

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

The Imbroglia of Contempt Laws in India

MILIND PRAKASH PARAB¹

ABSTRACT

“We cannot countenance a situation where citizens live in fear of the Court’s arbitrary power to punish for contempt for words of criticism on the conduct of judges, in or out of court.”

- **Vinod A. Bobde**²

India is a country which is still grappling with the colonial inheritance of its laws, one of them is the Contempt of Court, particularly the criminal aspect of it. This article examines the ancient origins of contempt and its plausible incision in India and its present implications. The paradoxical approach by the judiciary in the application of contempt laws burgeoning from the perennial fears of losing its dignity and getting scandalized seems to be the cause of its continuance, posing a standing threat to free speech. We see judiciary sharing similar discomfort with free speech, though for different reasons, with the legislature and the governments. The endeavour of the article is not to cast aspersions on the motives of the judiciary but to erect a reflection showcasing contradictions in the laws, the patronizing reluctance of the courts in addressing them and the overall inessentiality of criminal contempt.

Keywords: Contempt, Free speech, Judiciary, scandalization, colonial legacy.

I. INTRODUCTION

Free speech and Contempt are two ideas, which are bound to be at loggerheads with each other at regular intervals of time and the spectre of the instrument of Contempt of Court, is today in full force to haunt the minds of people with a different point of view. These are times, when the most cherished fundamental right of freedom of speech, constitutionally secured under Article 19(1)(a) is undergoing ruination and any disagreement is nipped in the bud by using the leviathan state machinery, and in such circumstances, the ordinary citizen expects succour from the Judiciary.³ But when the Judiciary, otherwise champion of freedom and progressive in its judgements, succumbs to similar insecurities as the other arms of the State, hangs the sword of Damocles by adopting the device of contempt, on those committed to human rights,

¹ Author is a student at Government Law College, Mumbai, India.

² Vinod A. Bobde, SCANDALISING THE COURT, (2003) 8 SCC (Jour) 32

³ Madan B. Lokur, Justice Lokur: Our Fundamental Rights to Free Speech and Protest Are Being Eroded and Mauled, The Wire (Oct, 2020), <https://thewire.in/rights/fundamental-rights-free-speech-protest>

transparency and accountability or those simply expressing their anguish over the sluggishness of the justice system. Justice V. R. Krishna Iyer aptly elucidated on laws of contempt as “having a vague and wandering jurisdiction, with uncertain boundaries; contempt law, regardless of the public good, may unwittingly trample upon civil liberties”⁴, therefore, there is a possibility that contempt can be applied in situations ranging from settling personal scores to protecting the condescending grandiloquence of the opaque institution of Judiciary. Nowadays contempt powers are rarely availed to penalize criticism⁵ and The Bangalore Principles on Judicial Conduct advice the judges to refrain from prejudices⁶ and only use contempt as a last resort with proper procedural standards.⁷ Although, some restrictions may be necessary to facilitate impartial justice⁸ but any capricious usage of criminal contempt will have a chilling effect on the guarded freedom of speech and expression in the country.⁹

II. GENESIS OF THE CONCEPT OF CONTEMPT

The concatenation of rise of rationality and enlightenment culminated into digression from the theory of divinity of law and the disintegration of law from its mythological origins, forming the foundations of modern law, but there still existed considerable traces of empyrean disposition in modern law, which carved an individualistic identity for itself, leading to the parturition of its own universe; similar to God.¹⁰ These traces of divinity were then transplanted into the sovereign of the realms and the notion of divine law becoming the first law of nature emanating from the English jurisprudence was replaced with modern law.¹¹ However, with the passage of time as the mortal sovereign proved to be incapable of dispensing justice, owing to the magnification of cases and their convolutions, the courts assumed the role of ‘final arbiter of justice’ in lieu of the king, becoming his representative.¹² As the courts became the substitute of the king in delivering justice, they also in the process acquired elements of divinity from the

⁴ Diganth Raj Sehgal, Fair critique, accountability and colonial roots of contempt law in free society, ipleaders (September, 2020), <https://blog.ipleaders.in/fair-critique-accountability-colonial-roots-contempt-law-free-society/> (last visited July. 7, 2021)

⁵ Commentary on The Bangalore Principles of Judicial Conduct, United Nations Office on Drugs and Crime (September, 2007), https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf

⁶ The Bangalore Principles on Judicial Conduct November, 2002, https://www.unodc.org/pdf/crime/corrupti_on/judicial_group/Bangalore_principles.pdf

⁷ The Bangalore Principles on Judicial Conduct, *supra* note 3, at 60.

⁸ 200th Report on Trial by Media, Law Commission of India August, 2006, <https://lawcommissionofindia.nic.in/reports/rep200.pdf>

⁹ International Commission of Jurists, <https://www.icj.org/india-icj-urges-review-of-criminal-contempt-laws-after-supreme-court-convicts-human-rights-lawyer-for-social-media-posts-critical-of-judiciary/> (last visited July. 17, 2021)

¹⁰ Mriganka Shekhar Dutta & Amba Uttara Kak, Contempt of Court: Finding the Limit, 2 NUJS L. Rev. 55 (2009)

¹¹ *Id.*

¹² Rahul Donde, Uses and Abuses of the Potent Power of Contempt, Vol. 42, No. 39, Economic and Political Weekly, 3919, 3910 (Sep. 29 - Oct. 5, 2007)

king which empowered the courts to further solidify the belief of 'self-creation' and extending the application of 'Lèse-majesté' to themselves. Therefore, if a king cannot be wronged, criticized or scandalized, then the same principle also appertained to the courts which could not be denounced or arraigned, and so, the potency of usage of contempt has its inception in the courts and not in any statute.¹³ Justice Wilmont in the *Almon* case, brought contempt to reputation and made it ubiquitous making it immaterial where it was accomplished, the reason given was that if contempt was not instantly punished, it limits the court to bestow immediate justice leaving the kingdom at an impasse.¹⁴

The Privy Council in *Surendra Nath Banerjee v The Chief Justice and Judges of High Court at Fort William* in 1888, stated that "a High Court derives its power to punish for contempt from its own existence or creation. It is not a power, conferred upon it by law"¹⁵, in this manner the archaic English law of contempt crept into Indian Jurisprudence and since has become an inseparable part of judicial system. With independence, having lacerated the supremacy of the colonial rulers, it was expected that there would be advent of new forms of autochthonous laws and governance, but the then government seemed to believe that the prolongation of the judicial institutions put in place by the British would be the 'compromise formula' which would work best for a diverse nation like India.¹⁶

III. ANALYSIS OF CONTEMPT LAWS

Article 129 of the Constitution empowers the Supreme Court to punish for its contempt, the same power is also conferred upon the High Courts by Article 215.¹⁷ Article 142 also entitles the Supreme Court to impart any punishment for the contempt of itself subject to any other law¹⁸ and under Article 143(2) can also investigate such contempt.¹⁹ Article 19(2) enables the courts to impose reasonable restrictions on freedom of speech in matters of contempt.²⁰ The Contempt of Courts Act, 1971 gives statutory backing to contempt, it divides contempt into civil contempt, which is wilful insubordination of any judgement by the court and criminal contempt comprising of scandalizing or lowering the reputation of any court, interfering with

¹³ *Id.*

¹⁴ Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. Q. 1 (1961).

¹⁵ *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court at Fort William in Bengal*, (1883) ILR 10 CAL109

¹⁶ Sonakshi Awasthi, *These five Indian laws owe their origin to British, but are still in practice*, *The Indian Express* (August 11, 2018 1:33:26 pm), <https://indianexpress.com/article/research/these-five-indian-laws-owe-their-origin-to-british-but-are-still-in-practice-4789251/> (last visited, July. 17, 2021)

¹⁷ India Const. art. 129, 215

¹⁸ India Const. art. 142

¹⁹ India Const. art. 143 cl. 2

²⁰ India Const. art. 19 cl.2

due course of judicial proceedings and obstruction of justice in any manner.²¹ The scandalizing aspect of the Act has been largely borrowed from *R v Gray* in 1900, where scandal was established as “any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority”.²² The amended section 13 of the Act allows the Court to determine to its satisfaction the nature of the contempt and its hindrance in administering justice, it also provides for truth as a valid defence but only if the Court satisfactorily believes that the contempt was in public interest and the request for using truth as defence is bona fide.²³ But it just adds to the volition and predisposition, if any, of the judges in dealing with contempt matters.

In civil contempt the courts have been very thoughtful in digging deep into the mental aspects of wilful disobedience clarifying ‘wilful’ as “knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability”.²⁴ But the structure of criminal contempt is intrinsically unclear and is subject to expansive interpretation. The Supreme Court in *Vinay Chandra Mishra’s* case accentuated that the Supreme Court was organised as a court of record and has inherent powers to penalize a person for not only its contempt but also the courts inferior to it.²⁵ In *C.K. Daphtary v O.P. Gupta*, it held that a vituperative pillory on the past conduct or a judgement of a judge shall sabotage the confidence of public in judiciary and if the confidence is compromised then ultimately justice will suffer and therefore, Article 19(2) is applicable to the contempt law and is reasonable and in public interest, the respondent had used the word ‘misbehaviour’ to describe a senior judge and the court held that the word was used within the ambit of Article 124(4) and not within the scope that the judge had committed errors, even the most ‘gross errors’ cannot be termed as misbehaviour.²⁶

In *Brahma Prakash Sharma’s* case, where the accusation was that certain magistrates were inept and deficient in credibility, the Supreme Court observed that any defamatory publication questioning the integrity, ability and fairness of the judge would create anxiety in the minds of the people and would dissuade the public from approaching the courts and placing their faith in the justice system, it will also cause the embarrassment in the mind of the judge and hamper

²¹ Contempt of Courts, 1971, § 2, No. 70, Acts of Parliament, 1971 (India)

²² Gautam Bhatia, Free Speech and Contempt of Court – I: Overview, The Centre for Internet & Society, <https://cis-india.org/internet-governance/blog/free-speech-and-contempt-of-court-2013-i-overview> (last visited July. 17, 2021)

²³ Contempt of Courts Act, 1971, § 13, amended by No. 6, Acts of Parliament, 2006 (India)

²⁴ *Convener FCI Labour Federation v Ravuthar Dawood Naseem*, 2020 SCC Online SC 461

²⁵ AIR 1995 SC 2348

²⁶ *C. K. Daphtary & Ors vs O. P. Gupta & Ors*, 1971 AIR 1132

his ability to deliver justice, further the court states that calculated criticism shall adversely impact the due course of justice and appropriate administration of justice, which may give rise to suspicion regarding the judiciary in the minds of public and harm their confidence in it, this meaning of contempt of court predates the Constitution and still forms the part of its meaning, which also the framers of the Constitution endorsed and the court has no role in giving it any wider implication and such meaning of contempt does not invite any restriction on freedom of speech.²⁷

The predicament is how shall the court estimate the reduction of faith in the minds of the people regarding the ability of the judiciary, is the court pre-empting the reaction of the people without any actual occurrence or does the court see some reflection of their fallacies in the statements of the contemner and wants to curb them expeditiously? It seems antiquated to continue with the meaning of contempt formulated before independence in the current Indian Republic, especially when its current generation has no baggage of its colonial past. The habit of shifting the onus of justification of contemporary issues to the framers of Constitution should be avoided, it is not necessary to rely on the meanings and suggestions, though valuable, of the Constitution makers constantly, current issues pertaining to current society and circumstances can be decided by the prevailing collective wisdom. The Court may not definitely give any wider connotation to contempt but possess requisite powers to give it a narrower one.

The Supreme Court in *R.C. Cooper v Union of India*, observed, a Judge is more aware than anyone about his limitations and fallibility and circumvents mistakes than others, the Court does not insist that the view taken by it is the truth and the view of others is erred, the Court went on to say that “while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken”.²⁸ In *Perspective Publications v State of Maharashtra*, the Supreme Court held that people are at liberty to “express fair, reasonable and legitimate criticism of any act or conduct of a Judge” and convey fair and just opinions on his judgements and contempt jurisdiction should be utilized with utmost wariness, but in the same breath also said that scandalizing the court is not redundant and the criticism should not vilify the stature of the court.²⁹ It is appreciable of the judges to draw fine nuances concerning fairness, administration of justice and what will affect public

²⁷ *Brahma Prakash Sharma and Others vs The State of Uttar Pradesh*, 1954 AIR 10

²⁸ *Rustom Cawasjee Cooper v Union of India*, 1970 AIR 1318

²⁹ *Perspective Publications (P) Ltd v State of Maharashtra*, 1971 AIR 221

opinion, but the more they go into specificities the more they amplify the vagueness, making it more susceptible to the whims of individual judges. Essentially, the courts are defining fairness, scandal and dignity of the court, paternalistically prescribing the tone and language of fair criticism, they also determine whether the definition prescribed by them fits into the case before them and disembowels its authority and then declare its verdict, convicting or otherwise, so in effect, bearing the fact in mind that contempt proceedings are *Sui generis* and *Suo motu*, the court transforms itself in a triumvirate of prosecutor, judge and executioner. So, even if an utterance which may not presently fall under contempt, the judges may anytime enlarge the meaning of unfair criticism and obfuscation of rendering of justice and may bring that speech under the rubric of contempt.

IV. DO JUDGES PRACTICE WHAT THEY PREACH?

The Supreme Court has been by far vigilant in safeguarding the nation's democratic institutions by engaging in substantial judicial review of executive exertion and has preserved fundamental freedoms vital for liberal democracy.³⁰ In the matter of *Shreya Singhal*, the Supreme Court reiterated that use of imprecise and over broad language in laws, vitiates the repeated injunctions given by the Court that diminutions on freedom of speech should be conveyed in narrowest feasible terms.³¹ The courts have resorted to apply restrictions on free speech especially of the press and rightly so, in media trials, where, in a true sense, there exists a danger to fair trial and administration of justice.³² Often Governments employ national security and public order as subterfuges to curtail free speech, but the Court has held otherwise. In *The Superintendent v Ram Manohar Lohia*, where the respondent was arrested under the pretext of disturbance to public order for provoking farmers not to pay increased water rates, the Supreme Court dismissed the appeal on the grounds that there should be a direct nexus between speech and disorder.³³

The judiciary, on one hand, demands respect accorded to legislature equating its constitutional significance with the legislature³⁴ but becomes insecure on the other when it has to apply the

³⁰ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, Volume 18, Number 2, *Journal of Democracy* (April, 2007)

³¹ *Shreya Singhal v Union of India*, (2013) 12 SCC 73

³² Aditya Talpade and Pratik Karande, *Media Trial: A Hindrance To Fair Investigation*, latestlaws.com (September, 2020),

<https://www.latestlaws.com/articles/media-trial-a-hindrance-to-fair-investigation/#:~:text=Such%20reporting%20has%20brought%20an,pressure%20on%20the%20investigation%20agencies.> (last visited July. 17, 2021)

³³ *The Superintendent, Central Prison, Fatehgarh v Ram Manohar Lohia*, 1960 AIR 663

³⁴ *Rajeev Dhavan and Balbir Singh, PUBLISH AND BE DAMNED—THE CONTEMPT POWER AND THE PRESS AT THE BAR OF THE SUPREME COURT*, Vol. 21, No. 1, *Indian Law Institute*, 1, 12 (January-March 1979)

same scrutiny to itself. Governments are rattled by free speech as it threatens their prospects of power and the courts appear to feel particularly eerie of scandalization. The meaning of scandalization can be understood as to offend, horrify or violate moral sensibilities or propriety, when the judiciary in general and a judge, in particular, are lambasted with condemnation, it amounts to scandalization of court.³⁵ The Indian citizenry has witnessed judges presiding over matters involving themselves³⁶, accepting positions influenced by governments immediately after retirement³⁷ and also tolerated them praising politicians openly³⁸, do these acts not lower the reputation of the court? Should such judges be held in contempt for scandalization? but the purported absence of respect for the judiciary in minds of a few is assumed by the judges to be scandalization. One view is, those judges, who by their rectitude invite scandalization should allowed to be scandalized and people should express themselves freely but on the contrary, are anticipated to keep mum or else face prison.³⁹ Governments and legislators are incessantly criticised, some they deal with supplying abundant cheap speech and some with an iron hand, is contempt the iron hand of the courts and why do they need it for? Public representatives have to face the brunt of the public eventually but judiciary is the most democratically and politically insulated institution, the former is achieved by the adoption of contempt law and use of English language restricting participation and the latter by deciding its own formation and the powerlessness of the political dispensation to eliminate the contaminated members of judiciary.⁴⁰ The judiciary compared to the degree of power it enjoys faces relatively miniscule probe. If they are still willing to display arbitrariness in using contempt and convict for heterodoxy, it will lead to oppression by law and amount to Judicial Barbarism akin to Democratic Barbarism, which is an extreme assumption but a prognostic one.⁴¹

In *Re Prashant Bhushan*, where he had published certain tweets in reference to the then CJI and the CJI's before him, which were largely generalised, apart from the repetitive objections on the definition of unjust criticism and scandalization, the court seemed irritated by the possible

³⁵ V. Venkatesan, what constitutes 'scandalising the court', *Frontline*, <https://frontline.thehindu.com/other/article30159684.ece> (last visited July. 17, 2021)

³⁶ Siddharth Varadarajan, *The Wire* (January, 2020), <https://thewire.in/law/supreme-court-justice-sacrifice-sexual-harassment-allegations-ranjan-gogoi> (last visited July, 2021)

³⁷ Siddharth Varadarajan, *The Wire* (March, 2020), <https://thewire.in/law/watch-beyond-the-headlines-ranjan-gogoi> (last visited July. 17, 2021)

³⁸ *The Hindu*, <https://www.thehindu.com/news/national/bar-association-dismayed-at-justice-arun-mishras-praise-of-pm-modi/article30922443.ece> (last visited July. 17, 2021)

³⁹ Vinod A. Bobde, *SCANDALISING THE COURT*, *supra* note 1

⁴⁰ Abhinav Chandrachud, *The Insulation of India's Constitutional Judiciary*, Vol. 45, No. 13, *Economic and Political Weekly*, 38, ((March 27-April 2, 2010)

⁴¹ Pratap Bhanu Mehta, *The Indian Express* (November, 2020, 8:40:30 am), <https://indianexpress.com/article/opinion/columns/supreme-court-arnab-goswami-bail-article-32-pratap-bhanu-mehta-7055067/> (last visited July. 17, 2021)

evaluation by historians of the contemporaneous role of the Supreme Court and the corresponding CJI's in the degradation of democracy and its conceivable imprint on the public destroying the image of judiciary, this is an acute stretching of probabilities.⁴² Moreover, this judgement's precedential value will now be further exploited to limit freedom of speech.⁴³ The Court should have taken inspiration from the Theodosian Code and ignored the tweets if they emerged from madness and levity and forgiven if from malice,⁴⁴ if not consider truth as a defence.⁴⁵ But the other vexation is the pusillanimity of Twitter in obediently removing tweets after the cognizance of the court, this is precisely the apprehended chilling effect caused by contempt.⁴⁶ The very British who introduced contempt have long diffused it; the last conviction was in 1931.⁴⁷ Britain's Law Lords were called "You Old Fools" by a newspaper, the Daily Mail referred to judges as "Enemies of the People"⁴⁸, the judges sensibly ignored these remarks. In *R v Police Commissioner*, Lord Denning refused to use contempt to uphold the dignity of court.⁴⁹ In Balogh's case in England, the defendant addressed the judge as a 'humourless automaton', to which the judge simply smiled.⁵⁰ The Supreme Court should also have just smirked at Kunal Kamra's tweets⁵¹ and moved on, no but the Court unnecessarily wants to fan the flames and create smoke around it and scandalize itself. The prosecution of selective individuals will become a cause celebre and induce people to self-censor.

V. CONCLUSION

Criminal contempt in its formulation is in utter disregard of free speech, free speech was immaterial at the time when contempt was devised. The continuation of contempt in India is completely antithetic to the precious fundamental right of freedom of speech. The speech and the ink used to pronounce and scribe these judgments are merely echoing and communicating the colonial legacy, which Indians are burlesquing inadvertently. The judiciary has been

⁴² 2020 SCC Online SC 698

⁴³ Tanishka Goswami, In Re Prashant Bhushan: Two Cents on Contempt and Free Speech, Law School Policy Review & Kautilya Society (September, 2020), [20on%20Contempt%20and%20Free%20Speech,-By%20Law%20School](https://www.law-school.org/2020/09/20/contempt-and-free-speech-law-school/) (last visited July. 17, 2021)

⁴⁴ Ronald Goldfarb, The History of the Contempt Power, *supra* note 14, at 6

⁴⁵ *Supra* note 42

⁴⁶ *Id.*

⁴⁷ Gautam Bhatia, Free Speech and Contempt of Court – I: Overview, *supra* note at 12

⁴⁸ Karan Thapar, Contempt of court': A relook may be needed, The Deccan Chronicle (November, 2020), <https://www.deccanchronicle.com/opinion/columnists/261120/karan-thapar-contempt-of-court-a-relook-may-be-needed.html> (last visited July. 17, 2021)

⁴⁹ Markendeya Katju, The Economic Times (February, 2015, 10:46 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/Contempt-law-threatens-freedom-of-speech-Markendeya-Katju/articleshow/46183470.cms?from=mdr> (last visited July. 17, 2021)

⁵⁰ *Id.*

⁵¹ Sindu Ajay, Jurist (December, 2020, 08:07:33), <https://www.jurist.org/news/2020/12/india-supreme-court-initiates-criminal-contempt-proceedings-against-stand-up-comedian-cartoonist-over-critical-tweets/> (last visited July. 17, 2021)

swallowed by the vortex of the antediluvian scheme of contempt and does not wish to be released out of it, the judiciary has rather attributed the status of stare decisis to contempt, meaning; it has always been there, it is available now, it is pervasive and at our discretion, so let's use it! The judiciary sources its powers from the Constitution that the Indian people gave to themselves and it is ironical that the judiciary using that Constitution draws a unique distinction between itself and the same people by exaggerating its powers of contempt proceedings and by placing amorphous concepts such as scandal, honour and its own dignity above the imperative right of freedom of speech of the people. The Indian public has immense trust in judiciary as compared to any other institution, the belief of the masses that the court will grant them fair justice is absolutely strong in their psyche, for every criticism of the court there is also corresponding praise for the institution, therefore few trivial comments or supposed use of harsh words have no potential to damage the judiciary in any substantial way but the use of contempt powers for such comments will definitely impact free speech
