

# ‘SCANDALIZING THE FALLIBLE INSTITUTION’: A CRITICAL ANALYSIS OF THE VARIED JUDICIAL APPROACH ON CRIMINAL CONTEMPT

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## INTRODUCTION

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

*“To charge the judiciary as an instrument of oppression.... is to draw a very distorted and poor picture of the judiciary. It is clear that it is an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions. It weakens the authority of law and law Court”<sup>2</sup>*

These two quotes from two separate judgments are the testimony of the fact that law on contempt has been eclectically interpreted so as to maintain the balance between the constitutional guarantee of free speech and the concept of court authority being a necessary

precursor for a civilized society. Though prima facie, these two statements can seem to be innocuous, a close look will show the incongruity in the courts approach and interpretations towards the law on criminal contempt. This dichotomy can make it difficult for normal citizens to discern the kind of acts, which are punishable as contempt. Contradiction like this becomes amplified when the authority of courts on record to punish for criminal contempt is juxtaposed with the freedom of speech and expression guaranteed by the Constitution of India.

Before moving further, the author will like to clarify from the outset that this paper doesn’t challenge the constitutionality or lawfulness of the contempt jurisdiction of the higher courts. With utmost respect to the judicial institutions, the main theme of the paper concerns with the confusion that terms like ‘scandalising or lowering the authority of the court’<sup>3</sup> can have on normal citizenry which in turn has led to judiciary interpreting the law in a contradictory way. By this contradiction, the author wants to point out towards the ambiguity

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<sup>1</sup> *Ambar v. A.G.*, AIR 1936 PC 141. These words spoken by Lord Atkin were adopted in *P.N. Duda v. P. Shiv Shankar*, AIR 1988 SC 1212; *Perspective Publications vs. Maharashtra*, AIR 1971 SC 221.

<sup>2</sup> *E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar*, AIR 1970 SC 2015.

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<sup>3</sup> Contempt of Court Act, 1971, § 2(c)(i).

in one of the themes of 'criminal contempt' and tries to question the kind of judicial symbols that it seeks to protect.

### **LAW ON CRIMINAL CONTEMPT VIS-À-VIS ARTICLE 19**

For a clear and constructive evaluation of various judgments pronounced by our judiciary on its contempt jurisdiction, it is pivotal to *firstly* understand what the law on contempt of court is in India, and *secondly* to draw a synthesis between this and the right to free speech and expression under Article 19 of the Constitution.

#### ***Understanding the general law on criminal contempt:***

Contempt of court is either characterized as either civil or criminal. Civil contempt arises when the power of the court is invoked or exercised to enforce obedience to court orders.<sup>4</sup> Criminal contempt, on the other hand, is quasi-criminal in nature.<sup>5</sup> The purpose of criminal contempt is to safeguard the judiciary from any inappropriate verbal attack, which can lead to prejudice to the whole image of the judicial

institutions.<sup>6</sup> Formerly, it was regarded as inherent in the powers of a Court of Record<sup>7</sup> and now by virtue of Article 129 and 215 of the Constitution, both Supreme Court and High Court have powers to punish for both their own contempt and contempt of lower judiciary.<sup>8</sup> A contempt proceeding, unlike conventional adversarial litigation, is between the court and the contemnor.<sup>9</sup> The actual proceedings for contempt are summary in essence.<sup>10</sup> There are three ways in which a contempt proceeding can be initiated:<sup>11</sup>

- Suo Motu action taken by High Court and Supreme Court independently or on the presentation of an application to it by a private person.
- Action taken by Attorney general (or solicitor general) on his own motion wherein he requests the court to initiate contempt proceeding against the contemnor.
- Action taken by the courts on an application filed by a third person after getting the

<sup>4</sup> Delhi Development Authority v. Skipper Construction, (1995) 3 SCC 507.

<sup>5</sup> M.P. JAIN, INDIAN CONSTITUTIONAL LAW 207, 208 (7<sup>th</sup> ed., Lexis Nexis Publication); Sahdeo Singh v. State of Uttar Pradesh & Ors., (2010) 3 SCC 705.

<sup>6</sup> K. BALASANKARAN NAIR, LAW OF CONTEMPT OF COURT IN INDIA 41 (1<sup>st</sup> ed., Atlantis Publication).

<sup>7</sup> Ganga Bhishan v. Jai Narain, AIR 1986 SC 441; E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar, AIR 1970 SC 2015.

<sup>8</sup> In re: Vinay Chandra Mishra, (1995) 2 SCC 603.

<sup>9</sup> Jaipur Municipal Corp. v. C.L. Mishra, (2005) 8 SCC 423.

<sup>10</sup> Narmada Bachao Andolan v. Union of India, AIR 1999 SC 3345.

<sup>11</sup> The Contempt of Court Act, 1971, § 15.

permission of the Attorney General (or solicitor general).<sup>12</sup>

In 1971, Parliament enacted the Contempt of Courts Act, with a purported view of defining the powers of courts in punishing acts of contempt.<sup>13</sup> Section 2(c)(i) of the Act defines criminal contempt as:

*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 scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court.*<sup>14</sup>

Contempt of Courts Act cannot be interpreted in any way so as to whittle down the power and authority derived by courts from Article 129 and 215 of the constitution.<sup>15</sup> ‘Supreme Court of India Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975’ formulated by Supreme Court in the exercise of its powers under Section 23 of the Contempt of Courts Act read with Article 145 of the Constitution of India<sup>16</sup> regulates its power concerning contempt.<sup>17</sup> Apart from this

Section 228 of the Indian Penal Code also makes the act of contempt of court punishable.<sup>18</sup>

### ***Harmonizing principles of criminal contempt and free speech:***

Article 19(2) of the constitution ensures that freedom of speech and expression is not exercised so as to prejudice the authority of the court.<sup>19</sup> It talks about ‘reasonable restrictions’.<sup>20</sup> This means that while the fundamental rights are supreme and people can make the final decision on the exercise of their free speech and expression, its limit has to be established and regulated by the legislature for the ‘benefit of the society’.<sup>21</sup> This goes on to show that if a restriction is unreasonable then it is not in the interest of the larger society and hence violates the basic feature of the constitution.<sup>22</sup> Freedom of speech and expression has been kept on a higher pedestal than the law on contempt of court by the judiciary in other jurisdictions.<sup>23</sup> In India, the approach has been a little different and an effort has been made to have a balance

<sup>12</sup> 1 D.D. BASU, THE SHORTER CONSTITUTION OF INDIA 762 (14<sup>th</sup> ed., Lexis Nexis Publication).

<sup>13</sup> Suhrith Parthasarathy, *The basics for free speech*, THE HINDU (Jan 30, 2016).

<sup>14</sup> Contempt of Court Act, 1971, § 2(c)(i).

<sup>15</sup> T. Sudhakar Prasad v. Govt. of A.P., (2001) 1 SCC 516.

<sup>16</sup> S.K. Sundaram v. Unknown, 2000 (8) SCALE 345.

<sup>17</sup> In Re: Vinay Chandra Mishra, (1995) 2 SCC 603.

<sup>18</sup> § 228, IPC.

<sup>19</sup> INDIA CONST. art. 19, cl. (2).

<sup>20</sup> *Id.*

<sup>21</sup> M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1043 (7<sup>th</sup> Ed., Lexis Nexis Publication); Bennet Coleman v. Union of India, AIR 1973 SC 106.

<sup>22</sup> See Soli. J. Sorabjee, ‘Constitution, Courts, and freedom of the Press and Media’ in SUPREME BUT NOT INFALLIBLE 338 (Oxford University Press).

<sup>23</sup> R. v. Police Commissioner, [1968] 2 QB 118; Garrison vs. Lousina, 379 U.S. 64, 77.

between them. In the *Narmada Bachao Andolan v. Union of India*<sup>24</sup>, the court held that:

*“We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule. Indeed, freedom of speech and expression is “lifblood of democracy” but this freedom is subject to certain qualifications.”*

Commenting upon the complex field of law on contempt, Justice V. Krishna Iyer in *Shri Baradakanta Mishra v. The Registrar of Orissa High Court & Anr*<sup>25</sup> observed that the dilemma of the law of contempt arises because of the constitutional need to balance two great but occasionally conflicting principles - freedom of expression and fair and fearless justice.<sup>26</sup> He further opined that:

*“Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the counter-vailing good, not merely of free speech but also of greater faith generated by exposure to the*

*actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked.”*

The two different approaches by the Apex court shows the intricacies attached with the implementation of the contempt procedures. The relationship between free speech and the contempt powers of the court is a perfect example of this. While the courts have the sacrosanct duty to protect civil rights and freedom of speech against judicial umbrage through the exercise of tolerance and detachment<sup>27</sup>, media has the duty to make institutions more accountable by establishing linkages between them and the citizenry<sup>28</sup>. The wielding of contempt powers on the press whose *‘liberty is subordinate to the proper administration of justice’*<sup>29</sup> shows the permeating relationship between free speech and justice rendering mechanism. In the subsequent part of the paper, a careful analysis of the court’s act of walking on this tightrope and grappling with this vexed problem is presented. It is asserted that although the higher courts have infused in every effort to maintain the attitude of objectivity, they haven’t interpreted the law on this issue in a coherent or a singular fashion.

<sup>24</sup> AIR 1999 SC 3345.

<sup>25</sup> AIR 1974 SC 710.

<sup>26</sup> See, In Re: Arundhati Roy, AIR 2002 SC 1375.

<sup>27</sup> Baradakanta Mishra v. The Registrar of Orissa High Court & Anr, AIR 1974 SC 710.

<sup>28</sup> *Supra* note 22.

<sup>29</sup> Rao Hrnarain v. Gumori Ram, AIR 1958 Punj. 273.

## PROBLEMS AND ISSUES WITH CRIMINAL CONTEMPT CONCERNING SCANDALIZING OF COURT

The interpretation concerning law on contempt involves a lot of complexities since it is difficult to find what this offence actually consists of.<sup>30</sup> This paper specifically focuses on courts interpretation with regards to the term ‘scandalizing and lowering of the court authority’ since the author feels them to be vague, arbitrary and prone to be misused.

### *An arena of uncertainty and vagueness*

The judiciary time and again has given its interpretation of what all acts amount to lowering the authority of courts. In *DC Saxena vs. Hon'ble The Chief Justice of India*<sup>31</sup>, the court held that scandalizing a judge or the court would include acts such as defamatory publication<sup>32</sup>, imputing partiality and lack of fairness against a judge or judicial institutions<sup>33</sup>. Further from these judgments various objectives of criminal contempt concerning this theme can be made out such as:

- Contempt jurisdiction keeps the administration of justice unpolluted.<sup>34</sup>
- The confidence in the courts of justice, which the people possess, cannot, in any way, be allowed to be tarnished, diminished or wiped out by the contumacious behavior of any person.<sup>35</sup>
- The dignity of the courts needs to be maintained at all cost so as to preserve people confidence in courts.<sup>36</sup>
- The contempt proceeding is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.<sup>37</sup>
- Public confidence in the administration of justice would be undermined if scurrilous attacks on judges, in respect of past judgement or public conduct is made leading to greater mischief than imagined.<sup>38</sup>

From these, five main broad objectives can be discerned. An effort has been made to critically understand the themes underlying these objectives in the subsequent sub-sections:

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<sup>30</sup> Mriganka Shekhar Dutta & Amba Uttara Kak, ‘Contempt of Court: Finding the limit’ 56, 2 NUJS L. REV. (2009).

<sup>31</sup> AIR 1996 SC 2481.

<sup>32</sup> C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132.

<sup>33</sup> In re: Ajay Kumar Pandey, AIR 1997 SC 260.

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<sup>34</sup> Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.

<sup>35</sup> In Re: Arundhati Roy, AIR 2002 SC 1375.

<sup>36</sup> C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132.

<sup>37</sup> Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.

<sup>38</sup> C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; P.N. Duda v. P. Shiv Shankar, AIR 1988 SC 1212.

**a) Keeping the administration of justice unpolluted**

In 1943, Lord Atkin, while delivering the judgment of the Privy Council in *Devi Prasad v. King Emperor*<sup>39</sup>, observed that cases of contempt, which consist of scandalising the court itself, are fortunately rare and require to be treated with much discretion. Proceedings for this species of contempt should be used sparingly and always with reference to the administration of justice.<sup>40</sup> He asserted that:

*"If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them."*

In various subsequent cases, the court has opined that it shouldn't use its power to punish for contempt unless there is 'real prejudice' which can be regarded as 'substantial interference' with the due course of justice.<sup>41</sup> It is extremely difficult to identify in what all cases the administration of justice is being polluted or there is substantial interference caused by a statement of a particular individual. There have been instances wherein judges have been able to initiate contempt proceedings even

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<sup>39</sup> 70 I.A. 216.

<sup>40</sup> *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*, AIR 1954 SC 10.

<sup>41</sup> *Rizwan-ul-Hasan v. State of Uttar Pradesh*, AIR 1953 SC 185.

when the administration of justice is not being sullied. A contrary view was given in the *E.M. Sankaran Namboodiripad vs. T. Narayanan Nambiar*<sup>42</sup> case wherein it was observed that:

*"The law punishes not only acts which do in fact interfere with the courts and administration of justice but also those which have that tendency, that is to say, likely to produce a particular result."*

This particular result that the judgment talks about is related to the image of the judiciary in the minds of people.<sup>43</sup> The court jettisons any statement, which has the tendency to tarnish or bring the image of the judiciary down in the eyes of the public on the premise that if the judiciary is not respected than rule of law cannot be upheld by the judges in a fearless manner<sup>44</sup>. The court has further stated that even if 'proper administration of justice' is hampered with by a statement then it will be considered as contemptuous irrespective of whether it leads to actual interference in the process of justice.<sup>45</sup> Actual damage is not considered being the important consideration in deciding upon contempt cases.<sup>46</sup> This leads to a pivotal

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<sup>42</sup> AIR 1970 SC 2015.

<sup>43</sup> *See*, In Re: Roshan Lal Ahuja, 1992 (3) SCALE 237.

<sup>44</sup> *Rajendra Sail v. Madhya Pradesh High Court Bar Association and Ors.*, AIR 2005 SC 2473.

<sup>45</sup> *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*, AIR 1954 SC 10.

<sup>46</sup> In Re: Arundhati Roy, AIR 2002 SC 1375.

question – Does interference in the actual administration of justice constitutes the constructive part in contempt proceedings? The route taken by the judiciary presents a dubious picture wherein the court has itself not been able to determine the true objective and direction of the contempt provisions.

**b) Real source of Confidence**

In a democracy, people assume the center stage and are the focus of the institutional administration. People are the masters and judges, legislators, ministers; bureaucrats are servants of the people.<sup>47</sup> The purpose of contempt of court hence should be geared towards ensuring that public interest is not hurt due to hinderance in the administration of justice. *In Re: S. Mulgaokar*<sup>48</sup>, while the court held the accused to be guilty of contempt, 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, not whimper of weakness. Christ and Gandhi shall not be lost on the Judges at a critical time when courts are*

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<sup>47</sup> Markandey Katju, *Contempt of Court: need for a second look*, THE HINDU, (Jan, 2007), <http://www.thehindu.com/todays-paper/tp-opinion/contempt-of-court-need-for-a-second-look/article1785785.ece>.

<sup>48</sup> (1978) 3 SCR 162.

*on trial and the people (“We, the People of India”) pronounce the final verdict on all national institutions”.*

Justice Krishna Iyer through this observation upheld that the court should harmonise the constitutional values of free criticism and the need for a fearless curial process and its presiding functionary, the Judge.<sup>49</sup> The focus of this observation was to emphasise that administration of justice and criticism can go hand in hand<sup>50</sup> since people are the final judges of the way national institutions function. Maintaining this balance can be tough. For e.g. in *Rajendra Singh vs. Madhya Pradesh High Court Bar*<sup>51</sup> the Supreme Court reiterated that:

*“The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.”*

This line of connection between people’s confidence in judiciary’s ability to deliver justice and disaffection affecting the foundation

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<sup>49</sup> *Id.*

<sup>50</sup> *In Re: Roshan Lal Ahuja*, 1992 (3) SCALE 237.

<sup>51</sup> AIR 2005 SC 2473.

of the judiciary is flawed. Confidence can never be controlled, manipulated and juxtaposed according to whims and fancies of an institution. Enforcing confidence by initiating contempt proceedings too often can be counterproductive as it can lead to an increase in resentment and people losing respect in court for safeguarding their interests.<sup>52</sup> Further, what amounts to a decrease in confidence or not can be decided in a multitude of ways based on the facts of the case, leading to abuse of law rather than the court upholding the rule of law.

**c) *Evaluating the concept of free market of ideas***

In the case of *Shreya Singhal vs. Union of India*<sup>53</sup> the concept of 'free market place of ideas' was discussed and Justice Holmes was quoted to explain the concept of free speech and expression in the world of Internet:

*"The ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."*<sup>54</sup>

<sup>52</sup> See, *Bridges v. California*, 314 U.S., 252, 268 (1941).

<sup>53</sup> AIR 2015 SC 1523.

<sup>54</sup> Justice Holmes Dissent in *Abrams v. United States*, 250 US 616 (1919). Quoted in approval by Justice R.F.

The argument that bad ideas will be replaced by good ideas eventually has a lot of relevance in cases of criminal contempt too. In the case of *P.N. Duda vs. P. Shiv Shankar*<sup>55</sup> the court brought in this concept of free place of ideas by stating that;

*"In the free market place of ideas criticisms about the judicial system or the judges should be welcomed, so long as the criticisms do not impair or hamper the administration of justice."*

This concept in the law governing contempt of court basically asserts for freedom of expressing bad ideas against the judiciary. The objective is not to give immunity to these verbal attacks but is to ensure that people respect judges and the institution of judiciary for correct reasons. Retired Hon'ble Justice Markandey Katju very succinctly puts that;

*"In a democracy, there is no need for judges to vindicate their authority or display majesty or pomp. Their authority will come from the public confidence, and this, in turn, will be an outcome of their own conduct, their integrity, impartiality, learning, and simplicity."*<sup>56</sup>

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Nariman in *Shreya Singal v. Union of India*, AIR 2015 SC 1523.

<sup>55</sup> AIR 1988 SC 1212.

<sup>56</sup>Markandey Katju, *Contempt of Court: need for a second look*, THE HINDU, (Jan, 2007), <http://www.thehindu.com/todays-paper/tp-opinion/contempt-of-court-need-for-a-second-look/article1785785.ece>.

The rationale of this argument is simple. The Court should garner authority and admiration by their own up bright acts and integrity and not by the use of the sword of contempt proceedings. This instills real reverence in the minds of the people and creates an environment of security amongst the citizenry. Citizens are not supposed to weigh their criticisms of an institution on golden scales. There will be bad criticisms, scurrilous attacks, public indignation of the institution, but ultimately, through the process of dispensing of justice, the courts have the full opportunity to commit themselves to public service and gain their respect. The confluence of outspoken statements and substantial justice will ensure achievement of twin objectives that of increase in respect for judiciary and attainment of rightful freedom of expression.

**d) Lowering the authority of court**

A general question that arises from the Court's views on the law on contempt is with regards to the authority that the court enjoys under our constitutional fabric. Can a handful of statements be dangerous enough to belittle our court's authority? Are our images of judicial institutions so weak so as to collapse at the mere insinuation of its shortcomings? Can an institution be ridiculed by mere unguarded chants of a few beings? It is a mistake, to try to

establish and maintain, through ignorance, public esteem for our courts.<sup>57</sup> Authority of the court as mentioned above should arise from the real source – people. If a statement which presents the truth about a particular judge or the judiciary should not be taken as contempt and it is extremely necessary for the Courts to show empiricism, tolerance and dignified indifference to these statements.<sup>58</sup>

In the case of *Court on its Own Motion v. M.K. Tayal and Ors.*,<sup>59</sup> the Mid-Day daily was charged for contempt for publishing a statement against the then Chief Justice of India, wherein it was alleged that biased judgments were passed by him in commercial property cases so that his sons could get pecuniary benefit out of it. The court held that the statements had lowered the authority/image of the court since the person imputed for corruption was none other than the Chief Justice of India. Contemnors plea to bring in pieces of evidence so as to prove the truthfulness of the report were dismissed at the threshold itself since Section 13 (b) of the Contempt of Court Act which talks about truth being a valid defense in contempt cases provides room for

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<sup>57</sup> DAVID PANNICK, JUDGES, 45 (1st ed. Oxford University Press).

<sup>58</sup> In Re: S Mulgaokar, AIR 1978 SC 727.

<sup>59</sup> 2007 (98) DRJ 41.

court's discretion.<sup>60</sup> In another attempt to vindicate the importance of maintaining the authority of the courts, the Delhi High Court in *Shri Surya Prakash Khatri & Anr. vs. Smt. Madhu Trehan and Others*<sup>61</sup> took serious notice of a magazines attempt to rate the judges of the High Court on parameters such as integrity and knowledge. These cases question the very genesis of contempt laws, as authority cannot be protected at the cost of public accountability, transparency and propriety. Muzzling of the free flow of information is pernicious to the idea of institutional checks and balances and detrimental to public interest<sup>62</sup>, hence showing that Contempt proceedings are meant to protect the sham authority and not the real one. It seems from the above evaluation that the focus of court has been on maintaining a favorable public perception rather than ensuring compliance with court's order.<sup>63</sup>

#### **e) Drawing the line between defamation and contempt**

In our country, the line between charging a person for defaming a particular judge and for

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<sup>60</sup> Contempt of Court Act, 1971, § 13(b) reads as, 'The court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.'

<sup>61</sup> 2001 Cri.L.J. 3476.

<sup>62</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

<sup>63</sup> GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER INDIAN CONSTITUTION 238 (Oxford University Press).

court contempt has become dotted and foggy. It becomes increasingly difficult to ascribe an act to be defamatory since the court has in cases given all-encompassing powers to the judges for initiating contempt proceedings. In *Aswini Kumar Ghose And Anr. vs Arabinda Bose And Anr.*<sup>64</sup> one of the first cases of contempt of court after our constitution came to force, the court had devised a yardstick of determining when contempt could have said to be there:

*"No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and bona fide criticism but had a clear tendency to affect the dignity and prestige of this Court."*

Protecting the prestige of the judges as an end objective of contempt proceedings was a devious tendency that this judgment had started. Making personal criticism against a judge punishable can be termed as a deathblow to the idea of promoting free speech.<sup>65</sup> In *C.K. Daphtary vs. O.P. Gupta*<sup>66</sup> the court vindicated the stand taken in Arabinda Ghose's judgment and observed that:

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<sup>64</sup> AIR 1953 SC 75.

<sup>65</sup> *See, R. v. Kopyto*, 1987 CanLII 176 (ON CA).

<sup>66</sup> AIR 1971 SC 1132.

*“We are unable to agree that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the Judiciary. If confidence in the Judiciary goes, the due administration of justice definitely suffers.”*

The court in *J. R. Parashar, Advocate & Ors vs Prasant Bhushan, Advocate & Ors*<sup>67</sup> reiterated this stand and pointed out that:

*“To ascribe motives to a Judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole and nothing is more pernicious in its consequences than to prejudice the mind of the public against judges of the Court who are responsible for implementing the law.”*

This link between criticizing a particular judge and hindrance in the administration of justice is a bit tenuous. To bring out the true nature of problem, Court’s further observation in the same judgment has to be placed wherein they have said that:

*“Holding a dharna by itself may not amount to contempt. But if by holding a dharna access to the courts is hindered and the officers of court*

<sup>67</sup> AIR 2001 SC 3315.

*and members of the public are not allowed free ingress and egress, or the proceedings in Court are otherwise disrupted, disturbed or hampered, the dharna may amount to contempt because the administration of justice would be obstructed.”*

Comparing the two observations through analogies, holding a *dharna* can be termed as equivalent to criticising judge or the institution of judiciary. On the other hand, holding a *dharna* which obstructs the free entry and exit from the court premise can be termed as equivalent to creating obstruction in the administration of justice. Holding *dharna* which doesn’t create hinderance in the movement of litigators and public but involves some other illicit activities punishable by law such as creating nuisance, can be punished under other laws of the country and not necessary through the contempt provisions. Going by this comparison, criticising of judges shouldn’t per se be a ground to initiate contempt proceedings as defamation proceedings can be initiated by the particular judge against the person so accused of making such statements.<sup>68</sup> In this regard it becomes necessary to go through the observation of the Hon’ble Supreme Court in the case of *Perspective Publication vs Maharashtra*<sup>69</sup>, wherein it held that:

<sup>68</sup> Rustom Corwasjee Cooper v. Union of India, AIR 1970 C 1318.

<sup>69</sup> AIR 1971 SC 221.

*“There is a distinction between a mere libel or defamation of a judge and what amounts to contempt of court. The tests are: (i) Is the impugned publication a mere defamatory attack on the Judge or is it calculated to interfere with the due course of Justice or the proper administration of law by his court? and (ii) Is the wrong done to the Judge personally or is it done to the public?”*

Keeping in mind this observation, it can be said that mere defamation of a judge doesn't amount to sullyng the process of justice.<sup>70</sup> In all practical terms, this distinction cannot be contained in watertight compartments and hence has led to heterogeneous observations from the judiciary's side. *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*<sup>71</sup> is a perfect illustration of this tendency. The court, in this case, had stated that:

*“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.”*

<sup>70</sup> Bathina Ramakrishna Reddy v. State of Madras, AIR 1952 SC 149.

<sup>71</sup> AIR 1954 SC 10.

Punishing a statement for the 'likely embarrassment it can cause to a judge' presents whole scope of the problem in a nutshell. 'Embarrassment' means to make someone feel awkward or ashamed.<sup>72</sup> The level of subjectivity attached with this word makes the abovesaid statement all the more scary and repugnant. A judge through the power of contempt has the ultimate unbridled authority to punish someone for contempt even if he feels awkward by a particular statement. This linkage between defamation and contempt as pruned out in the abovesaid case and the subsequent cases<sup>73</sup> is based on the premise that individuals in our country are very gullible and they on a mere libelous or defamatory statement can refuse to respect an institution which derives its authority from the constitution. The difference between constructive criticism of the court, abuse of the administration of justice, interference in the administration of law, defamation against a judge<sup>74</sup> and scurrilous attack on the judicial institution is still not clear.<sup>75</sup> This can be clearly seen in the case of *Re S.K. Sundaram Suo Motu*

<sup>72</sup> POCKET OXFORD ENGLISH DICTIONARY, (10<sup>th</sup> ed., 2012, OUP).

<sup>73</sup> Jaswant Singh v. Virender Singh, AIR 1995 SC 520; In Re Roshan Lal Ahuja, 1992 (3) SCALE 237.

<sup>74</sup> See, Abhinav Chandrachud, 'The insulation of India's Constitutional Judiciary', ECONOMIC AND POLITICAL WEEKLY, Vol. 45, No. 13 (March 27-April 2, 2010), at 39.

<sup>75</sup> See, In Re: Sham Lal, AIR 1978 SC 489.

*Contempt Petition*<sup>76</sup>, wherein the court observed that:

*“Scandalising the court, therefore, would mean hostile criticism of Judges as Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the Judge as a Judge brings the court or Judges into contempt, a serious impediment to justice and an inroad on the majesty of justice.”*

It is very difficult to draw a coherent difference between hostile criticism and constructive criticism. In this case, the contemnor was charged with criminal contempt for challenging the Chief Justice of India’s holding of his post even after reaching the age of superannuation. It is not easy to determine whether this is a fair criticism, personal attack against a judge or a statement which effects the administration of justice. A connected problem to this confusion is the fact that a judge has the power to invoke his contempt jurisdiction *Suo Motu*.<sup>77</sup> In effect, a judge himself has the authority to decide whether a particular act of the contemnor is defamatory to him or is contempt of court. Under the garb of contempt provisions, a judge can easily take out his

<sup>76</sup> 2000 Supp. 5 SCR 677.

<sup>77</sup> Contempt of Courts Act, 1971, § 15.

personal vengeance against the person accused<sup>78</sup> since the natural principle of *Nemo in propria causa judex, esse debet*<sup>79</sup> isn’t applicable when the offence alleged is criminal contempt which in effect consists of proceedings between the institution of court and the contemnor<sup>80</sup>. The quintessential question that arises is that how can a judge be assumed to remain impartial in deciding a case where his own reputation is at stake?

## QUESTIONING AUXILIARY

### CONSIDERATIONS

After talking about the main elements that constitute part of ‘scandalization’ of court under criminal contempt, the focus has been brought in the subsequent sub-sections to some of the fringe elements that the court took into consideration. Issues and some questions with regards to these two components are pruned out:

#### ***a) ‘Appropriate Audience’: Who consumes the statement?***

The Andhra Pradesh High Court court in the case of *Puskuru Kishore Rao vs. N. Janardhana Reddy*<sup>81</sup> had developed this test of audience in front of which outrageous

<sup>78</sup> See, *Bathina Ramakrishna Reddy v. State of Madras*, AIR 1952 SC 149; *In Re: Times of India*, AIR 1953 SC 149.

<sup>79</sup> ‘No one shall be a judge in his own case’.

<sup>80</sup> *Jaipur Municipal Corp. v. C.L. Mishra*, (2005) 8 SCC 423.

<sup>81</sup> 1993 Cri LJ 115 (AP) (DB).

statements have been spoken. According to this judgement, if the audience to which a speech or a statement is referred to comprises of a person whose confidence in the integrity of the judiciary is not likely to be shaken except on weighty standards, then prospects of committal will be remote.<sup>82</sup> In this case, the alleged contemnor was not held guilty for contempt wherein he had accused the judiciary for creating roadblocks in the implementation of pro-poor reforms. Since the function was attended by special invitees, like judges and senior advocates, the contemnor's speech wasn't held to be contemptuous. Related to this in the case of *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*<sup>83</sup> the fact that the statement by the alleged contemnor (a senior advocate) criticizing judiciary for not being able to control corruption in their own arena and receiving monetary benefits for judicial pronounced was given in front of lawyers and judges who had come to attend a function in the court premises was held to be relevant for not holding the contemnor guilty of contempt. In *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*<sup>84</sup>, a resolution accusing two judicial officers of impropriety was held to be contempt of court, but the contemnors weren't convicted

<sup>82</sup> SMARDITYA PAL, CONTEMPT OF COURT 79 (3<sup>rd</sup> ed., Wadhwa Nagpur Publishers).

<sup>83</sup> (2010) 7 SCC 502.

<sup>84</sup> AIR 1954 SC 10.

for it since the statement in the resolution was meant to remain within the four walls of the bar association.

In both of these cases, the distinction between normal citizens and people in the legal field is flawed. This creates a presumption that people from legal background have a greater degree of immunity and resistance to the court procedures. What stops a scandalizing statement to erode the confidence of the legal fraternity for the judiciary? General dissatisfaction<sup>85</sup> can occur within the walls of courtrooms and there is not stopping that such statement cannot reach the general populace.<sup>86</sup>

***b) Person committing the contempt: Is there a difference between the type of contemnors?***

Higher Judiciary has further differentiated between an advocate or a judge committing a contempt and a person from a non-legal background vilifying the authority of the court. Surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved are held to be relevant in contempt proceedings.<sup>87</sup> In the case of *Vishwanath vs E.S. Venkatramaih And Others*<sup>88</sup>, contempt

<sup>85</sup> Advocate General v. Seshagiri Rao, AIR 1966 AP 167.

<sup>86</sup> Hari Singh Nagra and Ors. v. Kapil Sibal and Ors., (2010) 7 SCC 502.

<sup>87</sup> In Re: Arundhati Roy, AIR 2002 SC 1375.

<sup>88</sup> 1990 Cri LJ 2179.

proceeding against the former Chief Justice of India for making a statement in an interview that, “*The judiciary in India has deteriorated in its standards because such Judges are appointed, as are willing to be "influenced" by lavish parties and whisky bottles.*” The court cited a Chinese proverb –“*As long as you are up-right, do not care if your shadow is crooked*” and dismissed the contempt petition and held that the statement was just a way by which the former Chief Justice expressed his sadness over the condition of some of the judges.<sup>89</sup> The emphasis, in this case, seems to be on the fact that allegations of contempt were made by an officer of the court. Similarly in the *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*<sup>90</sup>, the fact that the alleged contemnor was a senior advocate was given a lot of weightage in not holding him guilty of criminal contempt.

Moving to ‘*common citizens contempt*’, in the case of *Rajendra Sail vs. Madhya Pradesh High Court Bar Association and Ors.*<sup>91</sup>, the Supreme court was of the view that appellant being a law graduate should have known the limits upto which he could go while criticising judgment of the High court. On another occasion, Arundhati Roy was charged with criminal contempt as her statements were found

to be scandalous even though her statements were very similar to the statements spoken by the former Chief Justice of India and the Senior Advocate.<sup>92</sup> This can amount to unreasonable classification<sup>93</sup> since no person can be placed on a higher pedestal when attributing the offence of contempt to him. In *Re Arundhati Roy*<sup>94</sup>, the court commenting upon the proposition that actual damage of a statement is not important had held that, “*the well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses to hit the target.*” Taking this into account, how does it matter who the archer is? The rationale behind this classification between *archers* can be that some of them are experienced and their *arrow* would be in the direction of improving upon the administration of judicial mechanism in the country. From a different lens of view, a criticism by a person from a legal field can be more prejudicial to the whole image of the judiciary and in turn sow ‘*more*’ seeds of distrust with regards to the judicial institution in minds of the public. Public confidence in the judiciary can get affected to a greater extent by the words of legal experts compared to the statements made by normal citizens.

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<sup>89</sup> *Supra* note 82.

<sup>90</sup> (2010) 7 SCC 502.

<sup>91</sup> AIR 2005 SC 2473.

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<sup>92</sup> In *Re: Arundhati Roy*, AIR 2002 SC 1375.

<sup>93</sup> See, *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Budhan Chowdry v. State of Bihar*, AIR 1955 SC 191.

<sup>94</sup> AIR 2002 SC 1375.

## THE 'INFALLIBLE INSTITUTION' AMONG THE LOT

The judicial institutions in this country are in a premium position wherein they are excluded from the range of other public institutions and organs of state. A simple question arises from this situation: If the authority of the Legislative organ can be challenged and criticized; if the executive organ of the state can be ridiculed upon; then why is judicial organ kept aloof of all this?<sup>95</sup> In *Re: Vinay Chandra Mishra* the Apex court opined that the judiciary is not only the guardian of the rule of law and the third pillar of any democracy but in fact is the central pillar of a democratic State, which warrants the existence of law on contempt.<sup>96</sup> In the English case of *R. vs. Almon*<sup>97</sup>, considered to be the genesis of the law on contempt attributed the need for the court to have the power of contempt of court is to maintain the edifice of impartiality of the judiciary. The idea of judges being the soul of the judicial institution whose criticism can bring the court into disrepute has far-reaching consequences, wherein attribute of non-partisanship is attached with the judgment

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<sup>95</sup> See, *Landmarks Communications v. Virginia*, 435 U.S. 829, 842 (1978). In this case U.S. Supreme Court upheld that same standard of criticisms for both the government officials and the judges should be applied.

<sup>96</sup> AIR 1995 SC 2348.

<sup>97</sup> (1765) Wilm.243, 254.

rendering process. Judges according to this view are mechanical beings who can do no wrong and hence any attempt to analyze their work is equivalent to causing a disturbance in the whole mechanics of a machine. This observation assumes judges to be infallible humans having the power to objectively decide upon cases on contempt. There is no doubt with regards to the importance of judiciary as one of the central pillars in the whole institutional setup of our country, but it has to be accepted that judges are normal human beings made up of flesh and emotions.<sup>98</sup> They can make mistakes, can be impartial and falter in their judicial approach at times and hence in no way can they claim infallibility.<sup>99</sup> The famous quote of Justice Jackson in *Brown vs. Allen* stating “*We are not final because we are infallible, but we are infallible only because we are final*”<sup>100</sup> encapsulates this position very well. The respect and authority of judiciary cannot be equated as a spear which can protect the dubious image of the higher courts’ infallibility. If people haven’t lost faith in the other branches of state namely- executive and legislature who are criticized, caricatured and ridiculed upon on a daily basis, how can we assume so easily that courts will

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<sup>98</sup> *S.P. Gupta v. President Of India And Ors.*, AIR 1982 SC 149.

<sup>99</sup> *Ram Dhayal Markarha v. State of Madhya Pradesh*, AIR 1978 SC 921.

<sup>100</sup> BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 91 (Oxford University Press).

lose their authority if their mechanism gets scandalized in the minds of the same people? Law on contempt is surely a necessity, but unwarranted use of criminal contempt for protecting the symbols of justice away from public glare is marred by overreaching generalizations, dubious assumptions and feeble sense of insecurity.

In *Nambooripad's* case, the court stated that the case of *Kedarnath Singh vs. State of Bihar* in connection with sedition cannot render much assistance since it deals with an altogether different matter.<sup>101</sup> The court, in this case, couldn't have taken notice of the future development that took place in U.K. concerning this field, wherein 2012, Law commission of U.K. linked the term 'scandalizing of court' and the offence of sedition.<sup>102</sup> Abiding by the recommendation of the law commission, British parliament abolished the offence of scandalizing the court by implementing the Crimes and Court Act, 2013.<sup>103</sup>

In *Kedarnath's* judgment, the court restricted the scope of sedition and held that until the time there is no incitement of violence, tendency to create public disorder or disturbance of public peace, no charge of sedition can be

brought in.<sup>104</sup> Preaching overthrow of the government in a violent manner doesn't amount to sedition till the time these necessary ingredients are established.<sup>105</sup> The court also through series of judgments have mentioned that a statement to be classified as contemptuous must be prejudicial to the administration of justice. In contrast to this, the vagueness attached to the law on sedition<sup>106</sup> can be very much found in this concept of criminal contempt (as mentioned above). In *D.C. Saxena vs. CJI*<sup>107</sup>, the courts distinguished the concept of criticism against a judge and creating hindrance in administration of justice by observing that:

*“Any criticism about judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of the judges and brings administration of justice to ridicule must be prevented.”*

From the above statement, it can be made out that the real intention of the judiciary is to protect the 'faith' in the minds of people, even though the administration of justice is not hampered with but only being ridiculed upon.

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<sup>101</sup> AIR 1970 SC 2015.

<sup>102</sup> THE LAW COMMISSION (2012).

<sup>103</sup> § 33.

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<sup>104</sup> AIR 1962 SC 955; *See*, *Romesh Thappar v. The State of Madras*, AIR 1950 SC 124.

<sup>105</sup> *See*, *Balwant Singh v. State of Punjab*, AIR 1995 SC 1785.

<sup>106</sup> Nivedita Saksena & Siddhartha Srivastava, *An analysis of the modern offence of sedition*, 7 NUJS L.REV. 121 (2014).

<sup>107</sup> (1995) 2 SCC 216.

This is equivalent to saying that if statements against an official of the government are spoken then the speaker should be charged for sedition since he has interfered in the objective working of the particular officer and has made a mockery out of legislative corridors which in turn prejudices the government's image in front of the public. Since this is not the case according to the established law on sedition, protection of judge's image and connecting it to the symbols of judicial institutions shouldn't be given so much of importance under contempt of court laws. As the law on sedition has been misused by the government to stifle criticisms against itself<sup>108</sup>, the law on criminal contempt can be used for self-serving purposes<sup>109</sup> so as to maintain the mysticism around judicial entities. The rationale behind both these forms of laws is the same – that is to preserve the imagery of the institutions in the mind of the public. This tendency of institutional self preservation is to be looked critically since the scope of misuse is high.

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<sup>108</sup> See, Manish Chiiber, *Sedition: SC's shown the way, but govts have refused to see*, (Feb 17, 2016), <http://indianexpress.com/article/explained/sedition-scs-shown-the-way-but-govts-have-refused-to-see/#sthash.ZSmjUc4h.dpuf>.

<sup>109</sup> See, GAUTAM BHATIA, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER INDIAN CONSTITUTION 244* (Oxford University Press).

## **PURPORTED OBJECTIVE VS. THE REALITY**

As stated above, the judiciary in many of the judgments has carefully delineated the difference between defaming a particular judge personally and contempt of court.<sup>110</sup> The test devised for punishing a person for contempt is to see whether by particular act, harm is done to the administration of justice and consequently to the public at large.<sup>111</sup> Even after asserting the same principle in subsequent judgments, there have been cases, where contempt jurisdiction was brought on to effect even though the administration of justice wasn't being hindered. To understand this contrast and anomaly, it is important to compare cases which had same facts but were decided differently. These cases display the void between the intended objective of the laws on contempt and the ground reality.

### **E.M.S. NAMBOODIRIPAD'S CASE VS. SHIVSHANKAR'S CASE & CHANDRAKANT TRIPATHI'S CASE**

The facts of these three cases are very similar. In *P.N. Duda vs. Shivshankar case*<sup>112</sup>, It was alleged that the contemnor, Shivshankar (he was the Minister of Law, Justice and Company affairs at that point in time), by attributing to

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<sup>110</sup> *Rustom Caswajee Cooper v. Union of India*, AIR 1970 SC 1318.

<sup>111</sup> *Perspective Publications v. Maharashtra*, AIR 1971 SC 221.

<sup>112</sup> AIR 1988 SC 1212.

the Court partiality towards affluent people and using extremely intemperate and undignified language have made certain statements which were derogatory to the dignity of the supreme court in a speech delivered before the Bar Council of Hyderabad. In its judgement, the supreme court denied to initiate contempt proceeding against the alleged contemnor by stating that his statement was an expression of opinion about an institutional pattern and analysed judges as a class which was permissible. The court observed that:

*“It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the Court and in the majesty of law and that has been caused not so much by scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy.”*

On the similar facts, *E.M. Sankaran Namboodripad v. T. Narayanan Nambiar*<sup>113</sup> Namboodiripad (who was the Chief Minister of Kerala at the time) was duly convicted for contempt of court. He was alleged to have made remarks relating to the judiciary referring to it inter alia as "an instrument of oppression" and the Judges as "dominated by class hatred, class prejudices", "instinctively" favoring the rich against the poor during a press conference. In his defence, the contemnor pleaded that his

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<sup>113</sup> AIR 1970 SC 2015.

statement should be seen from a Marxist theoretical viewpoint. Upholding the conviction for contempt of court, the Hon'ble Supreme Court observed that:

*“It was clear that the appellant bore an attack upon judges - which was calculated to raise in the minds of the people a general dissatisfaction with, and distrust of all judicial decisions. It weakened the authority of law and law courts.”*

In the case of *State of Maharashtra vs. Chandrakant Tripathi*<sup>114</sup>, a minister was alleged to have committed criminal contempt by saying the following statement:

*"under the present judicial system even criminals are given benefit of doubt and are acquitted if there are no witnesses or if they turn hostile. The innocent are sentenced. Courts grant stay orders frequently due to which it becomes impossible for the Government to carry out works of public benefit in time”*

The court in this case after citing *Re. S Mulgaokar* case didn't bring in contempt charges against the alleged contemnor stating 'charitable reasons'.

The accusations levelled against the Court in these three cases were similar, but the decisions of the Court were different. The court instead of focusing on the aspect of the

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<sup>114</sup> 1983 Bom LR 562.

administration of justice emphasised more on the likely effect of the contemnor's words in lowering the prestige of judges and courts in the eyes of the people. The question hence arises – How can the Court interpret upon a law so differently even after the same facts being presented to it? The disparity in these two decisions in effect is the disparity between the objective law laid down by the Courts with regards to the law on contempt on one hand and the reality on the other. The law on criminal contempt is so nebulous, vague and arbitrary that the decision in such cases hinges heavily on the discretion of the court and less on provisions and precedents.

**ARUNDHATI ROY'S CASE VS. BRAHMA  
PRAKASH SHARMA'S CASE & KAPIL  
SIBAL'S CASE**

In the case of *J. R. Parashar, Advocate & Ors vs Prashant Bhushan, Advocate & Ors*<sup>115</sup>, Allegations of contempt of court were levelled against Prashant Bhushan, Medha Patekar and Arundhati Roy for holding a dharna in front of this Court and shouting abusive slogans against this Court including slogans ascribing lack of integrity and dishonesty to the judicial institution. While due to the technical defect in the petition, Prashant Bhushan and Medha Patekar were acquitted for the offence,

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<sup>115</sup> AIR 2001 SC 3315.

Arundhati Roy was asked to show cause as to why contempt proceedings shouldn't be initiated against her. The court took serious note of statements in her affidavit in which she had criticized the Supreme Court severely for invoking its contempt jurisdiction against three respondents while not initiating a judicial inquiry in the more important Tehelka case. From a purely analytical and objective viewpoint, these comments at the most seem to be trifling and outspoken criticisms of the apex court. In *Re S. Mulgaokar*<sup>116</sup> Justice V.K. Iyer, had opined that court should ignore trifling and venial offences in the context that "*the dogs may bark, the caravan will pass*". In *Jaswant Singh vs. Virender Singh*<sup>117</sup>, the court had opined that:

*"Fair comments, even if, out-spoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court."*

It is hard to discern as to why the court had asked Arundhati Roy to show cause even after the famous writer denied any ill will or malice against the judiciary. Neither comments in the affidavit impute any personal motives to a particular judge, nor does Arundhati Roy in her

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<sup>116</sup> AIR 1978 SC 727.

<sup>117</sup> AIR 1995 SC 520.

defense cast aspersions on the Court or the integrity of the Judges.<sup>118</sup>

In contrast to this, in the case of *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*<sup>119</sup>, the contemnors were not held to be guilty of contempt of court even after passing a resolution wherein it was alleged that the two Judicial Officers were thoroughly incompetent in law, did not inspire confidence in their judicial work, were given to stating wrong facts when passing orders and were over-bearing and discourteous to the litigant public and the lawyers alike. The court opined that:

*“In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. “The path of criticism”, said Lord Atkin [Ambar vs. Attorney-General for Trinidad and Tobago, 1936 A.C. 335], “is a public way.”*

The court took many factors into account, in this case, one of them being the

<sup>118</sup> J. R. Parashar, Advocate & Ors v. Prasant Bhushan, Advocate & Ors., AIR 1954 SC 10. The case against Ms. Arundhati Roy was followed up in the subsequent case of In Re: Arundhati Roy, AIR 2002 SC 1375.

<sup>119</sup> AIR 1954 SC 10.

intention of the contemnors<sup>120</sup>, while according to other decided cases; intention is not taken as a relevant circumstance in such an offence<sup>121</sup> and was not taken as a relevant factor in the Arundhati Roy’s case. The argument that the objective of the contemnors was not intended to interfere with the administration of justice but to improve upon it<sup>122</sup> could have been used in the 2001 case also. Another factor, which was found to be relevant in the Brahma Prakash Sharma’s case, was the extent of publication and degree of publicity given to the libelous resolution. In Arundhati Roy’s case, the fact that the statements were made in an affidavit which although are accessible to the public but aren’t accessed in all practical terms was not taken into account and the court after receiving her reply to the show cause notice, launched Suo Motu contempt proceeding against her.<sup>123</sup>

Taking another case which will show the ambiguity in this field is that of *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*<sup>124</sup>, a senior advocate was alleged to have committed

<sup>120</sup> Court on its own motion v. Arminder Singh, 1999 Cri LJ 4210.

<sup>121</sup> C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; E.M. Sankaran Namboodiripad v. T. Narayanan Nambia, AIR 1970 SC 2015; Hiralal Dixit v. State of U.P., AIR 1954 SC 743.

<sup>122</sup> Brahma Prakash Sharma and Ors., v. The State of Uttar Pradesh, AIR 1954 SC 10 (High court of Allahabad order while it held six members of the district bar association at Muzzafarnagar guilty of contempt).

<sup>123</sup> In Re: Arundhati Roy, AIR 2002 SC 1375.

<sup>124</sup> (2010) 7 SCC 502.

criminal contempt by sending a message which was published in souvenir of a Mehfil and later in Times of India (a daily newspaper). In the message, the contemnor had expressed his concerns about the falling standards in Indian judiciary. Quoting from his message:

*“Judiciary had failed in its efforts to eradicate the phenomenon of corruption which included receiving monetary benefits for judicial pronouncements, rendering blatantly dishonest judgments, kowtowing with political personalities and favouring the Government and thereby losing the sense of objectivity.”*

The court didn't hold the alleged contemnor guilty of criminal contempt since according to the law established a fair and reasonable criticism of a judgment which was a public document or *‘which was a public act of a Judge concerned with administration of justice would not constitute contempt.’*<sup>125</sup> In this case, a different view was taken. Criticising a public act of a judge according to earlier decided cases does amount to contempt of court since it brings into disrepute the institution of court by prejudicing its authority in the eyes of the normal citizenry.<sup>126</sup> Making a mockery of the

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<sup>125</sup> Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors., (2010) 7 SCC 502.

<sup>126</sup> In Re: S. Mulgaokar, (1978) 3 SCR 162; C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.

judiciary amounts to criminal contempt.<sup>127</sup> The criticism by the contemnor, in this case, could be said to exceed ‘condonable limits’.<sup>128</sup> The difference between the case of Arundhati Roy and Kapil Sibal seem to be pernicious and tenuous. This tendency of subjectively deciding contempt cases<sup>129</sup> can have a disastrous effect on the conscience of general public leading to the development of a civil society getting retarded.

## CONCLUSION

The varied observations, orders and judgments of the higher judiciary is clearly indicative of the fact that it wants to have ‘one foot stand on two boats’. One boat is indicative of judiciary’s effort in promoting free speech and forwarding the idea of undisturbed administration of law. The other boat is indicative of courts apprehension and self-doubt regarding its own image in front of the people wherein they have many times linked symbols of the judicial system with the administration of justice. This multitasking isn’t good for the development of a civil society, institutional frameworks and rule of law. The terms such as ‘scandalizing’ judiciary, lowering court’s authority, sowing the seeds of distrust in the

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<sup>127</sup> Advocate General Bihar v. M.P. Khair Industries, 1980 (3) SCC 3111.

<sup>128</sup> In Re: S. Mulgaokar, (1978) 3 SCR 162.

<sup>129</sup> See, Gobind Ram v. State of Maharashtra, AIR 1972 SC 289.

minds of the public don't espouse the real objective of the law on criminal contempt. The very ambiguity of these words has led the judiciary to follow two different paths leading to the blurring of lines between the right to free speech and contemptuous acts. Myriad of controversies have arisen due to this and hence it is absolutely necessary that the judiciary and legislature do a re-examination on the viability of these terms. It is pivotal for the judiciary to lay coherent guidelines bereft of subjectivity with regards to the nebulous field of criminal contempt. It is accepted that contemptuous acts are varied and complex, but certain broad guidelines pointing towards the same direction can help in connecting the important elements of this field. Judiciary needs to have a broader perspective when it comes to judging the ability of our people to differentiate between bad criticism and good criticism. It is only then will there be respect towards our judicial institutions grow manifold. Law on criminal contempt is pivotal, but when it compromises the basic tenets of public life and constitution, then elements going in contravention to these principles have to be amputated from the general statutory corpus as has been done by the legislatures of other jurisdictions.