



SCANDALIZING THE COURT: IN THE REALMS OF FREE SPEECH

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Introduction

*“Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even if outspoken, comments of ordinary men”.*¹

Protection against contempt under scandalizing the court arose out of the English law as a vindication against libelous actions that besmirched Court’s honour authority, which in extension was the King’s honour (*in contemptum domini regis et curiae*). Upon the devolution of state powers, a specific focus upon the individual arose, and the legitimacy of King derived from the divine rights was replaced, and separation of powers ensued. Thereby the prerogative of the Kings is now the prerogative of an elected parliament and the executive deriving its legitimacy from the Individual’s exercise of their statutory and inalienable rights within a democratic setup of society.

Historical Developments in the Contempt Laws

English Courts’ jurisdiction to adjudicate for contempt of itself can be traced back to the Court of Star Chamber in 1641, which passed on to the Court of King’s Bench upon

former’s demise.² The Antiquity of Criminal contempt can be located within the King’s vestige as a Royal Authority and thereby a privileged against any libelous or contumacious speech, as witnessed in the case of *R v. Almon*³, whereby a contempt of the court is a besmirch upon the Kings’ justice against its dignity. Chief Justice Wilmot, who opined that the court has a contemporaneous right of vindication against the contemnors to restore the honour of the court and such exercise is not an impediment rather a condiment to the sovereignty of the state and the independence of the courts as well.

The division of Criminal Contempt from its genus to its species is of *St. James Evening Post Case*⁴ creation, which is divided into (1) scandalizing the court and Secondly, (2) due interference with the judicial process. The delineation of contempt was explained by Lord Russel of Killowen as well in *Queen v. Gray*⁵ 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, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court”. However, the exercise of this power by the courts were unheard of till the 20th century. Therefore, bringing into application the principle of Desuetude which has been clearly been rejected by the court.

¹ *Ambard v. Attorney General for Trinidad and Tobago*, [1936] AC 322 at 335, as per Lord Atkin

² Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. Q. 1 (1961). Available at:

https://openscholarship.wustl.edu/law_lawreview/vol1961/iss1/6.

³ *R v. Almon*, (1765) Wilm. 243, 254.

⁴ *St. James Evening Post Case*, (1742)2 Atk. 469.

⁵ *Supra* at 6.



Upon approaching the 20th century, the case of *Mcleod v. St. Aubyne*⁶ held the effect of contempt of Court committal by scandalising the Court, had “*become obsolete in England*”, and preserved the exercise of Contempt of Court power against colonies that were “*consisting principally of the coloured population*”. However, words of Lord Morris, pertaining to desuetude of the Contempt of Court were not followed in the spirit⁷ as construable from *Queen v. Gray*⁸ wherein a certain Gray was charged for contempt of Court, wherein he published an article of scandalous nature. With the onset of 21st century, the attitude of the Judiciary in the UK altered and cohered to principles of tolerance against libellous and contemptuous allegation as can be inferred from a delay of 90 years since the last prosecution. The tolerance can be exemplified from the aspersion of Daily Mirror, in a response to the Spycatcher judgement, set aside by Lord Templeton with wry humour to dismiss exercise of contempt powers. The current English Position of contempt’s vis-à-vis Common law traditions can be actively understood with the propitious words of Lord Scarman in *AG v. BBC*⁹, “*It is high time, I would think that we re-arranged our law so that the ancient but misleading term contempt of court disappeared from the law’s vocabulary*”.

The desuetude of contempt was understood in the light that the last adjudged case was in the year 1931, so argument put forth that if

there was no pressing need for the last 80 years, therefore there is no pressing social need today as well.

The Law Commission of UK held in conclusion that scandalizing the court is an infringement of Freedom of Expression fraught with uncertainties and back-firing in practicalities. The Law Commission of UK¹⁰ examined the feasibility to abolish the offence of scandalizing of Court and erased the difference between “*scurrilous abuse*” and “*outspoken and vigorous*” criticism by bringing into perspective, the antiquity of the doctrine. It adopted the position of Lord Justice Mynby in the case of *Harris v. Harris*¹¹, wherein the change in the standards of discourse renders the erstwhile “*scurrilous attacks*” as “*trenchant criticism*” today and is infeasible to enforce in the current age due to widespread social media use and scurrilous abuses and accusations of low or no importance or any effect. Pursuant to the advice of the Law Commission, Contempt was abolished in the Crime and Courts Act, 2013.

Contempt of Court in India: A Brief History
Contempt Jurisprudence in India is an import of English jurisprudence in India. Peacock C.J in the case of *In Re: Abdool and Mahtab*¹², laid down rules to punish while exercising the powers to penalize for contempt: “*there can be no doubt that every court of record has the power of summarily punishing for contempt.*”¹³ The exceptionally

⁶ *Mcleod v. St. Aubyne*, 1899 Appeal Cases 549.

⁷ 1.1 CALQ (2013) 18; Judicial Accountability and Contempt of Court: Comparing India with U.K., the U.S.A. and Singapore.

⁸ *Queen v. Gray*, 1900-2 Queen's Division Bench 36.

⁹ Galia Schneebaum* & Shai J. Lavi, The Riddle of Sub-judice and the Modern Law of Contempt, Critical Analysis of Law 2:1 (2015), ISSN 2291-9732..

¹⁰ Law Commission, “Contempt of Court: Scandalising the Court”, Law Com No 355, Pg. 7 (December 2012).

¹¹ *Harris v. Harris*, [2001] 2 Family Law Reports 895 at [372].

¹² *Re : Abdool and Mahtab* (1867) 8 W.R. (Cr.) 32.

¹³ Law Commission of India, “Review of the Contempt of Courts Act, 1971 (Limited to Section 2



broad common law precedents in the absence of a codified law or procedures, empowered the courts with creativity to punish Indian English Dailies for minor infractions or legitimate criticisms, especially during the times of flaring revolutionary activities and often with no rights of general appeal which was construed in *Legal Remembrancer v. Matilal Ghose & Ors*¹⁴ which proposed a caution of “self-restraint” against any “arbitrary, unlimited and uncontrolled”¹⁵ exercise of the unbridled powers. Despite the general caution, The High Courts incoherence while implicitly expanding the jurisprudence of the courts beyond the Chartered High Courts as decided in the case of *The Crown v. Sayyad Habib*¹⁶.

A significant development happened between 1908 and 1909 when Lord Minto’s Government sought codifications of Contempt of Court within the Indian Penal Code as a punishable offence and bring the subordinate judiciary within the umbrage of the High Courts. However, Sir Tej Bahadur Sapru advised against it, on the grounds of Subordinate Court traditions and absence of such extraordinary Jurisdiction. In heed to the suggestions, the government passed The Contempt of Courts Act, 1926. The Act for the first time codified Contempt of Court Act however was myopic and congruent to the colonial nature of the government as the quantum of punishment was simple imprisonment or a fine of 2000 rupees or both. The act was extremely short comprised of 3 sections. It did not define contempt nor the procedures therefore construing virtually

limitless powers to the High Court. The Act of 1926 was replaced with the Contempt of Courts Act, 1952 wherein “High Court” were defined to include the courts of Judicial Commissioner which were excluded within the Act of 1926. However, no definition of contempt was provided as well. On April 1, 1960, a bill to amend the prevailing laws on Contempt of Court was introduced in Lok Sabha, as the previous rules were found wanting and arbitrary. The Sanyal Committee was constituted to provide an overlook into the contempt of court act. The committee submitted its report in 1963 and after much discussion the Contempt of Courts Act, 1971 was enacted. The major difference in the current act is that it is severely restricted to what the powers the courts can exercise, the grounds of contempt are comparatively severely restricted and the quantum of Punishment is lower.

Contempt of Court Act: The Checkboxes to fulfil

There are multitude of instances, wherein different High Court and the Supreme Court have interpreted the provisions of the Contempt of Court Act, 1971 differently.

In the case of *Hari Singh Nagra & Ors v. Kapil Sibbal & Ors*.¹⁷, The Supreme Court construed the term ‘scandalizing the court’ as:

“a convenient way of describing a publication which, although it does not relate to any specific case either post or pending or any specific Judge, is a scurrilous attack on the judiciary as a whole

of the Act)
”, para-1.3.

¹⁴ *Legal Remembrancer v. Matilal Ghose & Ors.*, (1914) I.L.R. 41 Cal. 173.

¹⁵ Id.

¹⁶ *The Crown v. Sayyad Habib*, (1925) I.L.R 6 Lah. 528.

¹⁷ *Hari Singh Nagra & Ors v. Kapil Sibbal & Ors* (2010), 7 SCC 502.



which is calculated to undermine the authority of the Courts and public confidence in the administration of justice.”¹⁸

In the case of *C.K Dapthary v. O.P. Gupta*¹⁹, it held that a scurrilous attack has been judged as an “*adverse effect on the due administration of justice*”²⁰. In the case of *Bathina Ramakrishna Reddy v. State of Madras*²¹ the court held that “*When the act of defaming a Judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt*”.

However, the clearest interpretation has been provided in the judgment *Baradakanta Mishra v. Registrar of Orissa High court*²², with a Constitutional Bench comprising of Justice V.R Krishna Iyer, Justice Y.V Chandrachud, Justice P.N Bhagwati, and Justice D.G Palekar. In the case, Contempt of Court Act, 1971 has been very clearly interpreted and defined within the auspices of Section 2. In the Para 49 of the judgment wherein, it was held that:

Firstly, scandalization of the Court is not an exhaustive crime.

Secondly, the test is to adjudicate whether the scandalous performance is against the Judge in his capacity as a Judge or an individual.

Thirdly, The Degree of Harm as to affecting Administration of Justice has to be very properly delineated and whether contemptuous imputations do or do not affect the administration of Justice.

And lastly, the Contempt jurisdiction is not meant to uphold the personal dignity of the Judges.

In the same judgment, the court laid down that Section 2(c)(i) and Section 2(c)(ii) were considered as a species of Section 2(iii). Therefore, within Section 2(c), the Sub-Clause (i)²³ and Sub-Clause (ii)²⁴ are to be used to uphold only the objective stated in Clause (iii).²⁵ Moreover, if the judge has been vilified as an individual, then the judge should be left to his private remedies and the court has no power to commit for contempt.

The court concluded that Contempt of Court should not be used as an interdict against constructive criticism, as it enhances the “*confidence of the public in the court*”, and contempt of court cannot function as an “*interdict*” for the criticism to be “*repressed by indiscriminate resort to contempt power*”²⁶. However, the standards laid down, in this case, has not been followed in spirit as displayed further.

In the subsequent period, the Courts have been subsuming “*undermining the authority of the Court*” as a new adage within the “*Scandalizing the court*” as another category of Criminal Contempt of Court. A bare reading with the ratio of *Baradakant*²⁷ will not render such categorization under Section 2(c) (i) of the Act as it will not be in coherence with the administrative tests laid down in the aforesaid judgment.

“*Undermining the authority of the Court*” has been constructed as having an even wider reach as against the offence of scandalizing.

¹⁸ Id.

¹⁹ *C.K Dapthary v. O.P. Gupta*, (1971) 1 SCC 626.

²⁰ Ibid.

²¹ *Bathina Ramakrishna Reddy v. State of Madras*, AIR 1952 SC 149.

²² *Baradakanta Mishra v. Registrar of Orissa High Court*, (1974) 1 SCC 374.

²³ Pertaining to Scandalising the court.

²⁴ Pertaining to any act that prejudices any judicial proceeding.

²⁵ Pertaining to the administration of Justice.

²⁶ Supra at 22.

²⁷ Ibid.



This can be conferred from the case of *In re, Ministry of Information & Broadcasting*²⁸ wherein, the court conferred criticism of the Court's order by MIB's Deputy Secretary on an affidavit in reply to a writ petition as actions to "undermine its authority".

The protection derived out of the Contempt of the Court for Functional capacities of the Court against a slant on the judiciary must exclude from its ambit interference with the administrative powers and the personal behaviour of the Judges. Similarly, while dissenting in the judgment of '*Baradakant Mishra*' Justice Krishna Iyer propounded that personal vilification of judges gives a right to pursue private remedies against the vilification, but not a right within the judge or the Judiciary to uphold or restore the honor of the judge, and therefore the court retains no powers to punish for criminal contempt. Such a rise is construed on the differentiation between the prima facie personal dignity and the dignity of the court. Thereby a positive differentiation between the positions has to be actively performed. The Constitution has constituted the Judiciary and all the protection of the powers are for the Position of the seat and not the Individual Judge as the Individual is the trustee of the office whose power the person performs.

Trvst with Article 19

The Offense of Scandalizing the Court listed under Sec 2(c) I of the Contempt of Court Act violates Article 19(a) of the Constitution of India. It limits the exercise of free speech in the society and creates obligations which fail

the inherent preambular values of dissent as envisaged by the constitution.

The offence in similar common law regimes has been criticized and bundled away so much so that in the case of *Bridges v California*²⁹ the judge observed the offence to be "English Foolishness".

The Constituent Assembly of India in the garb of discussing the "contempt of Court" incessantly debated on the idea of the offence of scandalizing the court. The members of the constituent assembly were of the view that the contempt has been vested under the penal laws and the same should not be a part of the restriction placed on the Draft article 13, present-day Article 19 of the constitution which seeks to grant the fundamental rights of speech and expression under the Republic of India. The debates also touched on the idea that the contempt is made only a penal provision for actions and not the speech itself so that no such action will be generated even if the restrictions are put in place.³⁰

Another object that came to question and rightly so was the glory being attached to the judicial person and the same is very well likely to make mistake and whether calling out such mistakes or actions of judges will be brought under the large flaring wings of contempt and also if the citizen feels that a certain judge by his actions, conduct or by the authority vested under him has passed strictures on the public should he not utilizing his right to free speech vested by the constitution to feel the need question the judge or his intentions thereto.³¹

²⁸ *In re, Ministry of Information & Broadcasting*, (1995) 3 SCC 619.

²⁹ *Bridges v California*, (1941) 314 US 252.

³⁰ Vol X, Constituent Assembly Debates, Bhargava Das, 17th OCT 1949.

³¹ Vol X Constituent Assembly Debates, R.K Sidhva, 17th OCT 1949.



The Test of Over Breath.

The test of over breath is one of the most widely used tests in constitutional law to determine whether the law in force if put in action will not only prohibit non-protected speech but also protected speech. The intentions of the law are not questioned and neither its application in the realms of non-protected speech however if the application can range into protected speech; due restrictions, safeguards on law and needs to be erected for the same. Freedom of speech and expression in India are protected under Article 19(1) of the Indian Constitution, however, it has to be noted that the same rights are not absolute, and relevant restrictions have been provided to maintain balance. The Courts in the country are tasked with the duty to check the validity of legislative pronouncements and the legislature has in itself powers to regulate the extent of restriction over the fundamental right.³²

The Doctrine was envisaged under the *Grayned v Rockford* where MARSHALL, J while delivering the opinion of the court laid the contours of the test “A clear and precise enactment may nevertheless be “overbroad” if, in its reach, it prohibits constitutionally protected conduct overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished”³³

The same court, however, used the same laws herein created another set of rights and subsequent liabilities in the case of “*Brahma Prakash Sharma and Ors. v The State of Uttar Pradesh* “It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.”³⁴

The apprehensions of the constitution-makers proved true when the Court decided in the present circumstance that commission of the criminal contempt is not necessary but mere apprehension tends to bring the ire of Court who through statutory definition in its duty merely striving to protect its “blaze of glory.” But the judgment fails to acknowledge the high regard the eyes of the public holds for the judge to which he serves by helping to uphold the law, should have a right with honorable intentions to question the abuse which authority perpetrates unintentionally so. Though in the *Brahma Prakash* Judgment the Supreme Court sets aside the order.

The Courts are not to be blamed for the overarching stream of things in the law, the problem lies with the language of the law which provides these powers to the court leading to the judicial conundrum. For reference in the case of “*Perspective Publication v State of Maharashtra*”³⁵ where

³² *Bennet Coleman v Union of India*, 1973 AIR 106.

³³ *Grayned v Rockford*, 408 U.S. 104 (1972).

³⁴ *Brahma Prakash Sharma and Ors. v The State of Uttar Pradesh*, AIR 1954 SC 10.

³⁵ *Perspective Publication v State of Maharashtra*, AIR 1971 SC 221.



the court pointed out and rightly so that the mere defamation on a judge cannot amount to contempt as it has not hindered the process of justice.

But the court took a contrasting stance in the case of *Re. Arundhati Roy vs Unknown*³⁶ on 6 March 2002 the Supreme Court in the case convicted Arundhati Roy under the offence of Scandalizing the Court for an affidavit which she submitted to the court criticizing it for its excessive use of contempt powers. The bare facts in both cases remain the same wherein one was acquitted as the court believed in the intentions and also the resolution passed under close doors garnered limited eyes but the Supreme Court's approach on a sealed affidavit which did not name any particular judge but of the Court as an institution drew a more aggressive approach to the same. As has been rightfully observed in the "*In Re: S. Mulgaokar*³⁷, while holding the accused guilty of contempt, on the other hand Justice Krishna Iyer observed that: "*Justice if not hubris; power is not petulance and prudence is not pusillanimity, especially when Judges are themselves prospectors and mercy is a mark of strength*".

Now in a conflicting set of circumstances there arises two sets of liabilities from the same law in action where the liabilities contradict each other so much so that the contemnor in the second case can plead that however defamatory his speech may be on the account of the conduct of the judge it did not hinder the wheels of justice. The language, therefore, is so broad and overreaching that no conduct can be excused

prima facie for not being contempt. The careful analysis would render that the judgment has opened a Pandora's Box into the powers of the court in terms of its use of contempt powers which can effectively swing into the realms of defamation.

The Contempt laws though have started to invite certain statements of defamatory nature, it fails to imbibe, what is known as the "actual malice" standard incorporated in the law of defamation. The Concern has been voiced and has been incorporated in South Africa in the case of *State v. Van Niekert*³⁸ where the court found that "*Before a conviction can result in the act complained of must not only be willful and calculated to bring into contempt but must also be made to bring the Judges in their judicial capacity into contempt or cast suspicion on the administration of justice*". There have been various judgments which have used the actual malice standard to prevent "*Judge Bashing*"³⁹ wherein it has been shown that a judge should not be maligned to get a favorable or against any unfavorable order, however, what we contend herein is that the same test is used in all other cases brought to the court. It should be determined by the judges under clear terms that the offence has sufficed the standard or if the same could be treated as mere "criticism".

Void for Vagueness Doctrine

The doctrine of Vagueness incorporates the idea that if any legislative enactment either forbids or requires any action to be carried out by the government the same cannot be so vague and indefinite that any penalty or punishment purported constitute violation of

³⁶ *Arundhati Roy vs Unknown*, AIR 2002 SC 1375.

³⁷ *In Re: S. Mulgaokar*, (1978) 3 SCR 162.

³⁸ *State v. Van Niekert*, [1970] 3 SA 655 (T).

³⁹ *Chetak Construction Ltd. v. Om Prakash* (1998) 4 SCC 577.



the due process of law. The same is based upon the Due Process Clause of the American Constitution where it establishes that a vague statute should not in ordinary circumstances allow a common man to establish its meaning and to differ in its application violating due process of law.⁴⁰ *Connally v. General Constr. Co.*,⁴¹ it was observed that a statute placing an embargo or requiring the performance of an act in a particular manner to be ambiguous so as to confuse intellect of a man of common intelligence to derive hypothesis, predict or confuse to its exact meaning and application renders the law violative of the due process which ought to have been followed.

The vagueness doctrine is not a novel addition to the Indian Constitutional jurisprudence and it traces its origin to the famous case of *State of Bombay v F.N Balsara*⁴², the case is however known for a proponent of different principle also dictated on the purview of Article 19 of the Constitution, the Court asserted that idea of contempt is outside the purview but propounded an important concept *“that a word or provision which of an act, provision or rule should not be so wide wherein it becomes difficult for to determine its extent or its purview, the same should be in ideal circumstances be invalid.”* *Grayned v Rockford*⁴³, however, defined the contours of the doctrine of vagueness, much later in 1972 wherein it was noted that a law which has an overarching effect cannot be fair and can be easily misused by the police or any member

of the judiciary to punish based on perception or whim.

The offence of Criminal Contempt in India is one such vague law, the act reads that,

“Criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which,

- (i) *scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court or*
- (ii) *prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or*
- (iii) *interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;”*⁴⁴

The Act is somewhat precise and accurate in laying down that all activities which in turn creates hindrance in the wheels of justice by any means necessary to be noted from the facts of the particular case are to be treated as criminal contempt and any punishment can be levied which the court deems fit to balance the scales.

However, the vagueness manifests itself in Section 2(c)(i) of the Contempt of Courts act where the act uses the word “scandalises” which has wide import in language and

⁴⁰“The void-for-vagueness doctrine in the Supreme Court: a means to an end” Vol.109:67 1960, UPenn scholarship.

⁴¹ *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

⁴² *State of Bombay v F.N Balsara*, A.I.R 1951, SC 318.

⁴³ *Supra* at 33.

⁴⁴ Section 2 of the Contempt of Court Act, 1971.



application. The historical analysis would clearly show and denote that the same has been a frisbee thrown around to protect the judiciary and the judge. The age-old concept of defamation can be a substitute for its varied use but the idea has not been wholeheartedly accepted.

The offence would have corroded off long before had the courts heeded to the magnanimity of character recounted in the comments of the Lallubhai Shah, A-C J in the case of *Marmaduke Pickthall v. State of Bombay*⁴⁵ where he says “*I am slow to hold that any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. I am willing to act upon the view that the confidence of the public in Courts rests mainly upon the purity and correctness of their pronouncements and that such confidence is not lightly shaken by a mistaken or unfair criticism of this kind*”⁴⁶.

There exists in the realm two possible conclusions or steps that can be taken if first the same can be taken to be vague in aspect as it enables the perceptibility of the judicial authority to creep in or as noted in *Kartar v State of Punjab*⁴⁷ the court of law can read into the act defining the broad contours and specified behaviour which in ideal circumstances can be deemed to have scandalized the court or tends to scandalize the court.

On the lines of the Supreme Court Judgement in the landmark case of *Maneka Gandhi v Union of India*,⁴⁸ it must be noted

that any due process of law enacted to vacate the structure of fundamental rights should not be arbitrary however it is obvious that summary proceedings for the offence of Scandalising the court has a twisted set of the structure where the same court who believes that their reputation has been tarnished by a material written or spoken, brings up a case on a set of facts on which the law remains moot and judicial precedents conflicting.

The problem is inherent in the act itself where a simple word of a wide import has been used to demarcate different spectrum of offences. The vague law, therefore, has vested a large authority under the judges, which therefore has created conflicting judicial standpoints. The Current case of Supreme Court's ire over tweets by Prashant Bhushan has widened this gap of judicial discretion. In an earlier judgement of the same court in the “*Dr D.C. Saxena vs. Hon'ble CJI*”⁴⁹ held that for preserving the democratic health of public institutions, constructive public criticism may slightly overstep its limits. However, the same should not be brought under the purview of contempt.

The bigger picture to look at should we not change the definition of the “glory” to courts garner and not what it should have. The offence has been hanging by a bare thread where it is public knowledge that it tramples fundamental rights under the garb of protecting the reputation of the judiciary but would not the same in itself become moot if we change the outlook of what we consider the reputation of the court or tarnishing its image. However even if the Courts today

⁴⁵ *Marmaduke Pickthall v State of Bombay*, AIR 1923 BOM 8.

⁴⁶ *Id.*

⁴⁷ *Kartar v State of Punjab*, (1994) 3 SCC 569.

⁴⁸ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.

⁴⁹ *Dr D.C. Saxena vs. Hon'ble CJI*, 1996 SCC (7) 216.



seek to build an image, it should be of an institution which champions free and speech and not tramples it.

Chilling Effect

The Chilling effect doctrine states that any action on the prerogative of the state or any private entity which intentionally or non-intentionally casts a shadow on free speech and expression, such should not reach to an extent that it initiates a cycle of self-censor in the minds of the actor so that he could fare clear of any issues which could have arisen from the exercise of his given right, the prerogative, therefore, is said to have a chilling effect on the exercise of freedom of speech and expression. The Chilling effect is, in general, a consequential effect of the inherent vagueness or the law being overbroad or in cases where a law is, generally, is arbitrary, In the case United States case of *Walker v State of Birmingham*⁵⁰ where Justice Brennan carefully analyzed the use of the Chilling Effect Doctrine, he notes that the same has been used to provide breathing space to freedoms of the people for their necessary protection from vagueness over breadth and unbridled discretion of the authority to limit their exercise. The Court's use in the case was out of concern for the protection of individual freedom guaranteed under the constitution of the United States of America. The famous case of *NY times v Sullivan*⁵¹ has associated the view that erroneous statements are very much a part of the societal discourse and any law allowing a blanket ban on such actions will in tandem create a chilling effect on the free speech discourse in.

The same doctrine however has not seen much use in the Indian Jurisprudence wherein there are limited cases that have used this concept. It has been viewed in the case of *Ram Jethmalani v Subramanyam Swamy*⁵² that the Supreme Court of India in the famous case of *R. Rajagopal v State of Tamilnadu*⁵³ has laid down the principle “that constant fear of being sued creates a situation under which the public discourse is chilled” The offence of Scandalising the Court in tandem has the exact effect upon the idea of public discourse. It creates and nurtures a society where criticism with no matter the intentions is generally treated as contempt and the same entails punishment. The quantum of the sentence or the gravity of the offence in these cases is a different debate altogether but the idea that any criticism will garner judicial scrutiny is producing a chilling effect in the minds of the accused and all other individuals who wish to contribute to this discourse.

The Courts as an institution have always been at the centre space of public discourse. It has enabled confidence not through its conduct but by the values it has encompassed under the cases it has heard and adjudicated. The courts have shaped the present-day democracy in the country. However, the same would be stretch to assume that a law which imposes restrictions through the iron fist and creates fear in the minds of the people against exercising their due right established in the law is to be credited for the same. As the courts have agreed that criticism without malice does not seek to impair the judiciary but strengthens it, there should be in the country ample protection.

⁵⁰ *Walker v State of Birmingham*, 308 US 307, 344-345.

⁵¹ *NY times v Sullivan*, 376 U.S. 254 (1964).

⁵² *Ram Jethmalani v Subramanyam Swamy*, AIR 2006 Delhi 300.

⁵³ *R. Rajagopal v State of Tamilnadu*, 1995 AIR 264.



Constitutional powers of the Parliament to Amend Contempt of Courts Act, 1971.

An analysis of the Commission's Report vis-à-vis Indian Constitutional Law scenario can be focused on the following points.

1. In our Analysis, we have Fundamental Rights as equivalents. As Scandalizing the court is a breach of the Freedom of Speech and expression.
2. However, Issues arise specifically as to the powers of the Indian Legislature to effectuate such changes as Division of Powers and the Basic Structure Doctrine⁵⁴ clash.

However, an analysis of the 2nd point has been performed by the Law Commission of India in its 274th Report, however, cannot be equated with the report of the Law Commission's (UK) report as the former upheld the validity of the genus of Contempt of Court and the latter committed itself to the Scandalizing of the Court species. The Commission also reached a conclusion which is in Authors opinion a misapplication of law on a bare perusal of the bare text which shall be discussed asunder.

Unlike the English Common Law, the Contempt of Court Doctrine has been codified and evolved in a tangent, as Contempt of Court Act, 1971 has laid down the procedure and the definition of Contempt of Court. Moreover, statutory clarity as to the power to edit and changes the Contempt Law is provided under Section 142(2) wherein, the Court exercises the power to punish for Contempt **subject** to the provisions of any

Law made by parliament in this regard. Moreover, this conclusion was reached by Sanyal Committee Report on Contempt of Courts, 1963⁵⁵, in their interpretation of Section 142(2), against that of Law Commission of India, which held that Contempt of Court is an unalterable power of the court, not subject to the powers of parliament. Moreover, a combined reading with Entry 77 of List I of the Seventh Schedule⁵⁶ can help us conclude that the Union government to amend Contempt of Courts Act, 1971 which will be binding upon the Supreme Court of India provided that such Act does not abolish contempt of the court. The Judgment of *Supreme Court Bar Association v. UoI*⁵⁷ has propounded that the exercise by the Court of the Contempt powers can subject to a law made by the parliament but such law cannot take away the inherent jurisdiction of Supreme Court and the dignity of the Supreme Court.⁵⁸ Such construction of the aforementioned case needs to be restricted within the tests laid down in the *Baradakan*⁵⁹ case, therefore restricting Contempt of Court applicability in those cases where such action interfere with the administration of Justice. Moreover, in conclusion, the parliament can amend the Act to exclude scandalizing of the court as a form of criminal contempt through such amendment.

Conclusion

In the face of the troublesome tendency to dismiss criticism as an outright attack on the foundation of the Courts, whereby in same breath delineating no constitutional space for

⁵⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁵⁵ Sanyal Committee Report on Contempt of Courts, 1963, pg. 15. Para 4.2.

⁵⁶ Entry 77 explicitly includes Contempt of the Court.

⁵⁷ *Supreme Court Bar Associations v. Union of India*, (1998) 4 Supreme Court Cases 409.

⁵⁸ Id.

⁵⁹ *Supra* at 22.



either softening the stance on the Scandalizing of the Court and defining vague boundaries for the same to be used in the discourse on free speech. The applicability of Contempt is shaky compared against contemporaneous Constitutional changes in Democratic societies and dissonance with the Fundamental Rights of the Individual. Moreover, it is a vestige of Divine Right Theory, and the jurisprudence of punishing contemnors to uphold the dignity of the King is misplaced as the loci of legitimacy has considerably changed, which has been specifically rejected in Postmodern societies. Thereby, the applicability of Scandalizing the Court is outdated, arguments that it upholds Public Confidence cannot be used as a crutch by Indian Court to uphold Constitutional Democracy on the basal arguments that were the creation of Colonial Courts and Judicial Bodies in an era that believed in incarcerating or fining, an amount that even the richest of the times would have hiccups, or in cases both for exercising Free speech against Judges.

