*subversive activities*” and digital “*financial means*.” Allowing the state to apply for tranches of police custody over a period of many months is a big systemic risk. The discovery of fresh digital footprints can subject an accused to repeated detention interrogation, turning routine trial preparation into a long period of state surveillance and coercion.

Digital Evidence and Electronic Signatures Under the BSA

The BSA greatly increases the scope of admissibility of electronic records, allowing them to be primary evidence if relevant certificates are attached. According to *Sarkar*, this move facilitates prosecution of complicated *cyber and digital crimes*.³⁸ However, in the context of *Section 152*, where the premise of the offense is an electronic communication or social media

³⁵*Sarkar's Commentary on the Bharatiya Nyaya Sanhita*, supra note 8, at lxxv.

³⁶Code of Criminal Procedure, 1973, § 167(2) (repealed).

³⁷Bharatiya Nagarik Suraksha Sanhita, 2023, § 187, No. 46, Acts of Parliament, 2023 (India).

³⁸Bharatiya SakshyaAdhiniyam, 2023, § 61, No. 47, Acts of Parliament, 2023 (India).

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post, the commentary does not address the lack of verification procedures. The burden is largely on the defence to show that a deepfake, AI-generated text file, or tampered chat log is not an “*electronic record*” that demonstrates an individual “*knowingly*” engaged in subversive acts. Sarkar discusses the certificate requirements of the BSA in a technical way, but does not provide a deeper critique of how easily electronic evidence can be faked or manipulated by state actors to get convictions *under Section 152*.

METHODOLOGICAL ASSESSMENT OF THE REVISION PROCESS

Such remark must also be judged by its editorial decisions. *Sarkar* has always been noted for its lucidity and the new edition continues that tradition of good readability. The publishers have done a good job in taking the reader through the changeover, with the use of bold headings, parallel tables and clear historical comments. But the approach of the revision is plagued by a structural defect of many early-stage commentary on new codes: *over-reliance on previous precedents*. Since the *BNS* is new, the editors had to fill the pages with extensive paragraphs from the old *IPC* case law. Historical continuity is an important consideration but the text often leaves the reader trapped between two worlds; it does not make clear whether an old *IPC* regulation has been kept or discreetly superseded by the new language of the *BNS*. The commentary, for instance, lists dozens of ancient instances on what amounts to “*disaffection*” under the *IPC*, even though the word “*disaffection*” does not appear anywhere in *Section 152*. Sometimes this congestion obscures the distinctive elements of the new law, making parts of the book seem like an old version of the *IPC* with a new cover rather than a fresh analysis of a brand-new code.

CRITICAL CONCLUSION: THE JUDGMENT ON SARKAR’S BNS COMMENTARY

Sarkar’s commentary on the *Bharatiya Nyaya Sanhita*, 2023 stands as a masterwork in traditional doctrinal legal research. Trial lawyers and judges operating in the new penal system will find it an indispensable reference because of its technical accuracy, extensive citation of historical precedents and meticulous monitoring of changes in legislation.³⁹ Yet the comments as an intervention into *high-level legal* theory leaves important holes unfilled. *Sarkar’s* emphasis on a textual reading of statutes tends to downplay the structural

³⁹*Sarkar’s Commentary on the Bharatiya Nyaya Sanhita*, *supra* note 8, at Vol. 2, 1890.

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concerns that *Section 152* poses to political opposition, press freedom and civil rights. The book talks about setting up new punitive nets and procedural shortcuts, but seldom questions the motives behind them, or the loopholes they reveal. For academics, constitutional lawyers and human rights experts, *Sarkar* is a useful source of reference to grasp what the law says is. However, the next generation of critical legal experts are left with the duty of exposing the structural vulnerabilities of *Section 152* and preserving political expression from official encroachments.⁴⁰



⁴⁰Constitutional Conduct Group, *Statement on the Democratic Deficits of the New Criminal Bills*, Economic Times (Dec. 22, 2023).

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