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# Overextending The Criminal Contempt Of Court

Authored By-Nidhi Minz

## Abstract

The law of criminal contempt of court in India has generally been viewed as somewhat uncertain, undefined and unsatisfactory. The problems relating to criminal contempt of court has been viewed as a constant conflict between the importance given to freedom of speech and expression and the need for safeguarding the status and dignity of courts and the proper administration of justice. Lately the Supreme Court has shown an impulse to criminalize excessively and punish general public under the law of criminal contempt leading to a phenomenon of overcriminalization. The origin of law of contempt of court was more towards punishing the prominent people in the State and not the common man. Earlier the courts assumed great powers because they were considered the ministers of the kings. This characteristic is no longer prevalent in the democratic India where the judiciary stands Independent. Yet, this greatness seems to have seeped into the position of the Indian courts, not as a force embedded in kingly relations, but as a necessary and inherent feature of the independence and dignity of the courts. This article aims to highlight that the legislators and the judiciary have created and used the criminal contempt of court so broad that the ordinary people are at risk of prosecution for expressing anything which is perceived to go against the judiciary. The article firstly critiques the law of criminal contempt of court in the light of principles of criminalization which acts as the limiting boundary of criminal law; it asserts that the legislators have drafted the law in disregard for the principles of criminalization. Secondly it highlights the role of the Indian judiciary in contributing towards overextending the criminal contempt of court. Lastly the author aims to suggest solution to the problem of overextending the criminal contempt of court by addressing the question, has the time come for the Indian government to abolish law of contempt which the British did in 1933?

## I. Introduction

Criminal law has cardinal importance in the society which cannot be doubted. Professor Wechsler, an eminent authority on criminal law, has rightly said that criminal law is considered to be the ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals. Its promise to provide safety is matched by its power to destroy. If penal law is weak or ineffective, basic human interest is in jeopardy. If it is harsh or arbitrary in its impact, it inflicts gross injustice to those caught within its coils.<sup>1</sup> The essence of criminal law is its capacity to punish, and it is this punishment which attaches stigma with criminal law which deters people from committing the same offence. The stigma which is attached with a criminal conviction reinforces the respect for criminal law in the society. Since criminal law punishes, it has to be fair, just and reasonable and not arbitrary or harsh. In the right hands, if used for the right ends, it acts as an instrument of justice. In the wrong hands, if used arbitrarily, it can become an agent of injustice. When criminal sanction is used for conducts that is perceived as harmless or undeserving of the severest condemnation, the stigma which is attached with criminal law is diminished, almost to the point of near irrelevance among some individuals and groups.<sup>2</sup> So serious are the potential consequences of punishment wherein one's life, liberty and freedom is curtailed any such censure or stigma should not fall on a person for a slight transgression. If non serious wrongs are being criminalized, stigma being a scarce resource may weaken quickly leading to lack of reverence for criminal law.<sup>3</sup> Recently, a troubling phenomenon of continually and excessively using the law of criminal contempt of court against people expressing their opinions on the Indian judiciary suggests a phenomenon of *overcriminalization*, to the point of erasing the line between tolerable and unacceptable behavior. Professor Sanford H. Kadish described *overcriminalization* as the excessive use of criminal law to perform tasks for which it is ill suited.<sup>4</sup> When criminal law is used to penalize conduct that is widely viewed as harmless or falls short of the substantial harm that the conduct poses to harm, it goes against the "harm principle".

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<sup>1</sup> Herbert Wechsler, "The Challenge of a Model Penal Code" 65(7) *HLR* 1098(1952).

<sup>2</sup> Gene Healy (ed.), *Go Directly to Jail* xii (Cato Institute, Washington D.C., 2004)

<sup>3</sup> Douglas Husak, *Overcriminalization: The Limits of the Criminal law* 3(Oxford University Press, Oxford, 2008).

<sup>4</sup> Sanford H. Kadish, "The Crisis of Overcriminalization" 374 *TAOAAO PASS* 157 (1967).

The criminalization of opinions of the people regarding the Indian judiciary is the abuse of the supreme force of a criminal law because expressing one's opinion about the judiciary is deficient in harmful wrongdoing and beyond any legitimate rationale for action by the State or the Judiciary. The contempt law is an extraordinary jurisdiction of the courts, usually the courts are reluctant to initiate contempt proceedings and use it sparingly and in compelling circumstances.<sup>5</sup> However lately the Supreme Court has shown an impulse to criminalize excessively and punish people like, Prashant Bhushan a public interest lawyer and activist,<sup>6</sup> and initiated contempt proceedings against Kunal Kamra a comedian,<sup>7</sup> and Rachita Taneja a cartoonist,<sup>8</sup> under the law of contempt of court. This excessive usage of the law of contempt of court is threatening as it poses a threat to the principles of criminalization which acts as the limits of criminal law and the constitutional freedom of free speech and the right to dissent.

The law of criminal contempt of court in India has generally been viewed as somewhat uncertain, undefined and unsatisfactory. The jurisdiction to punish for contempt by the courts touches upon two important fundamental rights of the citizen i.e. the right to personal liberty and the right to freedom of expression. The law and the problems relating to criminal contempt of court has been viewed as a constant conflict between the importance given to freedom of speech in the Indian Constitution and the need for safeguarding the status and dignity of courts and the proper administration of justice. The origin of the doctrine of contempt of courts is centuries old and has its roots in British law which was borrowed and codified by India. In England superior courts exercised the power to punish for contempt persons who scandalized the court or the judges.<sup>9</sup> There the subject of contempt occupied an important role in the manifestation of court's power over individuals who had prominent positions in the State. It has been used in ways which provoked great public interest and praise. The power of the courts to punish for contempt is one which historically goes back to the early days of England and the crown.

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<sup>5</sup> *Maninderjit Singh Bitta v. Union of India & ors* (2011) 11 SCALE 634.

<sup>6</sup> Available at: <https://www.livelaw.in/top-stories/breaking-sc-sentences-prashant-bhushan-to-a-fine-of-rupees-one-in-the-contempt-case-over-his-two-tweets-162190> (Last visited on December 20, 2021).

<sup>7</sup> Available at: <https://www.livelaw.in/top-stories/supreme-court-to-consider-contempt-cases-against-comedian-kunal-kamra-after-4-weeks-170210>. (Last visited on December 20, 2021).

<sup>8</sup> Available at: <https://www.livelaw.in/top-stories/rachita-taneja-sanitary-panels-contempt-of-court-supreme-court-169077> (Last visited on December 20, 2021).

<sup>9</sup> The contempt of Courts Act, 1971 (Act 70 of 1971).

One such incident involving contempt of court is the time when Chief Justice William Gascoigne committed prince Hal, later who would become Henry V of England, to the prison for interfering violently in behalf of one of his servants who was facing a trial at the court for committing felony.<sup>10</sup> While the court was initiating proceedings against the servant it is reported that the Prince appeared in a rage, and demanded that his servant be said free. Chief Justice William Gascoigne put it firmly that the rule of the law and the laws of the realm/king must be met to which even prince owed allegiance, and that if the prince wished the servant to be pardoned he should secure this from the king i.e. his father. The prince as reported physically tried to take the servant away upon which the Chief Justice ordered the prince to behave himself. When prince Hal continued with his misbehavior, he was sentenced for contempt of the court, and was committed to the King's Bench prison. It was speculated by the people that the sentencing of prince Hal for contempt of court would bring an end to Gascoigne's career however on the contrary the king was pleased and rejoiced by the fact that he has a judge who dared to minister justice to his son.<sup>11</sup> Another controversial issue that attracts a great deal of public attention over the use of contempt of court is the case of Major General Andrew Jackson who was in command of the city of New Orleans in 1814. General Jackson heard rumors that the State legislature was thinking of yielding to the British. Not knowing that the war was over and a peace treaty had been signed, he became suspicious of the French volunteer troops who were leaving the ranks and ordered them out of the city. Lewis louallier wrote an article in the local press critical of General Jackson's conduct. General Jackson ordered for his arrest and imprisonment. When Judge Hall of the district court granted the release of Lewis on habeas corpus proceeding, Jackson went into rage and arrested Hall. After the release of Judge Hall, the United States Attorney appeared before Judge Hall and moved for contempt proceedings against General Andrew Jackson, wherein he was found guilty of contempt of court.<sup>12</sup>

On analyzing the origin of laws of contempt, it could be said to be the product of the days of the kingly rule, it began as a natural tool for ensuring the efficiency, dignity and respect for the governing sovereign. The judges were considered to be the ministers of kings, and disobeying the judge were equivalent to disobeying the kings.

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<sup>10</sup> John Lord Campbell, "The lives of the chief justices of England; from the Norman Conquest till the death of Lord Mansfield" 74(154) *TNAR* 78 (1852).

<sup>11</sup> Ronald Goldfarb, "The history of contempt power" 1961(1) *WULQ* 4 (1961).

<sup>12</sup> *Id.* at 5.

This is corroborated by Sir John Fox Trod who through his complex and voluminous writings over the span of years ranging from 1908- 1924 has traced the roots of doctrine of contempt of court, he observed, “there is no greater crime than contempt because all within the realm ought to obey the king and be part of his peace.”<sup>13</sup> As the contempt of judge was considered to be contempt of the king, so the law of contempt of court could be seen originally as the law of contempt of the king. The law of contempt of court was more towards punishing the prominent people in the State and not the common man. Earlier the courts assumed great powers because they were considered the ministers of the kings. This characteristic is no longer prevalent either in England or in the democratic India where the judiciary stands Independent. Yet, this greatness seems to have seeped into the position of the Indian courts, not as a force embedded in kingly relations, but as a necessary and inherent feature of the independence and dignity of the courts. The legislators and the judiciary have created and used the contempt of court Act, 1971 so broad that the ordinary people are at risk of prosecution for speaking anything which is perceived to go against the judiciary. Now the principle of criminal contempt of court rests more on vague than on the surer grounds as the dignity and credibility of the courts are determined more by the opinions of people which the court perceives has the tendency to “scandalize” the court by lowering the confidence of the public in the system of administration of justice. The existence of such vague criminal provision shows a disregard for the strict construction of criminal law because what is assumed as scandalizing is left to the courts to interpret. An objections to vague statute is that it facilitates arbitrary harassment and convictions and since a contempt of court is an offence of a criminal character, a man could be sent to prison for it and so his freedom of liberty and expression could also be curtailed, as the result the law must satisfactorily justify itself on the principles of criminalization.

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<sup>13</sup> John fox, “Nature of contempt of court”<sup>37</sup> *L.Q.Rev.* 191 (1921). Also see, Ronald Goldfarbt, “The history of contempt power”<sup>1961</sup>(1) *WULQ* 9(1961).

## **II. Analysis Of The Scheme Of Contempt Of Court In The Light Of Principles Of Criminalization**

The law relating to contempt under the contempt of court Act, 1971 is mainly divided into two main heads of jurisdiction under the Indian law, firstly is the civil contempt and secondly is the criminal contempt. Civil contempt is the willful disobedience or willful breach of an undertaking given to the court or willful disobedience of any judgment or order of the court.<sup>14</sup>

In exercise of its civil contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the court's order. The intention of not carrying out the court's order or flagrant violation of the same undermines the authority, dignity of the courts and thus affects the administration of justice. There is no hesitancy to note that civil contempt strikes at the very root of rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society of which the judiciary is the guardian. If the judiciary has to perform its duties and functions effectively, the dignity and authority of the courts have to be respected at all costs.<sup>15</sup>

The challenge does not lie in the civil contempt but criminal contempt of court which appears to be unprincipled in terms of criminalization. The principles of criminal law apply to all crimes. Every crime has some common characteristics; it has physical elements and mental elements. These elements, their congruency and the resulting harm govern the material elements in crime. The principles that cover the material elements in attributing criminal responsibility include legality, harm and punishment.<sup>16</sup> The principle of legality requires that the State cannot punish citizens without a specific law defining it as such which gives sufficient warning to the citizens that a particular conduct if committed will be dealt with by way of punishment.<sup>17</sup> This principle appears not to have been incorporated in defining the criminal contempt of court under the contempt of court Act, 1971. According to section 2 (b) criminal contempt deals with publication (where by words, spoken or written, signs or by visible representation or otherwise) of any matter or doing any of act which scandalizes or

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<sup>14</sup> *Supra* note 9, s. 2(a).

<sup>15</sup> *T.N. Godavarman Thirumulpad v. Ashok khot and Anr.* (2006) 5 SCC 1.

<sup>16</sup> K.N. Chandrasekharan Pillai, *General Principles of Criminal Law* 85 (Eastern Book Company, Lucknow, 2011).

<sup>17</sup> *Ibid.*

has tendency to scandalize, lowers or tends to lower the authority of the court, prejudices, interferes or tends to interfere with due course of any judicial proceedings, or obstructs or tends to obstruct the administration of justice in any manner.<sup>18</sup> The offence of criminal contempt is not only vague but also overbroad. Does section 2 (b) provide an ample warning of what scandalous conduct amounts to criminal contempt of court? As the statute does not define the words, would the problem be alleviated if each vague word in the statute is precisely defined by the courts? If different people start to interpret the statute in different ways, whose approach should be used as a yardstick?

The expression “scandalizing the court” has not been defined in the statute, however through judicial pronouncements it has been considered to be a “scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice.”<sup>19</sup> Scandalizing the court, therefore, would mean hostile or unfair criticism of judges or the judiciary. In other words, attributing partiality, corruption, bias and improper motives to a judge is scandalizing the court and it amounts to contempt of court. A personal attack upon a judge is dealt under the laws of defamation however when defamatory publication concerns the judge as the officer of the court then it is considered to lower the dignity of the court and undermine or has the tendency to undermine the public confidence in the administration of justice.<sup>20</sup> One can see that the gravamen of the offence is even in the lowering of the dignity of the judge or his authority. It will be an injury to the judiciary if the prohibited act has the tendency to create an apprehension in the minds of the people regarding the integrity, ability or fairness of a judge, where the act causes embarrassment in the mind of the judge himself in the discharge of his official duties or the act deters actual and prospective litigants from relying on the judiciary. It is not even necessary to prove affirmatively that by such defamatory statement there has been an actual interference with the administration of justice; it is enough if it is likely to interfere with the administration of justice or scandalize or lower the authority and dignity of courts. By and large criminal law was considered as a necessary and last resort for offences entailing substantial harm to persons or to an institution but one can see that there is an extension of criminal sanctions beyond

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<sup>18</sup> *Supra* note 9, s. 2(b).

<sup>19</sup> *D.C. Saxena v. Hon'ble Chief Justice of India*, 1996 SCC (7) 216.

<sup>20</sup> *Ibid.*

substantial harm as criminal contempt includes even the *tendency* to interfere or scandalize the authority of the court. The conduct which threaten far less serious harms or are highly intangible ones and for which there are no general agreement or even no harms at all or when criminal law is used to penalize conduct that is widely viewed as harmless, it goes against the “harm principle”.<sup>21</sup> Once the concept of harm is extended to cover remote harms or harmless conducts the possibility of excessive criminalization then becomes enormous. J.S. Mill while giving the account for the limits of criminal law states “the only purpose for which power can be rightfully be exercised over any member of a civilized community against his will is to prevent harm to others”.<sup>22</sup> An interference with the judicial proceedings or obstruction in the administration of justice can be understood as a harm to the judiciary but what substantial harm lies in sanctioning one’s opinion and comments even if it includes harsh criticism? Can the opinions of people actually shake the confidence of the general public in the judiciary and deter actual and prospective litigants from relying on the judiciary? Should not the confidence of the people in the judiciary be tested on surer grounds? In *Sheela Barse v. Union of India & Ors*<sup>23</sup> the court recognized the broader right of the Indian citizen to criticize the systemic inadequacies present in the judiciary in the larger public interest. The court observed that it is the privileged right of the citizen to believe what he considers to be true and to speak out his mind, though not, perhaps, always with the best of tastes, and should speak with greater courage than care for caution. The judicial institution should endure to thrive even in such hardy climate.<sup>24</sup> In similar line former judge of the Supreme Court Markandey katju stated that the test to determine whether a particular conduct is contempt or not is to see whether the functioning of the court or functioning of the judge is disturbed if not then a conduct is not contempt even if it includes harsh criticism.<sup>25</sup> Thus no State or court should punish under contempt of court unless there is a substantial interference to interfere with the course of justice. This would also make the law of criminal contempt of court more in sync with the principle of individual autonomy. The “principle of individual autonomy” lies at the foundation of criminal liability. This principle assigns great significance to individual rights and liberty; individuals in general have the capacity and free will to make

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<sup>21</sup> *Supra* note 4.

<sup>22</sup> John Stuart Mill, *On Liberty and Utilitarianism* vii (Batman Classic, New York, 1993).

<sup>23</sup> (1988) 4 SCC 226.

<sup>24</sup> *Ibid.*

<sup>25</sup> Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/contempt-law-threatens-freedom-of-speech-markandey-katju/articleshow/46183470.cms>. (Last visited on, December 20, 2021).

meaningful choices.<sup>26</sup> Like a person's moral sense to perceive what is right or wrong and to express his or her opinions accordingly. This principle is a defensive approach to criminalization where the criminal law aims to protect the individuals from undue state powers. Thus at its core criminal law should be used and only be used to censure people for substantial wrong doing. Individual autonomy, therefore, promotes not simply principle of tolerance within the law but also an attitude of tolerance throughout all society.

The "principle of strict construction" of criminal law requires that law should not be vague and ambiguous, if at all there are ambiguities present in criminal law, it should be construed in favour of the defendant.<sup>27</sup> The problem with criminal contempt is that it deviates from the principle of natural justice. According to the principle of natural justice, no man shall be a judge on his own cause however in contempt of court the court itself is the judge, the prosecutor and the victim and the presumption of innocence is not followed but presumption of guilt.<sup>28</sup> According to section 14 of contempt of court Act, if a person who has been charged with committing contempt in the face of the court i.e. in the court's presence or hearing the contemnor may apply either orally or in writing that he should be tried other than by the judge in whose presence he is alleged to have committed the contempt, and here the court has the discretion to decide whether to allow such application or not. If the court is of the opinion that it is practicable to do so then the matter is placed before the Chief Justice for such direction as he may think fit.<sup>29</sup> It can therefore be argued that it would be just and fair and in accordance with the principle of natural justice if the provision is amended to incorporate that the judge has no discretion or option but to cause the matter to be placed before the chief justice.

Another problem with criminal contempt is the diminishing role of *mens rea* (guilty mind) or the "culpability principle" which is an essential element of crime. The culpability principle requires that a person who is not culpable or does not have a guilty mind (no *mens rea*) should not be made liable for a criminal liability. It also rejects those laws that are more broad than necessary to accomplish its purpose. The principle demands that a high fault

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<sup>26</sup> Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* 24(Oxford University Press, oxford, 6th edn., 2009).

<sup>27</sup> Nicola Padfield, *Criminal Law* 2(Oxford University Press, London, 9<sup>th</sup> edn. 2014).

<sup>28</sup> Faizan Mustafa, "SC holds Prashant Bhushan guilty of contempt: what the verdict means" available at: <https://indianexpress.com/article/explained/prashant-bhushan-supreme-court-contempt-case-verdict-explained-6555183/>. (Last visited on December 20, 2021).

<sup>29</sup> *Supra* note 9, s. 14.

element of intention and nothing less should be required for conviction of the accused. However the law of criminal contempt of court dispenses with the culpability principle and instead the strict liability rule is applied. The *intention* to scandalize, prejudice or interfere with the administration of justice is not a requirement. The object of the criminal law has been to secure compliance with law; primarily through the threat of punishment if they are broken, and it seems reasonable to follow that punishment should not be imposed upon a person who has no *mens rea* (guilty mind).<sup>30</sup> However in the absence of guilty mind, imposing punishment is pointless. A person, who does not have a mala fide intention, will not be deterred by punishment.

Although the sacrosanct principle of criminal law, says that there must be a guilty act accompanied by a guilty mind before there can be a crime, however it is not an inflexible rule, and that the legislature, under certain situations and circumstances, in order to prevent a particular act from being committed, may frame a statute to make an act criminal even though there has been no intention present. Generally strict liability offences had been confined to those activities which had great potential for harm or the legislators thought the requirement of *mens rea* would defeat the very purpose of the statute.<sup>31</sup> No doubt a statute can exclude the essential element of *mens rea*, but it has always been considered a sound rule of principle in India that if an offence is created it has to be in conformity with the common law principle rather than against it unless the statute expressly by necessary implication excludes *mens rea*. The dissenting opinion of Justice K. Subba Rao in the landmark judgment of *State of Maharashtra v. Mayer Hans George*<sup>32</sup> which latter got accepted in *Nathu Lal v. State of Madhya Pradesh*<sup>33</sup> is very apt in the context of criminal contempt of court:

There is a presumption that *mens rea*, is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability, helps him to assist the State in the enforcement of the law; can he do anything

<sup>30</sup> Dennis J. Baker (ed.), *Glanville Williams Textbook of Criminal Law* 182 (Sweet Maxwell, London, 4th edn, 2017).

<sup>31</sup> R.C. Nigam, *Law of Crimes in India* 92 (Asia Publishing House, Bombay, 1965).

<sup>32</sup> AIR 1965 SC 772.

<sup>33</sup> (1989) 3 SCC 596.

to promote the observance of law?

*Mens rea*, by necessary implication can be excluded from the statute only where it is absolutely clear that the objective of the statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. Will it be correct to say that by putting a person under strict liability, the dignity and integrity of the judiciary will be untarnished?

In the law of criminal contempt, though there is no requirement for a guilty mind however some defences are available such as innocent publication,<sup>34</sup> fair and accurate report of judicial proceedings,<sup>35</sup> fair criticism of judicial acts,<sup>36</sup> and justification by truth as a valid defence.<sup>37</sup> If at the time of publication a person had no “reason to believe” that the court’s proceedings were pending, such publication is innocent and not contempt. To establish, “reason to believe”, it must be proved that the contemnor had sufficient cause to believe. A person is said to have “reason to believe” if he has sufficient cause to believe that thing but not otherwise.<sup>38</sup> This requirement of mental element is less subjective and more objective as compared to actual subjective *knowledge*. Here the court must reason i.e. infer from the facts which are known to such a contemnor from the position of an objective reasonable man. Further the court may also permit truth as a valid defence, if it is satisfied that it is in the interest of public interest and made in bona fide faith.<sup>39</sup> When liberals and intellectuals tweet on the inadequacies of the judiciary a simple question to be asked, why could not they be given the immunity of serving larger public interest? Further another defence of fair criticism not amounting to contempt leads to the issue of what amounts to be fair?

### **III. Judicial Discretion In The Realm Of Criminal Contempt Jurisdiction**

The contempt of court is considered to be a relic of the past its origin can be traced from the English law. In England the superior courts have from earlier times, exercised the power of

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<sup>34</sup> *Supra* note 9, s. 3.

<sup>35</sup> *Supra* note 9, s. 4.

<sup>36</sup> *Supra* note 9, s. 5.

<sup>37</sup> *Supra* note 9, s. 13.

<sup>38</sup> The Indian Penal Code, 1860 (Act 45 of 1860) s. 26.

<sup>39</sup> *Supra* note 37.

committing the contemnor for contempt of court for scandalizing the courts or the judges.<sup>40</sup> A principle accepted for centuries and often quoted passage from *Ambard v. Attorney- General for Trinidad and Tobago*<sup>41</sup> where the Privy Council said, that “justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men”.<sup>42</sup> Further it was held that criticism is a public way however the public must abstain from attributing improper motives on the judges, and should genuinely exercise ones right to criticism.<sup>43</sup> There are some few examples of English cases where outspoken criticism was preferred over contempt of court. In 1987, the Daily Mirror after the spycatcher judgment captioned the three judges of the highest court as, “you old fools” with their pictures published upside down. Lord Templeton’s comment on being called an old fool is worth mentioning, he said it cannot be denied that he is old, but to be called a fool is a perception of someone.<sup>44</sup> In 2016, after the Brexit ruling, the Daily Mail referred judges as the “enemies of the people”; the words appears to be scandalizing the court however the British judiciary did not initiate any contempt proceedings. Here it is pertinent to mention what Lord Denning observed regarding the usage of contempt of court. He made it clear that the jurisdiction of contempt of court will never be used to uphold the dignity of the court as that must rest on surer grounds. Nor will it be used to stifle those who dissent with the judiciary, for the courts do not fear criticism or resent it as something far more important lies at stake like the delivery of justice which is no less than the freedom of speech itself.<sup>45</sup> Further he also observed that those who criticize should remember that the courts cannot reply to their criticism because of the nature of its duties and the conduct of the judiciary should be sufficient to clear the criticism.<sup>46</sup> Surely this should be the policy of the Indian judiciary rather than to show an impulse to punish for contempt. Britain abolished the law on contempt of court in 2013, but in India it is being increasingly used making one to ask the question is the Indian judiciary too sensitive to criticism?

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<sup>40</sup> *Supra* note 9.

<sup>41</sup> (1936) A.C. 322.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Karan thapar, “court must remember: it is supreme because its final not because its infallible” available at: <https://indianexpress.com/article/opinion/columns/law-of-contempt-challenged-supreme-court-prashant-bhushan-karan-thapar-6547810/> (last visited on, December 20, 2021). Also refer to Faizan Mustafa, “SC holds Prashant Bhushan guilty of contempt: what the verdict means available at: <https://indianexpress.com/article/explained/prashant-bhushan-supreme-court-contempt-case-verdict-explained-6555183/>. (last visited on, December 20, 2021).

<sup>45</sup> *R. v. Commissioner of Police*, (1968) 2 QB 150.

<sup>46</sup> *Ibid.*

## **Contempt And Freedom Of Speech And Expression**

The dilemma of the law of contempt arises because of the need to balance two competing and conflicting principles- the freedom of expression and the dignity of the courts. The courts of justice have been entrusted by the constitution with the administration of justice that they perform this function without fear or favour and it is the expectation and traditional confidence in courts that it will deliver justice to the people that are protected by the law of contempt. The law of contempt aims in preserving the faith of the people in the justice system. However it is important to draw the thin line between upholding the confidence of public in justice delivery system and to protect freedom of speech and expression. Criticizing the judiciary and judge fearlessly and fairly should not be a crime but a necessary right. The faith of the people in the judiciary and its dignity rests on surer foundation i.e. how justice is delivered. The law of contempt which protects the judiciary appears to be a sensitive law which has the capacity to unwittingly trench upon the civil liberties and so it is all the more important that it is used with deliberation. The guardian of our constitutional freedoms, the Supreme Court and the High Courts, must protect free speech and expression even against judicial criticism because it is vested with the most sacred duty to deliver justice that demands tolerance and detachment.

In the famous case of *Re: Arundhati Roy v. Unknown*<sup>47</sup> the Supreme Court while dealing with the issue of contempt of court and freedom speech and expression observed that it is true that the Constitution of India guarantees freedom of speech and expression under article 19(1). However while guaranteeing such freedom; it has also given Constitutional powers to the Supreme Court and the High Courts with powers to punish for contempt of itself.<sup>48</sup> Any expression of views is not immune from the liability of exceeding the limits, either under the law of contempt of court or the reasonable restrictions under article 19(2).<sup>49</sup> If a citizen in the garb of exercising this right tries to scandalize or undermine the dignity of the court, then the court is entitled to use contempt proceedings.<sup>50</sup>

The Supreme Court also observed what amounts to fair criticism? According to it fair criticism of the judiciary done in good faith and in public interest is not contempt.

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<sup>47</sup> AIR 2002 SC 1375.

<sup>48</sup> The Constitution of India, arts. 129, 215.

<sup>49</sup> The Constitution of India, art. 19(2).

<sup>50</sup> *Supra* note 47 at para 28.

How to ascertain whether a criticism is made in good faith and in public interest? The court observed: the courts will see all the circumstances in total including the person making such comments, his knowledge in the field on which the comments have been made and the intention or object behind it.<sup>51</sup> Criticism of judgments is permitted but not attributing motives to the judges; the criticism should also be made in respectful language and tempered with moderation. Further in *P.N. Dua v. P. Shiv Shankar*<sup>52</sup> the Supreme Court observed, in the market place of ideas, criticism about judiciary or judges must be welcome as long as such criticism does not erode the faith of the people in the objective approach of the judges and judiciary. These two important decisions of the Supreme Court on what amounts to fair criticism has left a judicial vacuum on the question of what is the dividing line between fair criticism and criticism which amounts to contempt.

In 2020, the Supreme Court found two tweets of Mr. Prashant Bhushan contemptuous hence brought him in the league of Arundhati Roy, a famous writer and an activist who was also punished by the Supreme Court under the contempt of court. Mr. Bhushan is India's leading advocate, who has been doing pro bono work and has given a new direction to India's legal system through public interest litigation. One of his tweets was about the role of the Supreme Court in destruction of democracy in India in the last six years especially referring to the role of last four Chief Justices of India, and the other one was about the former Chief Justice of India (hereafter CJI) riding an expensive motorbike without a mask or a helmet while the court was in "lockdown".<sup>53</sup> The Supreme Court observed, if cognizance of such cases are not made then a wrong message will be sent to the lawyers and litigants throughout the country as the tweets tends to shake the confidence of the people in the judiciary. The Supreme Court further observed, since the contemnor has not rendered any apology or shown any remorse hence the court by showing magnanimity imposes a nominal fine of Rs. 1 failure to do so would render an imprisonment for a period of three months and further would be debarred from practicing for a period of three years.<sup>54</sup> The court rejected the argument that the tweet was an expression of opinion.

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<sup>51</sup> *Supra* note 47 at para 36.

<sup>52</sup> (1988) 3 SCC 167.

<sup>53</sup> Available at: <https://www.livelaw.in/top-stories/breaking-sc-sentences-prashant-bhushan-to-a-fine-of-rupees-one-in-the-contempt-case-over-his-two-tweets-162190> (last visited on, December 20, 2021).

<sup>54</sup> *In Re: Prashant Bhushan and Anr.* Suo Motu Contempt Petition (CRL.) No. 1 of 2020.

As far as the other tweet is concerned Mr. Bhushan commented on the conduct of the former CJI riding an expensive bike which belonged to a member of a political party without a mask or a helmet at a time when the Supreme Court was denying its citizens the fundamental right to access justice because it was in lockdown stage. The Supreme Court held that the remark was made on the CJI not in his individual capacity but as the head of the institution and that such a remark tends to undermine public confidence in the integrity and efficacy of court. Though Mr. Bhushan in his affidavit to contempt proceeding expressed his regret as he failed to see the bike was in stand and so a helmet was not needed. But what about the conduct of the judge in not wearing a mask when surrounded by people in public? Further as far as his comment on denial of right to access justice was concerned it can be perceived to be partly right as the country was in lockdown stage, though this comment could have been avoided on being unreasonable but can it be criminalized for spreading contempt of court? Further isn't it also true there is a duty of the judge to maintain high standard of conduct? In *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*<sup>55</sup> the Supreme Court itself observed that the judge is required to keep the most exacting standards of propriety in judicial conduct. Society, therefore, expects higher standards of conduct and rectitude from a judge. It is therefore, a basic requirement that a judge's official and personal conduct should be free from impropriety. The standard of conduct is higher than what is expected of a layman. In fact even the private life must adhere to high standards of probity and propriety.<sup>56</sup> So if a remark on the conduct of former CJI is made how it does undermine the confidence of the people in judiciary?

The Supreme Court in the year 2020 also issued contempt notices to comedian Kunal Kamra and comic artist Rachita Taneja for their alleged contemptuous tweets on the highest court. The comedian had posted a photo of the Supreme Court against a saffron coloured flag instead of the tricolor flag and the cartoonist had referred the Supreme Court as the "*Sanghi* court of India".<sup>57</sup> Can these tweets be viewed as satire or perhaps the reflection of what the Indian people think? If one goes by the judicial pronouncements on law of contempt so far, these tweets appear to be contemptuous because the courts have always observed that

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<sup>55</sup> (1995) 5 SCC 457.

<sup>56</sup> *Ibid.*

<sup>57</sup> Available at: [https://www.livelaw.in/top-stories/supreme-court-to-consider-contempt-cases-against-comedian-kunal-kamra-after-4-weeks-170210?infinite\\_scroll=1](https://www.livelaw.in/top-stories/supreme-court-to-consider-contempt-cases-against-comedian-kunal-kamra-after-4-weeks-170210?infinite_scroll=1) and <https://www.livelaw.in/top-stories/rachita-taneja-sanitary-panels-contempt-of-court-supreme-court-169077> (Last visited on, December 20, 2021).

criticism of judgments are allowed but the moment the integrity and credibility of the judge or judiciary is questioned it amounts to contempt of law. But the important question to be asked here is whether the Supreme Court should be affected by every tweet which appears to be contemptuous? Why the court feels the confidence of the public would be shaken in the judiciary by the tweets of a comedian and a cartoonist? Should not the shoulder of the judges be broad and generous enough to accept? Whatever was written in the tweet could be the individual perception and not the perception of the people.

One can see that there is a growing departure from the original usage of law of contempt i.e. from the rulers now it has started to be applied on the general public. The judgment and the approach of the court forces one to think how the judiciary values the people's expression of opinion? There is also inconsistency seen in the application of contempt of court by the judiciary itself as in the past similar opinions have been shared about the threat to the democracy, when in 2018 for the first time in the history of India four senior most judges of the Supreme Court of high credibility resorted to the fourth pillar of the democracy where they expressed their concerns on the functioning of then Chief Justice of India and how there is enslavement of the judiciary by the executive.<sup>58</sup> However no contempt proceedings were initiated against those four senior most judges. When the judge's conduct on the functioning of the judiciary generates widespread feeling of dissatisfaction among the general public, the question would then be who would judge the judges or the judiciary? We all are aware that the constitutional procedure of removal of a judge is only for proved misbehavior or incapacity.<sup>59</sup> Further the impeachment proceedings are cumbersome and the result is uncertain. Amidst this challenge who would be the appropriate authority who has the duty to maintain the independence of the judiciary? Can criticism of class biasness and improper administration of justice be considered to be contempt? Are there any limits to the sanctity of the judiciary? The judiciary is only an institution like the President or the Parliament. After all the essence of democracy is that the sovereignty rests not with the institutions but with the people.

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<sup>58</sup> Available at: <https://www.livelaw.in/sc-judges-press-conference-dark-day-beacon-light/> . (Last visited on, December 20, 2021). The four senior most judges who had a press conference were: J. J Chelameswar, J. Ranjan Gogoi, J. Kurian Joseph and J. Madan Lokur.

<sup>59</sup> The Constitution of India, art 124(4).

## IV. Conclusion

The law of criminal contempt has become a vague and wandering jurisdiction with uncertain limits. Legislators no doubt have created the contempt of court Act, 1971 so broad that the ordinary people are at risk of prosecution for speaking anything which is perceived to go against the judiciary. But are the legislators only to be blamed? The one government body that could check political excesses and curb the phenomenon of such excess criminalization is the Indian judiciary. Unfortunately not only has the law been drafted improperly but the judiciary is also contributing towards overextending the criminal contempt of court by sidelining the limiting principles of criminal law, thus leading to the phenomenon of excessive or over criminalization. It has been emphasized that ordinarily the courts do not use the power to punish for contempt for curbing the freedom of speech and expression. It is only when the criticism crosses all limits of decency, fairness or objectivity then this power is used.<sup>60</sup> This approach makes the application of law more subjective and vague; this could be the reason that Britain abolished the law of contempt as the criticism of judgment and criticism of judicial institution is sometimes too fine for a clear understanding and therefore the use of contempt jurisdiction appears vague. The criminal contempt is framed in a way where an apology can remit the accused from the punishment for contempt of court.<sup>61</sup> The apology has to be made in good faith and to the satisfaction of the court. This scheme of the law of contempt puts some questions forward. Can the provision of apology be considered as an escape route in other words can it be said that the law is so framed that by offering apology one can escape punishment and thus punishment is being used as a last resort in criminal contempt? Here it can be argued that apology as a defense appears to be very subjective because it is intended to be the evidence of real contriteness and it should impress the court to be genuine and sincere, this brings in a lot of vagueness and ambiguity and loss of reverence for the law of criminal contempt of court. The loss of reverence is apparent from the fact that in cases of contempt generally the alleged contemnors have refused to tender an apology and stood firmly by their beliefs and freedom to express it. Like, Mr. Prashant Bhushan refused to tender an apology as he said that since his tweets amounts to constructive

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<sup>60</sup> *Indirect Tax Practitioners Association v. R.K. Jain*, (2010) 8 SCC 281.

<sup>61</sup> *Supra* note 9, s. 12.

criticism offering an apology would be an insincere and would also be contempt of his conscience and that of the Supreme Court.<sup>62</sup> Similarly the comedian kunal kumara refused to retract his tweets or apologize as he believes the tweets speaks for them.<sup>63</sup> Therefore it can be concluded that when criminal sanction is used for conduct that is widely viewed as harmless or underserving of such a severe condemnation, the moral force of the criminal law is diminished, leading to a possibility of loss of respect towards criminal law among some individuals or groups.

Has the time come for the government to abolish law of contempt which the British did in 2013? One should not forget that the law of contempt also includes violation to a great extent of courts order which is justly covered by civil contempt. There is no hesitancy to note that civil contempt strikes at the very root of rule of law on which the judicial system rests. If the judiciary has to perform its duties and functions effectively, the dignity and authority of the courts have to be respected at all costs. So abolishing the law of contempt might not be the solution, but what about criminal contempt of court? The law of criminal contempt holds good as long as the conduct actually interferes with the day to day judicial proceedings or the functioning of the courts further the law of criminal contempt should be read without encroaching upon the guaranteed freedom of speech and expression. The dilemma of the law of contempt exists because of the need to balance between two competing and conflicting principles i.e. the freedom of expression and the dignity of the courts. This can be resolved by setting a priority principle and by abiding to the principles of criminalization. In a liberal democracy basic value should be given to freedom of speech and expression. Any kind of criticism should be considered as a market place of ideas, where ideas counteract with each other but still they get a space to exist. Even if someone is unknowingly or deliberately giving a wrong or distorted picture of the judiciary that too should be allowed to come in and not be treated as a crime because if it happens to be true then the public interest will be served and if it false and biased it will be proved wrong. People should have the right to dissent with the functioning of the courts. It is true that the Supreme Court is supreme because it's final but when it makes mistakes it too should be open to any kind of criticism

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<sup>62</sup> Available at: <https://www.livelaw.in/top-stories/breaking-offering-an-apology-would-be-contempt-of-my-conscience-and-that-of-supreme-court-prashant-bhushan-refuses-to-apologize-in-contempt-case-161866> (Last visited on, December 20, 2021).

<sup>63</sup> Available at: <https://www.livelaw.in/top-stories/dont-intend-to-retract-my-tweets-or-apologize-kunal-kamra-responds-to-ags-consent-for-contempt-against-him-165857> (Last visited on, December 20, 2021).

because the integrity and credibility and dignity of the judiciary rests on surer grounds that is on how the judges deliver justice and nothing else. To stifle criticism and stamp out dissent, strikes at the very roots of the notion of democracy and for the judiciary to become intolerant of criticism or expression of dissent would mark the beginning of the end of democracy.

