CHAPTER-2

THE HISTORICAL PERSPECTIVE OF THE CONTEMPT OF COURTS IN INDIA AND ABROAD
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2.1 Introduction

The Contempt of Court is a matter concerning the fair administration of Justice, and aims to punish any act hurting the dignity and authority of judicial tribunals. Although it is difficult to accurately assess the origins of contempt law, there is little doubt that it stems from the common law ideal of supremacy and independence of the Judiciary. The law of contempt has gradually changed over the years. The Judges have used and transformed the contempt jurisdiction to deal with the problem that they have faced. Most studies of the law of contempt work on the assumption that we must take the contempt jurisdiction as we find it and that a historical analysis of how the contempt jurisdiction was evolved is unnecessary. Even so, there is a lot to learn from the historical development of the law of contempt.

In ancient times, the ruler or the King of any state used to dispense justice himself sitting in court. With the rule of law in the form or the other coming in for governance of a state, King delegated his power of disposing justice to different organs of his Government. They acted in the name of King and it was then called the 'King's' justice. Therefore, such court demanded respect and obedience, and any disrespect to the seat of justice was treated and taken as an affront to the dignity and authority of the King. This broad concept of what is known as 'contempt of court' has persisted since ages in almost every country in the world and it has continued even in the present day of democracy. This chapter deals with Historical Perspective of the contempt of court in India and other countries of the world.

2.2 History of the Contempt of Court in other Countries

One of the great legal traditions of the world the common law maintains that judicial power to punish non-compliance with court order under the doctrine of

contempt of court is inherently and incontrovertibly necessary for the working of a system of administration of justice. The other legal system of equal significant, i.e. the civil law system operates without a general concept of contempt, the concept is "simply unknown."4

Role of judiciary and its power regarding contempt of court has assumed global significance. The experience of two major legal systems, i.e. common law and civil law, must be on agenda of discussion for the study of law of contempt in common law traditions. Therefore, to make the law functional for a liberal republican structural; and attempt has been made to see the law and procedure regarding contempt of court in countries with common and Civil Law Traditions.5

The following efforts have been made to trace the Historical Perspective of the Contempt of court in various countries of the world and Indian in general.

2.2.1 History of Contempt of Court in England

The roots of English Law, from which the contemporary contempt doctrine sprouts, are thin but deep in history. The phrase contempt of court (contemptus curiae) has been in use in English Law for eight centuries. The Law conferred the power to enforce discipline within its precincts and punish those who fail to comply with its orders.6 Sir John Fox had mentioned that contempt was extent as far back as the 10th century in England.7

The Law relating to contempt of court has developed over the centuries as a means whereby the courts may act to prevent on punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally. It is in the substance of England. In legal system it is based on common law with the exception of certain contain statutory modification in England.8

The idea of contempt of the King is referred as an offence in the laws set forth in the first half of the twelfth century. Contempt of the King’s writ was mentioned in

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the laws of King Henry-I. In the same laws there was mention or primary pecuniary for contempt or disregard of orders. Thus in England before the end of the twelfth century contempt of court was a recognized expression and applied to the defaults and wrongful acts of suitors.⁹

After making a study of cases in the thirteen century John Charles Fox concluded that there was no indication of trial of contempt out of court otherwise than in the ordinary course of the law and many cases of contempt in court were tried by indictment and not by a summary process. If the contempt is confessed there was no need for trial by Jury and such cases of contempt were disposed of by sentence upon confession. The earlier form of procedure was attachment by Bill, when trial by jury was followed, unless the accused confessed. Later the Star Chamber practice of attachment and examination without jury was substituted for the procedure by Bill.¹⁰

From fourteenth century onwards the jurisdiction of the King Justices to punish contempt's of a criminal nature summarily was limited to offences net heinous, committed in court in the actual view of the Justices. The summary jurisdiction was held to extend to all contempt whether committed in or out of court.¹¹

It seems, therefore, that the common law courts had the power to deal summarily with contempt committed in their presence. From 1402 to 1640 a number of statutes were passed giving the superior courts powers to proceed summarily in certain cases against officers of the court, including juror. Styles Practical registrar published in 1657 shows that, certainly, by the middle of the seventeenth century the King's Bench was proceeding summarily against its officers.¹²

In the Seventeenth Century, an important development in the law of contempt took place in the court of chancery. The writ of attachment began to be used not merely in the case of those flagrant abuses of the administration of justice with which the common law courts were not only to deal, but also to compel performances as between parties in a particular suit. The writ of attachment and summary process,

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¹⁰ Ibid.
¹² Supra note 5, at p. 29.
thereon, became part of the ordinary procedure of the court. This development led eventually to the distinction between criminal and civil contempt. In the Seventeenth and Eighteenth Centuries, the distinction was not made as clearly as it was in the Nineteenth Century. In the Eighteenth Century the press and the pamphleteers flourished and it was in that period that contempt in publishing matter calculated to interfere with due administration of justice became clearly established. It developed in three stages. Firstly, there were examples of persons being published for speaking disrespectfully of the court on service of process. Secondly, where matters scandalizing the court constituted contempt whenever publish. Thirdly, court began to punish persons who published matters calculated to prejudice the fair trial of a pending case.

The power to punish for contempt of court was applied originally in England to contempt committed in the presence of the court. In 1747 Thomas Martin, Mayor of Great Yarmouth, sent a banknote fundamental rights ponds 20 to Lord Hardwicke, Lord Chancellor, with a letter referring to a proposed chancery proceeding. Lord Chancellor ordered Martin to show cause why he should not be committed for contempt. He sought pardon and Lord Chancellor in consideration of this, his public office, the payment of costs, and his willingness to the suggestion that the banknote be sent to the warden of the Fleet Street prison for debtors for their relief, did not take any action.

In 1631, when a prisoner threw a brickbat at the Judge and narrowly missed him, the prisoner’s right hand was ordered to be cut off and hung on the gallows. In 1938, when disgruntled litigant threw tomatoes at the court of Appeal, consisting of Clawson and Goddard JJ. He was immediately committed to prison but released after a few days of incarceration, because, he did not score a direct hit. There are several instances of contempt in the face of court in English Tradition and they would not end even if we write a book on it. The development of contempt law in England did contribute great principles to the law of contempt, which are presently followed by several common Law Jurisdictions.
In the year of 1906 the House of Commons passed a resolution that the jurisdiction of Judges in dealing with contempt of court was practically arbitrary and unlimited and called for the action of parliament with a view to its definition and limitation and a similar resolution was passed in 1908. Bills for the amendment of the law of contempt of court brought forward in the years 1883, 1892, 1894, 1896 and 1908 but none of these met Lord Fitzgerald’s protest with regard to the summary punishment of constructive contempt’s. In 1960 the Administration of Justice Act gave a right of appeal in criminal cases. After the provision of Administration of justice Act and believe the enactment of Contempt of Court Act, 1981 the recommendation of Phillimore Committee requires serious attention.

On June 8, 1971 Lord Hailsham L.C. appointed a committee under the Chairmanship of Lord Justice Phillimore to consider whether any change was required in the law relating to contempt of court? The committee submitted its report in December, 1974. There were some general conclusions and recommendations. The bill finally received the Royal Assent on July 27, 1981 and become law on August 27, 1981.

The law of contempt has, in the words of the committee on contempt of court which reported in December, 1974 “developed over the centuries as a means whereby the court may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of Justice earlier in relation to a particular case on generally”. Its uncertainties, anomalies and unique procedural features have been demonstrated on many occasion, and the appointment of a committee to investigate the entire law of contempt was long overdue. The terms of reference of the committee which was eventually set up in 1971 chaired initially by Phillimore L.J. and latterly by Lord Cameron were taken to include Civil Contempt, as well a Criminal Contempt, and one of the principal recommendations made in the report is that the distinction between Civil and Criminal Contempt should be abolished.

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17 Supra note 5, p.35.
18 In England Shaw Cross Committee was appointed by the international Commission of Jurists (British Section) headed by Lord Shaw Cross found that law of contempt was unsatisfactory in quite a few important respect and the recommendation of that committee, made in 1959, have already been made the basis for the administration of justice Act, 1960.
19 Phillimore Committee report, quoted from Supra note 8, pp. 1121 to 1217.
20 D.G.T. Williams, ‘Contempt of Court: Possible Reforms’. Vol. 34, 1975, p. 6
In the late 1960's one of the most bitter points of contention between journalists and the law arose over the question whether or not-and if so, when newspapers committed a contempt of court by publishing material disclosing the commission of criminal offence, if the material was potentially prejudicial to the fairness of a subsequent Criminal trial. The journalist was at risk when criminal proceedings were 'pending or imminent”, hopelessly imprecise time indicators as far as the journalist was concerned. Furthermore, the law imposed liability without proof of mens rea, the offence was one of the strict liabilities. Part of the purpose of the Contempt of Court Act, 1981 was to clarify all of this, which it did by saying in Section 2(3) that the strict liability rule was to apply only when the proceedings were active.21

European court of Human Rights decided that the United Kingdom’s contempt law was not in compliance with the free speech principles enshrined in Article 10 of the European convention (Sunday Times v U.K.),22 it let loose a chain of events where implications are still only gradually becoming apparent. Whilst emphasizing that it is not its function to pronounce itself on an interpretation of English Law adopted in the House of Lords, the court points out that it has to take a different approach. The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.23

In general, the 1981 Act goes a long way towards bringing the United Kingdom law in tune with the European convention on Human Rights. In interpreting the Act, the court may consider the provisions of the convention to avert any breach of its items. The act is, undoubtedly a liberalizing measure in important respects. However, it also leaves untouched several areas of uncertainty in the law of contempt. Moreover, it should be remembered that liberalizing the letter of the law does not necessarily involve the liberalization of the practice of the law. The attitudes of those who bring contempt proceedings and those who adjudicate upon them are crucial.24

2.2.1.1 Kinds of contempt under English Law

Many Jurists and Judges tried to classify contempt. The definition of contempt of court given in the leading case *Birch v. Balsh* has been accepted by the Supreme Court of India in *D.J. Shield v. Ramesan*. There the court gave three categories of contempt:

(i) Contempt in respect of the order of courts;
(ii) Contempt by letters or pamphlets addressed to the Judge who is to decide the case with the intention either by threats or latterly or bribery to influence his decisions; and
(iii) Constructive contempt depending upon influence of an intention to obstruct the course of Justice.

With the passage of time, the law of contempt identified two types of contempt, civil and criminal.

2.2.1.1.1 Civil Contempt

Civil Contempt appears to have been originated in the Seventeenth Century from the practice of the Court of Chancery. Civil Contempt of Court provides for punishment of a person who refused to comply with the orders of a court. Consequently sanction will be committed to prison or fine. Consequential sanction will be committed to person or fine. Disobedience to orders on judgment directing a person to do any act (other than the payment of money) or to abstain from doing anything can be enforced by attachment or committal.

Oswald say and order must be implicitly observed but disobedience if it is to be punishable as contempt must be willful. Before an attachment can be ordered the disobedience must be proved to have been willful. In other words it is intended to exclude casual accidental or unintentional acts of disobedience. In *Barton v. Field*, held that the failure of the Judge of the Vice-Admiralty court at Gibraltar to comply with their monition was contempt, but the penal consequences of attachment did not follow for the following reasons according to their Lordships:

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25 10 Irish Eq. R. p. 93 (1886).
26 AIR 1955 Andhra 156.
29 Callow v. Young, (1887) 56 L.J. Ch. 690.
30 James F. Oswald, *Contempt of Court: Committal, Attachment, and Arrest upon Civil Process*, 1910, p. 102.
31 (1843) 4 P.C. 273.
"We one of opinion that it is not sufficient, for the purpose of visiting him with the penal consequences which it has been endeavored to attach upon him, that he may have committed an error of Judgment all think it must be proved to our satisfaction not only that there was error, but that in addition to there being an error, it was useful error and proceeded from corrupt or improper motives."

From the above discussion it is clear that civil contempt of court involves willful disobedience to an order of the court. In civil contempt the court has exercised the power to fine instead of committing the defendants to prison.

**2.2.1.1.2 Criminal Contempt**

Criminal contempt is considered as misdemeanor on indictment. The penalty is fine on imprisonment on by order to give security for good behavior. It includes any kind of interruption on interference in the administration of Justice in or out of court. But contempt committed out of court was punished in the sixteenth century, by common law, only after trial in the ordinary courts and not by any summary process.\(^\text{32}\) A distinction was made between contempt of court and out of court in the case of strangers. Contempt by strangers out of court was tried by information or by attachment and examination in the common law courts. This practice continued through the eighteenth century and the procedure by attachment and examination was confirmed by the opening of Chief Justice Wilmot in *King v. Almon,\(^\text{33}\)* case and finally established a law by Mr. Justice Holrayed in the *King v. Clements,\(^\text{34}\)*

It is important to point out here that the art of printing and publishing brought into prominence another form of criminal contempt know as indirect criminal contempt or constructive contempt. The issue is again aggravated with the invention of Television, Telephone, Computer, Internet and other electronic gadgets. The origin of indirect contempt is traceable form the opinion expressed by Lord Hardwicke, Lord Chancellor in *St. James Evening Post Case,\(^\text{35}\)* His Lordship expressed that there are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may likewise be contempt of this court in abusing the parties who are

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\(^{32}\) Supra Note 28 at p. 21.

\(^{33}\) (1765) Wilmot 243, 97 E.R. 94.Qouted from supra note 28, pp. 21-22

\(^{34}\) (1876) 46 L. J. Ch. 375.Quoted from supra note 28, p. 22

\(^{35}\) (1742) 2 Atk. 469.
concerned in causes here. There may also be contempt of court in prejudicing mankind against persons before the cause is heard. Scandalizing the court, abusing parties and prejudicing mankind against person before the cause is heard are instances of criminal contempt.

Further extension of the law of constructive contempt could be seen in the opinion of Wilmot J. in *King v. Almon's case*. In this case a pamphlet was published accusing Lord Mansfield of officiously, arbitrarily and illegally making an out of court order. The opinion states as follows:

The power which the court in West Minister Hall have of vindicating their own authority is coeval with their first foundation and institution, it is a necessary incident to every court of justice, whether of record or not to fine and imprison for a contempt to the court, acted in the face of it and the issuing of attachments by the Supreme Courts of Justice in West Minister Hall, for contempt out of court, stands upon the same emotional usage as supports the whole fabric of the common law. But when the nature of the offence of libeling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does, in my opinion become more proper for an attachment than any other case whatsoever.

This opinion has been referred by Lord M.R. Esher to in a later case as the most valuable exposition of law on the subject. Criminal contempt may also be tried by indictment on information but these procedures were rarely adopted. As stated by the committee on contempt of court, through the historical reasoning of the judgment has been criticized by the learned authorities, opinion expressed by Wilmot in *King v. Almon* has long been accepted and applied by the courts as the firmly established basis of the modern law on the subject. Regarding Jurisdiction of Courts to deal with constructive contempt, there have been different Judicial Opinions.

Until the decision of the House of Lords in the *Sunday Times Case*, the rest of constructive contempt formulated by the court were all based on the concept of

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36 Supra note 33.
37 Reg v. Johnson (1887) 2 Q.B.D. 72.
39 Supra note 33.
prejudice or improper interference with legal process. The Divisional Court in the *Sunday Times Case* granted an injunction restraining the publication on the ground that it would be contempt of court. But the Court of Appeal decided that there was no contempt as the words complained of did not create a serious risk of interference with the course of justice and discharged the injunction. On appeal the House of Lords reversed the decision by applying the test of prejudging the issue. Lord Reid observed that trial by newspaper was wrong and should be prevented.

Being aggrieved by the decision of the House of Lords, the Sunday Times and the journalists applied to the European Courts of Human Rights\(^1\) as the ban on publication violated Act, 10 of the European Convention. The majority ruled that the court was faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted. On a reading of the Act it is clear that it mainly deals with the 'strict liability' rule and as its application to publications with effect the judicial proceedings. However, uncertain its definition and scope may be in some respects contempt of court is undoubtedly one of the great contributions the common law has made to the civilized behavior of a large part of the world beyond the continent of Europe where the institution was unknown.\(^2\)

**2.2.1.2 Distinction between Civil and Criminal Contempt under English Law**

A contempt of court may be either a civil contempt or a criminal contempt. The two kinds of contempt's are often confused, owing to a failure to recognize the importance of the distinction. As a matter of fact they differ as widely as torts differ from crimes- this analogy being especially appropriate, as in reality a civil contempt is a tort and a criminal contempt is in many respects similar to a crime.\(^3\)

Contempt of court may be classified either as (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice on (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgments, orders, or other process of the court, and involving a private injury.\(^4\)

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\(^2\) F.A. Mann, 'Contempt of Court in the House of Lords and European Court of Human Rights,' Law Quarterly Review, Vol. 95, 1979, pp. 348-349


When a man does not obey an order of the court made to some civil proceeding, to do or to abstain from doing something— as where it injunction is granted in an action against a defendants, and he does not perform what he is ordered to perform and then a motion is made to commit him for contempt— that is really only a procedure to get something done in the action and has nothing of a criminal nature in it. And generally, the distinction between contempt criminal and not criminal seems to be that contempt which tend to bring the administration of justice in to scorn, or which tend to interfere with due course of justice, are criminal in their nature; but contempt in disregarding orders or judgments of a civil court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt includes a public injury or offence, it is criminal in its nature, and proper remedy is committal— but where the contempt involved a private injury only it is not criminal in its nature, and the remedy is either attachment or committal.\textsuperscript{45}

The more important distinctions have been whittled away in the last few years, starting with the creation of similar rights of appeal in both civil and criminal contempt by the Administration of justice Act, 1960. There is now some doubt as to whether some of the destruction still exists, and if so, to what extent. The question is of some importance because the dividing line between civil and criminal cases of disobedience to a court order is far from clear. Where the breach of an order was particularly public, flagrant or contumacious, the court held that a criminal rather than contempt had been committed and sometime there were protected arguments to determine these issues. It would be clearly desirable if these long and technical arguments could be finally laid to rest by abolishing such destruction as remain. They have already acquired something of an air of unreality because most of them represent limitations upon courts power in cases of civil as opposed to criminal contempt and yet the court itself has wide discretion to decide in to which category a particular case falls. We observe, finally, that no need for this destruction appears to be felt in Scotland where the law treats all contempt \emph{pari passu}.\textsuperscript{46}

Finally, it has been emphasized in many cases that disobedience to a court order, even where it is described as a civil contempt, partakes of a criminal nature, and for this alone the practical importance of the destruction is now very small.

\textsuperscript{45} Supra note 30, at p. 36.
\textsuperscript{46} Supra note 27, para 169.
2.2.1.3 Prejudicing Criminal Trials

Approximately 98 percent of criminal cases in England are disposed of by Magistrate's Courts the majority of which are manned by lay Magistrates. The remaining 2 percent are tried by Jury but these are, of course the more serious and difficult cases, which more likely to attract press interest. It would, be going much too far to say that professional judges are never influenced by what they may need or hear, but they are by their training and experience capable of putting extraneous matter out of their minds. A Judge, therefore, does not really need the law of contempt to protect him from prejudicial matter, although wholly unrestricted comment immediately before and during a hearing could be embarrassing and might constrain him to demonstrate in some manner that he had not been influenced by it.

2.2.1.4 Prejudicing Civil Cases

In England, the great majority of civil cases have since 1934 been heard by professional judges sitting without a jury. Action for defamation and fraud are the main types of jury action. In 1972, only 23 (or 2.04 percent) of Queen's Bench Division actions in London and only four country courts action in the whole country more heard with Jury. Magistrate's courts hear and decide a substantial number of domestic cases every year. In Scotland, however, a large number of civil actions are still tried by Jury, in particular many industrial and more accident cases.

2.2.1.5 Procedure in Contempt Under English Law

Volumes have been written on the subject of injunctions yet very little attention is paid to the methods or means of enforcing them. A men passing remark that injunctions are enforced by competent proceedings seems sufficient. That contempt proceeding are instituted by filing on affidavit for a rule is well known, but as to the steps thereafter to be taken most of us are in the dark. Is proof to be taken by the compliment after seeking notice on the other party, or will the affidavit alone set the wheels of Justice revolving and cause proof to be taken and punishment administered by the court whose mandate has been disobeyed? In order to answer the

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47 Id., para 48.
48 Ibid. para 49.
50 Court of Session Act, 1850; Evidence (Scotland) Act, 1866; Quoted from supra note 27. Para 47.
above question it must first be determined what is the purpose of the contempt proceeding.\textsuperscript{51}

If the authority and power are to be upheld, the affidavit bringing the infraction to the notice of the court is sufficient. The court may be relied on to take care of its dignity on the other hand if the purpose of the proceedings is to secure the rights of a party litigant, it is that party’s duty to collect the evidence and present it to the court with a prayer for redress. Very often, however, the compliment, presumably urged by his sacred regard for the dignity of the court, seeks to have the defendants punished for disobedience of the court’s order, and in his public zeal, neglects to state and prove his own injuries. The procedure in contempt cases, however, does not depend upon the option of the compliment, but is governed by as well defined law as that in any other branch of Jurisprudence.\textsuperscript{52}

A proceeding in civil contempt is one in which the court has no interest over they to see that the rights of the complainant are protected. It is based on an injury to the rights of the plaintiff, and therefore, remedial are civil in nature, and the only punishment which can be inflicted is a compensatory fine based upon the amount of injury or damage to the plaintiff caused by the acts complained of. The affidavit upon which a rule for a civil contempt is based beans the style and number of the original suit and must contain an allegation that complainant was injured by the acts complained of and also a plea for damages. A criminal contempt is an act in disrespect of the court or its processes, on which obstructs the administration of Justice or tends to bring the court into disrespect. The proceedings are in the name of the state, and conducted by the state, and the punishment is purely primitive in character.\textsuperscript{53}

2.2.1.6 Nature of Contempt under English Law

The above resume of law of contempt in England indicates that the court guarded their prestige and would not allow it to suffer anybody’s hands, be he a stranger, party, counsel, witness, court officer, jury or Judge. That offence of contempt came into existence with the law itself and in spite of a number of attempts

\footnotesize{\textsuperscript{51} Supra note 43, at p. 265. \\
\textsuperscript{52} Ibid. \\
\textsuperscript{53} Id. at p 266.}
to modify and restrict the unlimited and extraordinary powers of punishment claimed and exercised by Superior Courts of Record, their Jurisdiction both as regards procedure and punishment, has remained intact, if not from time immemorial, at least from the day when the view expended by Wilmot in his undelivered Judgment in Almon's case was made known in 1802.  

2.2.2 History of Contempt of Court in America

It is an ancient rule of Justice that no man should be judge in his own case, and this principle is jealously guarded by the law. Any personal interest on the part of a Judge is sufficient to disqualify him to act. But in the case of contempt's it has been found difficult to adhere to the rule. For the reason that due administration of Justice requires that the Judge should be able to employ the power of the court to prevent interference with the proper performance of his own Judicial duties. It is quite clear, however, that human nature is put to a considerable strain by this theory, and one who feels that he has suffered insult or indignity in regard to the performance of his official duties will find it difficult to try the offender with complete impartiality. His common law right to act as judge in such cases has never been judicially questioned, but while the courts adhere unreservedly to this policy of the law, and vigorously insist upon the necessity of granting such Jurisdiction to the Judge, they frankly admit that it places him "in an extremely delicate and injudicious position."

Contempt can be generally defined as an act of disobedience or disrespect toward a Judicial or legislative body, on interference with its orderly process, for which a summary punishment is usually exacted. In a grander view, it is a power assumed by governmental bodies to course cooperation, and punishes criticism or interference, even of a casually indirect nature. In legal literature, it has been categorized, sub-classified and scholastically dignified by division into varying shades—each covering some particular aspect of the general power, respectively governed by a particular procedure. The implementation of this power has taken place predominantly in England and America, and has recently been accelerated in to a continually greater role in the United States.  

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54 Tek Chand, 'The Law of Contempt of Court and of Legislature', 1949, p. 35.
The American ideology is based upon recognition of rights and liabilities of the individual. In dealing with legal problems, the Americans are faced with what are often the paradise and anomalies of the common law. These rules of law, so long stated and often expedient, seem to be ensconced in a sacrosanctity of age and prestige, which often fools its subjects.\(^{37}\)

The survey of the American law in this regard reveals that in the beginning the law of contempt in America was based on the common law postulates but a sharp departure could be discerned from the beginning of the 19th century in favour of the protection court intentionally guaranteed basic rights than reinforcing the punitive authority of the American courts in contempt cases. The law of contempt in the United States proceeded on a totally different basis from the law in England. The Press has always been quite powerful and the courts have adjudged the law of contempt to meet the demands of the press rather than use it as *modus-operandi* to full wheel a status for them.\(^{58}\)

The power of American courts is as old as our Judiciary itself and, while derived from Historical Common Law practices, is peculiar both to and within American Law. It is peculiar to American Law in that other legal system (not based on the English) have no such power of the nature or proportions of ours. It is peculiar within our system in that no other of our legal powers is comparable to contempt in pervasiveness or indefiniteness. Nor does any analogy come to mind of a legal power with the inherent constitutional anomalies characteristic of contempt. The contempt power of American courts is truly "*sui generis*", to adopt a favourite cliché of our Judiciary.\(^{59}\)

The law relating to contempt of court in the United States from the beginning of the Republic had a chequered and controversial career. Attempts were made by the Pennsylvania and New York courts in 1788 to 1809 to introduce to the new world the Blakstonian doctrine of the inherent powers of the courts to indicate their authority and dignity.\(^{60}\)


The power of courts to punish contempt's is one which goes historically back to the early days of England and the crown. A product of the days of kingly rule, it began as a natural vehicle for assuring the efficiency and dignity of, and respect for the Governing Sovereign. Viewed as a legal doctrine which was articulated and immersed in the common law, it is generally a product of Anglo-American society.\(^\text{61}\)

Whatever informal groups ruled, the primitive associations of men undoubtedly looked to some pagan, religious, or divine and natural right to enforce their system. There is some evidence that schemes akin to contempt were at least thought of in more antiquated societies. One author reported that the Theodosian code considered the subject of contempt of a governmental authority and concluded that it should not be punishable; “for if it arose from madness, it was to be pitied; if from levity, to be despised; and if from malice, to be forgiven.”\(^\text{62}\) Such Taoistic reasoning, if not practical in the complex societies of our age, at least recognizes that respect by compulsion is a contradiction in terms, and the least ideal means to a free, libertarian government.

With the multi-millenary growth of organized societies, the sophistication of governing systems, and the inter-complexity of the relationships between sovereign and men, some power force within a rule-of-law scheme became necessary to replace the caveman’s club as a means of enforcing obedience and respect. Though century’s later men were to accept the self-righting process, recommended by the writings of man like Locke and Milton, as the more democratic way to resolve individual Governmental conflict, the contempt power was more suited to the early English rulers and their style of Government.\(^\text{63}\)

In the Thirteenth Century, contempt action was taken for such acts as default or misfeasance of parties, assaults and disturbances in court, insults to Judges and misconduct by officers of the law. However, in all of the cases reported, contempt was treated procedurally “in the ordinary course of Law.”\(^\text{64}\)

The first American Federal Legislation dealing with the contempt of court power was the Judiciary Act of 1789, which empowered the Federal courts “the

\(^{61}\) Supra note 56 at p. 6.
\(^{62}\) Patterson, ‘On Liberty of Speech and Press’, 1939, p.18
\(^{63}\) Siebert Peterson and Schramm, ‘Four Theories of the Press’, 1956, pp.44-51.
\(^{64}\) Supra note 9 at p. 199.
power to punish by fine or imprisonment, at the discretion of said courts, all contempt's of authority in any case or hearing before same. Impliedly, this included whatever the extent of the power of contempt of court was at common law. The first state legislation in America was passed in Pennsylvania and it condemned contempt as official misconduct of court officers, disobedience to process, and misbehavior in the presence of the court. This excluded various kinds of constructive contempt to the administration of justice which was approved by Justice Wilmot in the Almon case. New York followed with similar legislation, which was finally passed in 1829, also excluding the contempt, Almon-Wilmot species, but accepting without question the power of contempt of court in general. The courts considered that the right to punish for contempt was one adopted from long precedent and essential to Judicial efficiency. These statutes were followed in theme and extent by Federal Legislation 1821, which aimed at alleviating both the uncertainties and the harshness of the original federal rule. This change was provoked by a heated controversy which arose out of the famous Peck impeachment case.

Until then, there were only a few federal cases in the lower federal courts arising under the 1789 statute, and they followed the common law rule with respect to constructive contempt. There was no question that the exercise by courts of the direct contempt power (disobedience to process, or disrespect in the presence of the courts) was inherent and proper. Then lawless and Attorney from Missouri, provoked Congress into mitigating impeachment proceedings against Judge Peck for willful oppression. Peck was a federal judge who punished the lawless summarily under his assumed contempt power, for publishing a critical article about his conduct of a series of pending proceedings, which concerned the adjudication of land grants from the old Spanish–American authorities, and in which the judge had ruled unfavourably to the interest of the lawless. Congressional hearings lasted almost a year, when the judge finally acquitted by a vote of 22-21. One of the arguments made at these hearings was that the power of judicial contempt was not inherent but a product of the common law. The judge claimed innocent and fair interpretation of the common law power of contempt of court, basing as conclusions upon the English decisions that proceeded his one month after judge Peck’s acquittal, late-to-become resident Buchanam, then

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65 Supra note 33.
66 Supra note 5, pp. 39-40.
Chairman of the Judiciary Committee and active in the impeachment debates, presented a bill to congress which followed the New York Pennsylvania trend and omitted summary contempt power in cases where the act was not obstructive of the physical administration of justice. It was passed in 1831 and covered misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, disobedience of process, and discipline of court officers. By 1860, 23 of the then 33 states had enacted legislation implementing the federal policy concerning constructive contempt, and only a few states applied the rule of Almon’s case. The current federal statute reads much the same as 1831 statute, though the Supreme Court cases have varied at different times in their interpretation of it, and are currently closely split as to allegiance to or departure from the English Rule, the latter group currently prevailing.

As the American power of judicial contempt is the product of the transplantation of English common law (whether with good reasons or not), so the use of the contempt power by congress harkens back to Anglican beginnings. But though the historical arena was the same, the participating power forces which provoked, and the path of precedent which led to its acceptance, were not. Nor was the unquestioning readiness with which the American legal climates accepted contempt of court concepts. The environment in which it was be planted, though the future was to see the doctrine flourish.

American courts and American legal historians have often referred to the history of English parliament in support of their theories about contemporary congressional contempt powers.

The original American colonies adopted many procedures akin in to the motherland’s common law methods. Their assemblies exercise the contempt power in defense of privilege, to compel testimony, and to protect their dignity and position. The cases were many, and though they reasoning were not often questioned, they rationalized their power as one of inherent and necessary rights-auxiliary to their legislative nature. Strangely only a few states included this right in their constitution.

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67 Ibid.
68 Supra note 56 at p. 18
Defenders of the right of the legislature to punish for contempt attribute this silence to its supposed axiomatic or inferred implication within the grant of legislative powers in general.  

Finally, in 1821, the American case to discuss the power of the legislature to punish for contempt was decided. An examination of this case, and another early decision of the United States Supreme Court, will illustrate the political misgivings towards application of the English contempt rule to congress, as well as the reasons advanced in support of adopting this legislative power, which prevailed at that time.

The case, *Anderson v. Dum* arose out of an order by the then speaker of the House, Henry Clay, to the Clerk, and thence to the Sergeant-at-Arms of the House, Dunn, “to take into custody the body of the said John Anderson, wherever to be found, and the same forthwith to have before the said House.” Anderson was charged with abuse of the House and contempt of its dignity. He was charged with an attempt to bribe a member of the House. Anderson sent Lewis, a member of the House, $500 for any “extra trouble” gone to in furtherance of a claim in which Anderson was interested. The House, in debate, decided that it had the contempt power irrespective of any constitutional provision, in order to protect itself and to operate efficiently. After being taken into custody, Anderson was brought before the House and allowed to present a defense to the change of misconduct against him. The House was adjourned each day, and Anderson was kept in custody during the adjournments, until the matter was finally closed, and he was judged guilty, reprimanded and discharged from custody. Later Anderson sued Dunn in trespass for assault and battery and false imprisonment. Dunn’s defence was the warrant by the authority of congress. There was little American authority to guide the Supreme Court, and both parties argued in consideration of the English practice, and the more settled theory of contempt of court.

The Attorney General argued for the government that the power of congress to punish contempt is a “principle of universal law growing out of the natural right of self-defence belonging to all persons”, and that the “necessity of self-defence is as

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21 Supra note 69, pp. 700-712.
22 Supra note 56 at p. 22.
23 19 U.S. (6 Wheat) 204 (1821).
24 Id. at p. 208.
25 Supra note 70 at p. 4.
The court reasoned that if congress had no power to punish Anderson it had no power to compel his appearance, because the later is an initiating process issued in the assertion of the former (punishing power). It followed by agreeing that there was no express congressional power to punish except over its own members. Consequently, if the power existed to punish non members, it was one to be implied, though "the genius and spirit of our institution are hostile to the exercise of implied powers."\(^77\)

In America contempt in general had been considered as disregard of or disobedience to the rules or order of a legislative body or a judicial body, or an interruption of its proceeding by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceeding or to impair the respect due to such a body. Contempt of court is clear disregard of the authority of court, a despising of its authority, dignity or justice. A willful abuse process of court may be contempt. Thus attempts by a mere colourable dispute to obtain the opinion of court on question of law to satisfy a private party's purpose. Whereas as a fact the so-called contesting parties had in reality no real on substantial controversy, has been held to be a punishable contempt.

The American Jurisprudence defines contempt of court. It can be classified as follows:\(^78\)

1. Despising the authority of the Judge or dignity of the court;
2. Any conduct which tends to bring the authority and administration of justice into disrespect or disregard;
3. Any conduct which interferes on prejudices the parties to a litigation or their witnesses during a litigation;
4. Any conduct which otherwise tends to impede, embarrass, or obstruct a court or a judge in the discharge of its or his duties;
5. A statute may define contempt but it can never be exhaustive.

It can be fairly concluded that the powers of contempt which are now exercised in the United States originally were adopted from English common law.

\(^76\) Supra note 73 at p. 219.
\(^77\) Id. at p. 225.
The inconsistencies and inappropriateness's came too as part of the inherited common law package. Though time has changed, as have political climate, the power has remained, in fact increased. Paradoxically, the legislative contempt power has played a lesser role in Modern English practice, through the American off-spring has grown to proportions considered by some as monstrous. This blind heritage, in the hands of power seekers, has created an anomalous result of kingliness in a government which was concealed to establish the sovereignty of man.79

2.2.2.1 Kinds of Contempt under American Law

Current federal jurisprudence grants judges wide latitude in the exercise of contempt powers, which in turn can lead to dire consequences for anyone (otherwise known as a contemnor) who has committed contempt of Court. Despite the possibility of such consequences, the authority to hold individuals in contempt of court is one of the least regulated areas of judicial power in the American legal system.80

Considering the frequent state of confusion surrounding this area of the law, attempt will provide to federal practitioner with a basis, but better understanding of existing federal contempt of court jurisprudence. This is no easy take considering the fact “the literature on contempt of court is unanimous on one point: the law is a mess”.81 Moreover, “few legal concepts have bedeviled courts, judges, lawyers, and legal commentators more than contempt of court”.82

To curb this potential for abuse, the common law developed a system of classifying contempt that determines how much procedural protection a contemnor receives. Contempt of court is classified in two ways: the contempt may be deemed civil and criminal, and the contempt may be direct or indirect. Thus there are four types of contempt:83

(i) Civil contempt;
(ii) Criminal contempt;

79 Supra note 56 at p. 29.
(iii) Direct contempt; and
(iv) Indirect contempt.

2.2.2.1.1 Civil Contempt

Civil contempt occurs when any party, called the “Contemnor” willfully disobeys a court order. A contemnor does not have to be a party to a case, rather they can simply disobey an order to appear as a witness and be held in contempt. Penalties vary based on the severity of the contempt, but generally the penalties are geared simply toward coercing the party to obey the court’s order. In order to be found in civil contempt of court, the contemnor must have acted in a manner inconsistent with a court order. Further, he or she must have known about the orders, been able to comply, and refused to comply with the order generally, anyone to be charged with contempt will be notified of such a charge and depending on the circumstances will have a chance to comply with the orders to wipe out the charges. Though, if the circumstances dictate a penalty regardless of immediate compliance, the alleged condemner may have the right to hearing at which he or she may present evidence in rebuttal of the charge.84

In civil cases, a contempt order may be issued if the contemnor intentionally disobeys a court order. For example, if a party fails to pay child support, the court may issue civil contempt order against the party. Contempt orders are also commonly issued in child custody, alimony, visitation and small claims court cases. The purpose of a civil contempt order is to compel the contemnor into action, rather than to punish him order. For instance, suppose that a Judge sentences a person to jail for not paying child support. Once the support is paid, the Judge will usually release the person from jail.85

Civil contempt may also be referred to as indirect contempt because the behavior usually does not occur in front of a court. Rather, a contempt hearing must be held in order to establish that the contempt has defied the court. Typically a contempt order action is initiated by filing a motion for contempt, and the Judge hears evidence before agreeing to the order. For example, suppose that a woman has been awarded alimony in a divorce case. If her ex-husband fails to pay the alimony, the

woman may file a contempt motion declaring that the divorce decree was violated and explaining why the court should issue a contempt order against the ex-husband. \(^{86}\)

In nutshell a civil contempt is one in which the court has no interest other than to see that the rights of the complainant are protected. It is based on an injury to the rights of the plaintiff, and is therefore remedial or civil in nature, and the only punishment which can be inflicted is a compensatory fine based upon the amount of injury or damage to the plaintiff caused by the acts complained of. The Affidavit upon which a rule for a civil contempt is based bears the style and numbers of the original suit and must contain an allegation that complainant was injured by the acts complained of and also a plea for damages. \(^{87}\)

### 2.2.2.1.2 Criminal Contempt of Court

The word contempt generally means to have disrespect for something or someone. In a legal sense, the concept of contempt covers not only holding the court up to disrespect, but also the disobedience of a court order or an act which can impede the administration of justice. In common law, the judge is considered a representative of the law, and disrespect shown to him constitutes disrespect for the law. It is this interpretation which authorizes a charge of criminal contempt to anyone who holds a court or legislative body up to ridicule. In the US, a contempt charges can be brought against anyone who refuses to obey a court order, who shouts or is disruptive inside the courtroom, who holds a protest outside the courtroom which is sufficiently disruptive to the court matters inside, or who refuses to answer questions directed to him by the Judge. Judges are granted great latitude in determining whether or not contempt charges are justified, but higher courts have ruled that such charges only be levied if there is an apparent danger of justice being thwarted. \(^{88}\)

A person charged with criminal contempt has the same right to a trial as any other person charged with a crime. One of the criticisms of contempt hearing in the US is that the same Judge who makes the charge often conducts the hearing and passes sentence. Another concern is that a sentence such as confinement in jail can be imposed immediately before a hearing can take place, and that in some cases the

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\(^{86}\) Ibid.

\(^{87}\) Supra note 43. at p. 266.

sentence can be indefinite as long as the contemnor refuses to comply with the order. An example of this is when a reporter refuses to reveal his sources to the court. Contempt charges against reporters are rare in the US, however, in deference to the constitutional protections of the press.89

Criminal contempt of court refers to behavior which disobeys, offends or disrespects the authority or dignity of a court. It can occur directly, in the presence of the court, or indirectly when it happens outside the presence of the Judge.90

Criminal contempt can be direct or indirect. Direct contempt is preference in the presence of the Judge, such as when any attorney or witness yells at the Judge or refuses to deliver evidence for which a subpoena has been issued. Indirect contempt occurs outside the presence of a Judge and includes such things as improperly approaching a Juror to discuss the case, threatening or attempting to bribe a Juror or prosecutor, or interfering with a process service. U.S. courts have ruled that there elements must exist to justify a charge of criminal contempt. The court must have issued a clear, reasonable and specific order, the contemnor; the contemnor, or person charged with contempt, must have violated that order; and the violation must have been willful, or intentional.91

Persons accused of criminal contempt are said to be in danger of being deprived of six constitutional guarantees:
1. Double Jeopardy,
2. Due process of law,
3. Excessive punishments,
4. Freedom from self-incrimination,
5. Freedom of speech and press, and
6. Trial by Jury.

2.2.2.1.3 Direct Contempt

Direct Contempt is that which occurs in the presence of the presiding judge (in facie curiae) and may be dealt with summarily; the judge notifies the offending party that he or she has acted in a manner which disrupts the tribunal and prejudices the

89 Ibid.
91 Supra note 88.
administration of justice. After giving the person the opportunity to respond, the Judge may impose the sanction immediately.92

"Direct contempt of Court" is the inherent power judicial officers possess to maintain respect, dignity, and order during proceedings. Judicial officers are not only circuit Judges or Federal District Judges, but also may often be specially appointed commissioners or special masters. A Judge may find anyone in her court-attorneys, parties, witnesses, and spectator in civil or criminal direct contempt. Because direct contempt of court includes conduct at the proceedings, criminal direct contempt is much more unusual than civil direct contempt. The Judge declares that he "finds" the person in contempt, in the sense that the Judge is making a finding of direct contempt. The finding is meaningless, until the Judge adds a punishment term. The punishment is mainly a fine or confinement in Jail for a brief period of time. Confinement is usually a day or two, but very rarely can be six months or more. The punishment cannot become completely arbitrary. The Judge must make a record about the conduct being punished, and the conduct must either be offensive or interfere with the proceedings conduct that shows direct disrespect for the court or the Judge is sufficiently offensive.93

Direct contempt occurs when a person speaks words or commits and acts in the presence of person resist or interferes with the lawful authority of the court in its presence or so near the court or Judge as to interrupt or hinder Judicial Proceedings.94

2.2.2.1.3.1 Summary Contempt Proceeding

Direct contempt may be prosecuted summarily, if they are "committed in the presence of the court and in its immediate view," but they must also "constitute a threat that immediately imperils the administration of Justice." This summary power to punish a "direct" contempt is obviously offensive to the traditional values of a fair trial; but, on the other hand, it is said to be essential to the preservation of those very values which it offends. For, since fairness in the administration of justice can be

guaranteed only to the extent that a court can maintain order, dignity, and impartiality in its proceedings, the summary contempt power is defended as a measure necessary for preserving this proper decorum. Summary contempt is a legal sanction entrenched in the Anglo-American judicial system. In general, a Judge may impose criminal penalties without a plenary hearing for conduct occurring in the presence of the court. This power creates a conflict between judicial power to assure a smooth and unobstructed flow of justice and fundamental notions of criminal procedural due process. Because due process plays a central role in the country's legal system, courts must justify clearly any abridgment or modification of procedural rights.

2.2.2.1.3.2 Immediate View and Presence

Direct contempt of court occurs "during the courts sitting" and "in the Courts immediate view and presence". "When any contempt is committed in the immediate view and presence of the Court, the court may punish it summarily by fine, imprisonment, or both." Thus, when direct contempt occurs, the proceedings are often referred to as "summary contempt proceedings."

The Michigan Supreme Court defined "immediate view and presence" as follows:

"Immediate view and presence are words of limitation, and exclude the idea of constructive presence. The immediate view and presence does not extend beyond the range of vision of the Judge, and the term applies only to such contempt as are committed in the face of the court. Of such contempt, he may take cognizance of his own knowledge, and may proceed to punish summarily such contempts, basing his action entirely upon his own knowledge. All other alleged contempt's depended solely upon evidence, and are interferences from fact, and the formation for the proceedings to punish therefore must be laid by affidavit."
2.2.2.1.3.3 During its Sitting

The phrase “during its sitting” is not as strictly limited as is the phrase “immediate view and presence”. “During its sitting” includes the period of time when the Judge is actually in the courtroom conducting judicial business. Therefore, if the contempt occurs in the courtroom during a period when the court has concluded one case and is about to proceed with another, it qualifies as having occurred during the “sitting of the court.”

2.2.2.1.3.4 Elements of Direct Contempt of Court

2.2.2.1.3.4.1 Direct Criminal Contempt

The elements of direct criminal contempt are:

(i) The willful doing of a forbidden act, or the useful refusal to comply with an order of the court,

(ii) That impairs the authority or impedes the functioning of the court,

(iii) Committed in the immediate view and presence of the court,

(iv) Where the court seeks to punish misconduct that has altered the *status quo* ante so that it cannot be restored, or the relief sought by the original court order can no longer be obtained, or

(v) Order in the courtroom cannot be restored unless criminal contempt sanctions are used.

2.2.2.1.3.4.2 Direct Civil Contempt

The elements of direct civil contempt are:

(i) The doing of a forbidden act, or the failure to comply with an order of the court,

(ii) That impairs the authority or impedes the functioning of the court,

(iii) Committed in the immediate view and presence of the court,

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99 Id. at Ch. 2, p. 12.
100 Id. at Ch. 2, pp. 12-13.
(iv) Where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court’s order, and still has the ability to perform the act ordered by the court, or
(v) It is still possible to grant the relief originally sought by the court order, or
(vi) It is possible to restore order in the courtroom.\(^{101}\)

2.2.2.1.4 Indirect Contempt

Indirect contempt occurs outside the immediate presence of the court and consists of disobedience of a court’s prior order. Generally a party will be accused of indirect contempt by the party for whose benefit the order was entered. A person cited for indirect contempt is entitled to notice of the charge and an opportunity for hearing on the evidence of contempt and, since there is not written procedure, may or may not be allowed to present evidence in rebuttal.\(^{102}\) Examples of indirect contempt include improperly communicating with jurors outside the court, refusing to turn over subpoenaed evidence and refusing to pay court ordered child support.

Indirect contempt occurs outside the present of the court, but its intention is also to belittle, mock, obstruct, interrupt, or degrade the court and its proceedings. Attempting to bribe a district attorney is an example of an indirect contempt. Publishing any material that results in a contempt charge is an indirect contempt. Other kinds of indirect contempt include preventing process service, improperly communicating to or by juror, and withholding evidence. One man was threatened with contempt charge because he had filed more than 350 lawsuits that the judge considered frivolous. Indirect contempt also may be called constructive or consequential contempt: all three term mean the same thing.\(^{103}\)

2.2.2.1.4.1 Elements of Indirect Contempt of Court

2.2.2.1.4.1.1 Indirect Criminal Contempt

The elements of indirect criminal contempt are:

(i) The willfully doing of forbidden act, or the willful refusal to comply with an order of court,

\(^{101}\) Ibid.
\(^{102}\) Supra note 92.
(ii) That impairs the authority or impedes the functioning of the court,
(iii) Committed outside the immediate view and presence of the court,
(iv) Committed outside the immediate view and presence of the court,
(v) Where the court seeks to punish past misconduct and civil contempt remedies are inappropriate.¹⁰⁴

2.2.2.1.4.1.2 Indirect Civil Contempt

The elements of indirect civil contempt are:

(i) The doing of a forbidden act, or the failure to comply with an order of the court,
(ii) That impairs the authority or impedes the functioning of the court,
(iii) Committed outside the immediate view and presence of the court,
(iv) Where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court's order, is in present violation of the court order, and still has the ability to perform the act ordered by the court, or
(v) It is still possible to grant the relief originally sought the court order.¹⁰⁵

2.2.2.2 Distinction between Civil and Criminal Contempt of Court

(a) Civil and criminal contempt of court under American Law
(b) Direct and Indirect Contempt of Court under United States

2.2.2.2.1 Distinction between Criminal and Civil Contempt under United States

The distinction between civil and criminal contempt has been one of the most confusing and problematic areas of contempt jurisprudence. Some of this confusion results from the fact that criminal contempt can occur in either a criminal or civil proceedings, just as civil contempt can occur in either a criminal or civil proceeding. Moreover single acts of contempt can result in both criminal and civil contempt sanctions in some cases.

¹⁰² Supra note 97, Ch. 2, p. 13.
¹⁰⁵ Id. at Ch. 2, p. 12.
The U.S. Supreme Court struggled with the distinction between civil and criminal contempts as early as 1911. Although *Gompers v. Buck's Stove & Range Co.*, continues to be most influential case, the court has revisited this complex issue on several occasions. In Gompers the court first acknowledged the difficulty in distinguished between criminal and civil contempt. In Gompers, the court also articulated a mandatory prohibitory test to assist in determining whether a civil or criminal sanction is appropriate. Basically the court opined that civil contempt is appropriate for coercing future compliance with a previously violated mandatory court order, while criminal contempt is appropriate for punishing a past violation of a prohibitory court order.

In *United States v. United Mine Workers*, the Supreme Court applied the Gompers analysis to contempt fines. This opinion, however, only served to muddle the already confusing destruction between civil and criminal contempt. By equating the coercive use of fines with the coercive use of imprisonment, new confusion arose as the court approved of the use of fines as a method for coercing compliance with court orders. As a direct result, "the court made it possible for courts to set out perspective fine schemes and then lezzy fixed fined in subsequent civil, rather than criminal contempt proceedings." Therefore, lower court basically saw this as an opportunity to finish future acts of contempt with prospectively affixed sanctions but increcent the procedural requirements of a criminal contempt proceedings.

To distinguish civil from criminal contempt, it is necessary to look at the purpose of the sanctions. If the purpose of a sanction is to punish the contemnor for a past act that he or she was forbidden to do, criminal contempt proceedings may be instituted. If, on the other hand, the purpose of the sanctions is to coerce the contemnor to do an act for the benefit of the complaint, then civil contempt proceedings are appropriate.

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106 221 U.S. 418 (1911).
107 530 U.S. 258 (1947).
<table>
<thead>
<tr>
<th>Purpose for imposing sanction</th>
<th>Civil Contempt</th>
<th>Criminal Contempt</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Coercive:</strong> to compel compliance with court’s order by imposing punishment for indefinite term until contemnor complies or no longer has ability to comply. At the time of hearing, contentment must be (1) under a duty to comply with the court’s order, and (2) in violation of the court’s order</td>
<td><strong>Punitive:</strong> to preserve the court’s authority and dignity by pursuing past disobedience of court’s order.</td>
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<tr>
<td></td>
<td></td>
<td><strong>Compensatory:</strong> to indemnify for loss caused by condemner’s conduct.</td>
</tr>
<tr>
<td>Sanctions that may be imposed</td>
<td><strong>Monitory:</strong> Fine (Limited to $7,500 per single continuous act), costs, and expenses of proceedings; damages for injuries resulting from conduct, including attorney fees.</td>
<td><strong>Monetary:</strong> fine limited to $7,500 for per single continuous act (unless otherwise provided); damages for injuries resulting from conduct, including attorney fees.</td>
</tr>
<tr>
<td></td>
<td><strong>Jail:</strong> contemnor may be incarcerated indefinitely until compliance or contemnor unable to comply. Incarnations indeterminate and conditional.</td>
<td><strong>Jail:</strong> Limited to 93 days per single continuous act, unless otherwise provided. Incarceration is fixed and absolute. Probation may be imposed.</td>
</tr>
</tbody>
</table>

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109 Supra note 97.
<table>
<thead>
<tr>
<th>Intent of contemnor</th>
<th>Willfulness is not required</th>
<th>Willfulness is required.</th>
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</thead>
<tbody>
<tr>
<td>Primary interested of party.</td>
<td>Injured persons: May be the court, but is usually one of the litigants in the underlying action.</td>
<td>Usually the court/or the public.</td>
</tr>
<tr>
<td>Courts ability to restore status quo ante</td>
<td>Status quo ante can be reserved through coerced compliance, or if it is still possible to grant the relief ordered in the original court order.</td>
<td>Status quo ante altered so that it cannot be restored in original court order can no longer be obtained.</td>
</tr>
<tr>
<td>Contemnor’s ability to purge contempt</td>
<td>Contemnor must be given opportunity to purge by complying with conditions set by the court.</td>
<td>Contemnor has no opportunity to purge.</td>
</tr>
</tbody>
</table>

2.2.2.2.2 Distinction between Direct and Indirect Contempt of Court in United States

Besides classifying a contemptuous act on the basis of the criminal and civil destructions, a contemptuous act also can be classified as being either direct or indirect. The distinction between direct and indirect contempt renders around where the contempt occurred: Did it occur within the presence of the court? For instance, direct contempt occurs when contemptuous behavior is committed in the physical presence of the judge, or within an integral point of the court, while the court is performing any of its judicial functions. In contrast indirect contempt occurs out of court. Unlike direct contempt, indirect contempt is usually associated with the refusal of a party to comply with a lawful court order, injunction, or lower which imposes of action or forbearance.

Direct contempt “is that committed in, or in close proximity to, the court so that the judge knows the facts from his personal observations.”¹⁰ Direct contempt may be affirmative, such as assaulting a witness during a trial, or it may be negative,

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such as refusing to sit down when ordered. Indirect contempt may be defined as “all contempt not direct,” but a more helpful definition is that it arises from matters which do not transpire in court but which go to degrade impotent the authority of the court or to impede or embarrass the administration of justice. An indirect contempt must be proven before a court of jury. Direct or indirect contempt may arise out of civil or criminal proceedings and may be punished by either a civil or criminal contempt proceedings depending largely or whether the court or a party is the moment. Direct contempt may be dealt with by a judge in a summary manner while indirect contempt required notice, a hearing and proof.

Determining whether a contemptuous act should be classified as direct or indirect is often relatively straightforward. A direct contempt takes place in the presence of the judge, whereas an indirect contempt takes place outside the presence of the judge. Conduct that disrupts the courtroom would be a direct contempt. Indirect contempt almost invariably stems from a violation of a court order. The distinction between indirect or direct contempt thus depends on the act of contempt.

The law of contempt should attempt to balance the necessity of the contempt power with the need to limit its potential for abuses. The distinction between direct and indirect contempt admirably performs his function because direct contempt more directly interfere with a court’s ability to function. The distinction between civil and criminal contempt, on the other hand serves only to provide fewer rights to civil contemnors, even though there is nothing substantively different about the conduct.

2.2.2.3 Sanctions for Contempt of Court in United States

General provisions of the Revised Judicature Act provide sanctions for contempt of court, which contains the general penalties for criminal and civil contempt, States:

(1) “Except” as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is

111 Supra note 83, pp. 224-27.
112 Supra note 97, Ch. 4, p.1.
113 Supra note 97, Ch. 4, p.1.
still within the power of the person to perform, shall not exceed 93 days, or both, in the discretion of the court.

(2) "If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment."

In addition to imposing a fine and/or a jail term, the court must order the contemnor to pay compensatory damages to any person who suffered an actual loss or injury as a result of the continuous conduct status.\textsuperscript{114}

If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

2.3 History of Contempt of Court in India

Before proceeding to the ancient History of contempt of court we must have to discuss the ancient legal system in India.

2.3.1 Ancient Period (Vedic to Early Medieval Period)

In Ancient India not only was there tremendous development of mathematics, astronomy, medicine, grammar, philosophy, literature etc., but there was also tremendous development of law. This is evident from the large number of legal treaties written in ancient India (all in Sanskrit). Only a very small fraction of this total legal literature survived the ravages of time, but even what has survived is very large.\textsuperscript{115}

\textsuperscript{114} Id. at p. 2.
\textsuperscript{115} Justice Markanday Katju, Judge, Supreme court of India. Speech delivered on 27-11-2010 at Banaras Hindu University, Varanasi.
Law in Ancient India had a glorious career. It was insuperably brilliant in the annals of the legal culture of the world. It was highly democratic, marvelously sensible remarkably reasonable and inspiring rational and judicious. It fostered equality of rights and treatment, maintained a very high standard of judicial thinking and procedural, fostered the spirit of peace and social order and had luminously the dignity of cherishing the individual rights and liberties. It had its own characteristics idealism based on imaginative, persuasive and philosophic thinking of life and clear learning.\textsuperscript{116}

The people of Ancient India were inherently devotees of learning, as Chanakya says- 'there can be no comparison between the learning and the kinship. A King can be respected only in his even realm while the person being possessed of learning can be respected everywhere. The enthusiasm of curiousness for learning in Ancient India ushered in unique and delightful system of philosophical thinking and also idealism of life which helped in evolving a dignified system of law. Therefore, the state of the law in Ancient India can be clearly visualized only when the philosophical ideas and idea's of life of the time is in studied perspective. The life in Ancient India was highly spiritualistic. The History of legal thoughts in Ancient India reveals that the law had its foundations on soul force and spiritual glory. In the words of a poet of Ancient India the sources of learning are endless, the knowledge to be derived from then is immense and obstacles are many, so the very essence of them has to be chosen very much as a swam picks up milk lying mixed with water.\textsuperscript{117}

The centuries old history of law of Ancient India vividly reveals that law in Ancient India conformed to the high ideals of life and sentiments. It is also manifestly clear that law in Ancient India had unique features of growth. The vigorous spirituality of the people along with the sacred ritualistic environments they lived in brought about the evolution of a magnificent all embracing system of law which seems to have no parallel in the history of the world legal culture. M. Winternity rightly remarks – “But inseparably connected with it (theology) is the science of Dharma, dealing with the worldly usages and duties that gradually abandoned the sphere of theology and developed into the intensive law literature.\textsuperscript{118}

\textsuperscript{116} Chakradhar Jha, 'History and Sources of Law in Ancient India', 1987, p. 13.
\textsuperscript{117} Id., pp. 13-14.
In Ancient India the concepts of both vidya (knowledge) and karma (action) were highlighted to bring about a great intellectual and spiritual harmony which resulted in to the rise of consciousness of rights, duties and obligation and it laid the foundations of law on more stable and idealistic footings. Badarayana, the writer of the Vedanta philosophy says – “Knowledge and action go together.” Similar is the view of the Rishi Pulastya when he says- “The combination of knowledge and Karma is the right course of action.”

Law in Ancient India and its sources had great evolutionary developments. As time rolled on, legal thoughts developed rapidly, and ultimately the legal literature assumed a great creative force. The ideas which are the original and primary source of law of ancient India give vivid idea of legal culture. The ideas include the Brahmanas and the Upanishads as well the philosophy of law was based on the idealism of life of the time and these three types of literature show before the world a very clear view of the formation of the state, democratic rule, sovereignty of the people and the popular Kingship acceptable to the sovereign people. These literatures also reveal the supremacy of law i.e. the position of law above the ruler as well as the ruled. They also reveal that the development of law depended on the inner purification of mind and soul of the people as well then popular ruler. But the people of ancient India were very progressive in culture and their earnest desire for developing the law and adopting it to the changing conditions of life gave rise to various types of legal literature in a very developed form. They are predominately the Dharm Shastra, Artha Shastra and the Niti Shastra. Out of these three Dharam Shastras predominated and they assumed the commanding role in the Ancient Indian Society.

The scope of the source of law of Ancient India is necessarily wider and varied and they cannot be pinned down to merely the Dharma Sutras and the Smritis, and their commentaries and the Nibandhas alone. The entire Vedic literature including the philosophical literature, the literature of Janism and Buddhism, the Artha Shartra, Dharma Shastra, the Niti Shastra, the Epics, the Puranas and the classical Sanskrit literature, all are highly relevant for giving a picture of all embracing law of ancient India and as such a comprehensive survey of the above materials unquestionably

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120 Supra note 116. pp. 163-164.
comes in the field of the sources of law of ancient India. With regard to the theory and conception of law the philosophical literature forms a rich source material. In the Gautama Dharma sutras the vedas were considered to be the source of law.\(^{121}\)

2.3.1.1 **Vedic Period (1500 B.C. to 800 B.C.)**

2.3.1.1.1 **The Vedas**

The word ‘Veda’ means knowledge, Badrayana in his Vedanta Sutra says- Brahma is the author of the Vedas. Shankaracharya while commenting on it says that the Vedas are accomplished with several branches of learning. They are capable of expressing the true meaning like lamps and all virtues and knowledge are the creatures of the Vedas. Jaini also says that the Shastras which impart knowledge are the Vedas. Further he says the Vedas are full of manifold, deeper and virtuous meaning. The Mahabharata says that in the beginning of the creation of this universe Almighty God lightened the world with external and right learning engrafted in the Vedas from which the entire ranking get all activities. The Mahabharata further says- the Vedas are our best eyes, the Vedas are our supreme strength; the Vedas are our great abode of culture and the Vedas are the Supreme bliss.\(^{122}\)

There are four Vedas, the RigVeda, The Yajurveda, the Samveda and the Atharvaveda. The Supplementary to the Vedas are Brahmanas, which concern mainly with the rituals prescribing religious duties. But they cast reflections on the social, political and legal conditions of the time. The Aranyakas and the Upanishads are really the concluding portions of the Brahmanas and they deal with the philosophy of life. The derivative meanings of the four Vedas have evident significance. The word ‘Rig’ means song i.e. song of the Supreme soul. The world ‘Yajus’ means worship and sacrifice (Yajna). The Yajna played a very important part in the cultural glory of ancient India. The object of yajna was to bring about national unity and prosperity on around and spread an atmosphere of serenity and purity of soul. The aim of Yajurveda was to perform sacrifice for the social uplift and to bring internal harmony. The meaning of the work ‘Sama’ is happy and sonorous. The object of SamaVeda was to appease the Gods by singing the Vedic hymns to bring prosperity of the nation. There was a Rishi named ‘Atherva’ and after his name one branch of the Veda was

\(^{121}\) Id., pp. 55-56.
\(^{122}\) Id., pp. 57-58.
known as Atharvaveda. The Rishi was of a great eminence having a great soul force. The Atharvaveda is also a good source of law.\textsuperscript{123}

As the Vedic language is very old it has peculiarity of style. There could be no possibility of adulteration in the Vedas and they are considered to be completely in the original form. The Vedas are the prime and authoritative sources of law and are the earliest records of the Indian Civilization. Though the Vedas themselves do not contain any systematic codes or rules of legal system, but in the Vedas there are abundant materials which very authoritatively reveal the concept of sovereignty, the principles of governance and the clear glimpses of civil, criminal, constitutional and administrative laws.\textsuperscript{124}

Commenting on the Vedas, the words of God, as the primary source of law, Sir Gooroodas Banerji in “The Hindu Law of Marriage and Stridhana” says:

“The Hindu regards the law as commands, not of any political sovereign but of the Supreme Ruler of the Universe commands, which every political sovereign is most imperatively enjoined to obey. As obedience to law implies obedience to the divine will, it never wounded the pride of the most absolute despot and the thought never entered the mind of a Hindu King that he could, if he chose, alter or abrogate any of the existing law.”\textsuperscript{125}

The Vedas by virtue of their antiquity and sanctity attached to them were recognized in ancient India by the writers of legal literature as the highest authority. Considering the Vedas to be eternal, self extent and superhuman in origin, ancient law givens claimed to have based the laws framed by them by authority of the Vedic literature. Gautama, Vasistha, Manu, Yajnavalkya and other describe Veda as the primary source of law. According to Gautama the source of law is to be found in the Vedas. Apashtamba holds the view that the opinions of those learned in the Vedas should be regarded authoritative in matters of Dharma, i.e. Law, and Vasistha thinks that what is based on the authority of the Shruti and Smriti is Dharma. On the basis what has been said by the law-givers of ancient India, some modern writers have came to the conclusion that at an early stage, the Vedas were regarded as the only

\textsuperscript{123} Id., pp. 55-58.
\textsuperscript{124} Ibid.
\textsuperscript{125} Sir G.D. Banerji, 'The Hindu Law of Marriage and Stridhana', Tagore Law Lectures, p. 3.
source of law, the rest counted supplementary to it. The Vedas would see to occupy a place of pride among the sources of Hindu law recognized by the early law givers.\(^{126}\)

The Vedas are concerned mostly with sacrifices and prayers and do not contain much of positive law. Dr. Kane cites example of references in the Vedas to matters, which in later ages, were prescribed as code of conduct for the people. If we have little positive law in the Smriti, about the law of procedure we have still less, Dr. Radhabinod Pal gives some references to procedural law in the Vedas. In “The History of Hindu Law” he says: “very little is recorded as to civil procedure in the literature of this period. The list of victims at the Purusamedha, includes, Prasnin, an Abhiprasnin and a Prasnavivaka, in whom it is not unreasonable to see the plaintiff, the defendant and the judge. The terms may refer to what is probably an early form of judicial procedure, a voluntary arbitration. The same idea may be conveyed by the word, Madhyamasi, which occurs in the Rigveda itself and which is understood by Vedic scholars as meaning an arbitrator or judge the expression being derived from the judge acting with other judicial persons and being perhaps surrounded by the assembly of people.\(^{127}\) In the Vedas there are some special references to special earths, ordeals, the court and other matters but most of them are oblique.

From a comprehensive study of the Vedas it appears vividly that the Vedas exemplify a developed state of social, political and legal thoughts. The linguistic and philological dissection of the Vedas, their transcendental language interflowing with a dignified style and glistening poetical diction, exuberant richness and elegance of thoughts and also the animatic treatment of Nature in the Vedic sutras, their great social awakening all serve to show that the Vedas are the reflection not of the initial but of the growing and developed stage of civilization.

2.3.1.1.2 The Brahmanas

The Brahmanas are mainly concerned with the rituals and Sacrifices. The word ‘Brahmana’ means knowledge. They are part of the Vedas. The chief purposes of the Brahmanas are to prescribe the rule, injunction or precept (Vidhi) for

\(^{126}\) Dr. Birender Nath, ‘Judicial Administration in Ancient India’, 1979, p.9.

performing the ritualistic acts and to explain the meaning and purpose of the ritualic
texts (Arthavad). The mostly important Brahmana is Shatapatha Brahmana which
has defined the rule of law and says the law is above the King.

The specific Veda has its known Brahmanas the classifications of which are as
follows:\textsuperscript{128}

(a) The Rigveda- Aitareya Brahmana and Kaushitaki Brahmana which is also
called Shankhyayana Brahmana.

(b) The Yajurveda- Shatapatha Brahmana.

(c) The Samveda- Panka- Vinisha Brahmana or Tandya Brahmana.

(d) The Atharvaveda- Gopatha Brahmana.

These are the main Brahmanas. The Brahmanas are the valuable sources of
law.

2.3.1.1.3 The Aranyakas

The extremely ritualistic life was considered to be a great bondage and,
therefore, some relaxations became necessary giving rise to the Aranyakas (Forest
Texts). The Aranyakas are like appendices to the Brahmnas and they deal with
upabanas (Meditations) rather than sacrificial ritual. The Brahmanas deal with the
rituals which are concerned mostly with the physical acts and they have very little
concern with the mental culture. But the Aranyakas deal also with the mental culture
giving rise to ideal texts books for the forest harm its. Each Veda has separate
Aranyakas:\textsuperscript{129}

(a) The Rig Veda has Aitareya Arangakar and kaushitaki Aranyaka.

(b) The YajuriVeda has Taitteriya Aranyaka.

(c) The samavedahas Chhandogya Aranyaka.

(d) The Arharva Vedas has no Aranyaka.

These Aranyakas afford some materials of legal thinking.

\textsuperscript{128} Supra note 116 at p. 61.
\textsuperscript{129} Id. at p. 63.
2.3.1.1.4 The Upanishads

The word Upanishad has been formed of the root ‘Sad’ meaning to sit down and the two prefixes i.e. “Upa’ which means nearby and ‘Ni’ means down. The word ‘Upanishad’ means to sit down near the teacher for attaining knowledge! Another meaning of the word ‘Upanishad’ is also noticeable. The Prefix ‘Upa’ means near and ‘Ni’ means perfectly. The root ‘Sad’ means to attain. These three conjointly mean the attainment of knowledge of the reality of the world. Thus in this perspective the meaning of the word ‘Upanishad’ is to attain knowledge. The Upanishads have been called out from the philosophy of the Vedas in a new perspective. The word Vedas has been derived from the root ‘Vd’ which means supreme knowledge. Thus the objective of the Upanishads was to verify the knowledge and dispel darkness so that there could be peace and harmony of the soul and avoidance of immoral and illegal actions among mankind.\(^1\)

The texts of the Upanishads came into existence after the composition of the Brahmanas and the Aranyakas. The subject matter of the Upanishads is quite different from that the Aranyakas and Brahmanas. The Brahmanas deal with the interpretation of the sacrificial system of the original Vedic texts whereas the Upanishad interprets Vedic philosophy and attempt to discover the meaning of life. The Mithila region made a great contribution to the development of the Upanishadic branch of learning. Kaiser Bahadur says- “The King Janaka’s court of Mithila is famous for the origin of the Upanishads.”\(^2\)

The important Upanishads are eleven- (i) Isha, (ii) Kena, (iii) Katha, (iv) Prashna, (v) Munda, (vi) Mandukya, (vii) Taittiriya, (viii) Aitareya, (ix) Chhandogya, (x) Brihadaranyaka (it forms part of Shatapatha Brahmana), and (xi) Shvetashvatara.

In the opinion of Dr. Radha Krishnan the possible date of the Upanishads in between 1000 or 800 to 300 B.C.\(^3\) Rahul Sankrityan has classified the ages of the important Upanishads:\(^4\)

(i) Isha Chhandogya and Brihadaranyaka 700 B.C.

\(^{1}\) Id. at p. 64.
\(^{4}\) Supra note 116, p. 65.
2.3.1.1.5 The Gita

The Gita is well known to the world. But apart from its spiritual aspect it has a great relevance to jurisprudence in Ancient India. It is the combination of Sankhya and Yoga Philosophy. Regarding the yoga Darshan it is a combination of the Yoga of knowledge and the Yoga of action. It also contains the essential principles of the Upanishads. In the Gita various rudiments of law are available. The Fundamental Right of equality of worship has been recognized as Lord Krishna says—"that the Divijars, women or even Shudras can attain the highest level of the Supreme goal of life." In the Gita the instances of the equality of man and equality of human rights and liberties are gloriously pictured. Many fundamental rights essential for human life have been recognized. There are glorious elements of international law also in the Gita as Lord Krishna impressed upon Arjuna that when a war is necessary due to aggressive attitude and actions of the adversary, to refrain from fighting in such a case is a vice. The enemy has to be fought out.¹³⁴

In the Gita there is enough material about the theory and conception of law and also about the causation, necessity and impulse of law. The Gita says—satya (right thinking) being stainless is illuminating; it is a condition of happiness and knowledge. The Rajas means the passion and it is the source of thirst and attachment and keeps man bounded with the bond of action. Tamasa is born of ignorance, and is mortal man’s delusion; it keeps man bound with heedlessness, sloth and slumber. Thus satya attaches man to happiness; rajas to action; and Tamasa which shrouds knowledge, attaches man to needlessness and error.¹³⁵

2.3.1.1.6 The Ramayana of Valmiki

Valmiki was the writer of the Ramayan which is a Mahakavya (Great Epic). The Ramayan in the very beginning deals with the concept of Dharma, Astha and Karma by which the life in ancient India was governed. The Ramayana extensively

¹³⁴ Id., pp. 70-71.
¹³⁵ Ibid.
deals with the principles of civil, criminal, Administrative, constitutional and International laws and about political administration. It also deals with the various principles of political economy. The Ramayana gives a picture of the democratic and constitutional kingship that’s political and constitutional activities were always governed and controlled by the public opinion and able guidance of the ministers. The Ramayana mentions Arthashastra, Rajashastra, Niti Shastra, and Danda Niti. It has Seven Kandas (parts). In the Balakanda which is the first part in chapter seven the virtues of ministers and described. The ministers used to be always conscious by looking to the things with the eyes of Niti and the bad specialized knowledge of Niti Shastra.\[136\]

In the Ramayana there is specific mention of the Rajashastra i.e., the science of governance which shows that there was a developed system of constitutional law. Regarding the Judicial administration the King was the fountain of justice and the final authority. In the Ramayana also the judicial proceedings was called Vyavahara. The Ramayana says- A minister interested in the welfare of his king should ascertain the relative strength of the king and his adversary and should give proper adverse to the king by ascertaining by mature deliberation of the inferiority of the strength of his own king and that of his adversary and the possibility of the loss or gain by waging war. This shows the consciousness regarding the international law.\[137\]

2.3.1.1.7 The Mahabharata by Maharishi Vyasa

The Mahabharata is the great epic written by Maharish Vyasa. This great epic deals with the various phases of human life. But it is the store-house of legal learning and forms a great source of law of ancient India. The Mahabharata came much later than the Ramayana. Vyasa says Maharishi Valmiki in older times had, sung a verse on this earth. This proves that the Mahabharata was composed after the Ramayana of Valmiki.

Maharishi Vyasa himself has praised the Mahabharata in very attractive words. He says as butter in curd, the Brahmana among men, Upanishadas in the Vedas, nectar in the Medicine, sea in the water channels, and the cow in the cattle are superior, so in the Itihas (Historical Writings) the Mahabharata is superior. He further

\[136\] Id. at p. 81.
\[137\] Id., pp. 83-84.
says the Gods having assembled weighed the Mahabharata with the Vedas but the balance of the Mahabharata was greater and since then the Mahabharata began to be considered superior even to the Vedas in importance, greatness and gravity. The Mahabharata consists of eighteen parvas or books or divisions. In each parva there are some legal materials but the vana parva, shantiparva, the Anushashana parva, the Ashwamedhika parva etc., extensively deal with the legal matters.\(^{138}\)

The Mahabharata has given a beautiful exposition of the Rule of law which is of great relevance to the modern age. In the parva it has been said that the King is for maintain law not for enjoying luxury of life. The entire human folk are dependent on law and law itself is depending on the King (for its due maintenance). The King is he in whom law abides, when the law flourishes, all being proper. If the law receives deterioration then the entire would deteriorates, so care should be taken to preserve the law. Law flourishes when people are in prosperous condition. Law exists to check the illegal acts of the men. Law is considered supreme, so only he who rules his subjects in accordance with the law is the king in the true sense of the term.\(^{139}\)

Thus the Mahabharata is a great contribution to the sources of law in ancient India. Maharishi Vyasa has assigned Mahabharata to the place of Dharma Shastra. As the Mahabharta says- 'Vyasa, possessing great intellect has called the Mahabharata as the Arthashastra, the great Dharma Shastra and also Kama Shastra all in one.'

2.3.1.2 Post Vedic Period (800 to 400 B.C.)

2.3.1.2.1 Jainism

There are two branches of Jainism, the Shwetambaras and the Digambaras. As a matter of fact the Janis devoted themselves more to the problems of penance and revocation than to worldly life. Jain literature also adopts the ancient Indian allegorical view disclosed in the epics and the Dharm Sutra literature about the organ of Danda that originally there was no King, no Kingdom and no administration to control the wrongdoers. But in advance of time the people violated the rights of the people. So far the legal administration is concerned the Jain literature also affords

\(^{138}\) Id., pp. 84-85.
\(^{139}\) Id., pp. 87-88.
some source of law. For instance in the Jataka, it has been laid down that punishment should be awarded according to the nature and seriousness of the offences committed.\textsuperscript{140}

2.3.1.2.2 Buddhism

Buddha revolted against the systems of Hindu Dharma existing at his time and in his speeches preached his revolutionary philosophy of life. His disciples collected his teachings in Pali written hundred years after his death grouped under three collections (i) Sutt Pitaka, (ii) Abhidharma Pitaka, and (iii) Vinaya Pitaka. The Buddhistic philosophy of life is based on extreme pessimism. Buddhism was a reviler of the Vedas and of the Vedic view of life. The Buddhism had a great influence on politics, constitutional and legal culture of ancient India for a pretty long time. In the period of Ashoka, the great Mauryan Emperor, Buddhism dominated pre-eminently the political, constitutional and legal phases of Indian life. Under Ashoka Buddhism expended from insignificant position to mighty and for extending dimensions.\textsuperscript{141}

Buddhism was a rebellion against the Vedic system of life and religion. But the basic principles of the original Vedic philosophy and the Buddhistic philosophy were practically the same. Buddhism was engrossed in various complications of life and ultimately its root became much shaken in the country of its birth i.e., in India in the later period. From a passage of Dhammapada given below it would be clear that the basic idealism of Hinduism and Buddhism was the same. Dhammapada says- not Nakedness nor matted hair, not smearing of dust not fasting, nor lying or earth nor rubbing of ashes nor ascetic postures none of these purifies a man who is not free from (evil) desires. He who thought be dressed in simple apparel, is quite, subdued, restrained, chest and does not inflict hurt to any living being, he is the Brahmana, he is the Shramana (ascetic) and he is the Bhikkhu (mendicant).\textsuperscript{142}

2.3.1.3 The Dharma Shastra

In the sources of law of Ancient India the Dharma Shastra occupied a very predominant position. The Dharam Shastra has correlation with (i) Artha Shastra; (ii) Niti Shastra; (iii) Rajashastra; and (iv) The Nyaya and Mimasa Darshana. The

\textsuperscript{140} Jagdish Chandra Jair, 'Life in Ancient India as Depicted in the Jain Canons', 1947, p. 64,
\textsuperscript{141} Supra note 116 at p. 78.
\textsuperscript{142} Id. at p. 79.
Dharma Shastra consists of the Dharma sutra and the Smriti. Before going to the detailed study of Dharm Shastra we must know the meaning of Dharma.

### 2.3.1.3.1 Meaning of Dharma

The word Dharma is used to mean justice (Nyaya), what is right in a given circumstances, moral, religion, pious or righteous conduct, being helpful to living beings, giving charity on alms, natural qualities or characteristics or properties of living beings and things, duty, law and usage or custom having the force of law, and also a valid Rajashasana (royal edict). Dharma is that which sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The Dharma is promulgated in the form of commands. Dharma embraces every type of righteous conduct covering every aspect of life essential for the substance and welfare of the individual and society and includes those rules which guide and enable those who believe in god and heaven to attain moksha (eternal bliss).

The word ‘Dharma’ is derived from the root ‘dhir’ to upheld, to support or to sustain. The practical meaning of the word ‘Dhanna’ is ‘law’ and it also means ‘Justice’. Therefore, the workable and operative meaning of the word ‘Dhanna’ is law and justice. The word shastra is derived from ‘shas’ which means to lead, to explain, to control, to advice. So the practical meaning of the mind shastra is science. The word “Dharm Shastra’ means science of law.

### 2.3.1.3.2 The Dharmasastras of Manu, Yajnavalkya, Parasara

#### 2.3.1.3.2.1 Manusmriti

Manu is the precursor of Kautilya and Yajnavalkya. The work of Manu is not very much classified and arranged subject wise whereas Yajnavalkya placed the matter in a very systematic way. Manusmriti involved the religions and moral belief, of the people and also the legal principles. Manu lucidly and authoritatively discussed the substantive and procedural law in very concrete forms. Manu says Brahmmin has created the king to protect the persons of all Varnas and Ashramas who are faithful to their Dharmas.
Manu devotes the 8th Chapter of his Smriti mainly to the treatment of law. For the purpose of deciding, the King should enter the court house with learned Brahmins and experienced councilors preserving a very dignified demeanour. When it is not possible for the king himself to administer justice personally, he should appoint a learned Brahmin, for that purpose but by no means should be appointing a Sudra. The fault of an unjust decision is apportioned to the offender, the witnesses, the judges and the King. Manu makes similar provision like Gautama and Vasistha regarding the protection of the property of a minor, of a barren woman and of an owner of property who has disappeared. Property do lost and recovered shall be kept in the custody of the King's special officers; those convicted of stealing such property shall be slain by elephants. The King must restore the stolen property when recovered and must compensate when unrecovered; he shall also administer the law by taking into consideration, the special laws of the Jati, country, guilds, families and men who follow a particular occupation and abide by a particular class of duty likely to be tied together by a similar body of rules. The King and his officers should neither encourage litigation nor wish it up; unnecessary adjournments also should not be allowed.\textsuperscript{146}

Manu has also referred to oaths and ordeals, but he has not described them in detail like the subsequent simriti-writers. He has also added one special made of oath in giving evidence by touching the heads of wives and children, implying thereby that the false evidence in these cases would result in the death or injury to the wives or the children. Manu also advocates different degrees of punishment beginning from simple admonition and ending with corporal chastisement. Manu appears to make another peculiar provision according to which judgments based on false, evidence must be reversed by the very Judges who passed them.\textsuperscript{147}

The entire law of defamation was mainly based on the variation of caste. The caste was undoubtedly the most important and obvious factor in determining the status as a person in the ancient Hindu society. Obviously, the harshest punishment was reserved for Sudras, especially when they defamed the Brahmins. A Sudra insulting a twice-born man with gross invectives shall have his tongue cut-off, the reason being that he is of low origin; if he mentions the name of twice born classes

\textsuperscript{146} Dr. U. C. Sarkar, 'Epochs in Hindu Legal History,' 1958, pp. 104-105.
\textsuperscript{147} Id. at p. 106.
with contempt, an non-nail ten fingers long shall be thrust red-hot into his mouth and
if he arrogantly teaches Brahmins their duties, the king shall punish him by powering
hot oil into his mouth and ears. As in defamation, so as to in assault, nearly the whole
of the law is mainly determined by reference to the question of caste. Manu also
provides for criminal punishment in the shapes of fines for those who hurt trees,
plants, arrivals and even inanimate goods.\textsuperscript{148}

Adultery was regarded as one of the most heinous offences for which
exemplary and deterrent punishments were provided for, so that they might create
awe and fear in the minds of the people at large. A Sudra guilty of adultery with a
woman of any caste especially of the twice-born class shall be sentenced to capital
punishment. Capital punishment way provided for only for the Sudras independent of
the caste of the woman in question. For committing adultery with a guarded
Brahmin woman, a Vaishya shall forfeit all his and suffer imprisonment for one year;
a Kasatriya shall be fined one thousand panas and be shaved with the urine of an ass.
For adultery with Brahmin woman, they could be put to death. The punishment,
again, varied, according as the woman was grounded and willing or unwilling. A
Brahmin, however, could not be subjected to capital punishment; he was to be
punished from Kingdom-unhurt in body and property, after tonsure of the head. A
wife violating for duty towards for husband was to be devoured by the dogs in a place
frequented by the public and the male offender was to be burnt on a red-hot iron-bed
by putting logs under it. Having dealt with the main topics of law-civil and criminal-
Manu refers to certain Miscellaneous topics such as non fulfillment of agreements,
especially among Brahmins, engaged in the performances of sacrifices, maintenance
of parents, wife and legitimate children, non-invitation to qualified Brahmins of the
neighborhood, relaxation of rules for paying taxes by the blind, the idiots, the aged,
the infant or the distressed, conduct of washer man, weavers, monopoly, fixation of
price examination of weights and measures and the duty of a ferryman. Manu
recognizes seven kinds of slaves who are not capable of owning any property like
wives and sons.\textsuperscript{149} Woman according to Manu are wicked when left to them; but they
become respectable only on account of their union with worthy husbands.

\textsuperscript{148} Id. at p. 108.
\textsuperscript{149} Id., pp. 109-110.
The coming into existence of the commentaries from time to time on Manu indicates that as a codified law Manussmriti held sway throughout the country for several centuries.

2.3.1.3.2.2 Yajnavalkya Smriti

Yajnavalkya’s work is more symmetric than Manu’s. He has divided his book in three parts Achara, Vyavahara, and Prayashchitta. His Smriti is a great authority in the realm of Hindu law. The Yajanaualkya Smriti is a great authority on personal rights of a man. It has been rightly observed by Kane\(^{150}\) that “on account of the paramount importance of the Mitaksara in Modern Hindu Law, as administered by the British courts in the whole of India, the Smriti of Yajnavalkya has indirectly become the guiding work for the whole of India and this position it richly deserves by its concise but clear statement of principles, its breadth of vision and its comparative impartiality of the claims of both sexes and the different varnas.” Jayaswal\(^{151}\) also says that “Yajnavalkya’s work being a purely scientific book, the scientific attitude and freedom from prejudice made the work acceptable throughout India. It was not a mere chance that Jurists like Vijnanesvara and Apararka selected it as basis of their writings.”

The King is primarily responsible for the administration of Justice with the help of learned and virtuous assassins. In case of un-awardable pre-occupation, a learned Brahmin should replace the King, try judge or assessor doing any deliberate injustice should be punished by the King to the extent of double the amount in dispute. The allegations of the plaintiffs should be recorded. This will be the plaint. The plaint will be followed by written statement, which also should be recorded similarly. Then will follow the proof. The last stage will be the judgment. Thus the four stages of litigation are plaint, written statement, proof and the judgment. Generally no counter suit will be allowed except in cases of certain crimes. The party loosing the case will be liable for penalty besides the payment of claim.\(^{152}\)

Yajnavalkya refers to ordeals by balance, fire, water, prison and kosa. Kosa means drinking the water in which an idol has been washed. In applying or deals, the


\(^{151}\) Manu and Yajnavalkya, Tagore Law Lectures, 1917, pp. 61-62.

\(^{152}\) Supra note 146, p. 114.
plaintiff must undertake to undergo punishment in case the allegation is not proved or the accusation is not substantiated. This was undoubtedly a very wholesome check for the accused to be immune from unnecessary harassment and imaginary allegation; in a sense, this served, to some extent, the purpose of presumption of innocence, in behalf of the accused person. In case of Kosa ordeal, the accused person was to be declared guilty, if any serious calamity befell him within 14 days. Yajuakalkya prescribes different ordeals for different person according to their individual conditions.153

Abuse, Assault, Sahase, Theft and Adultery were the different types of crimes, as enumerated by Yajnakalkya. Abuse or defamation was to be adjudicated chiefly with reference to the question of caste of the different parties. Commenting on this verse, it has been held by Vijnanesvara that a Ksatriya, a Vaisya or a Sudra abusing a Brahmin would be punished with a fine of 100 and 150 panas and beating and mutilation respectively. A Sudra abusing a Vaisvya is to be fined 100 panas. A Brahmin or the other hard abusing Ksatriya, Vaisya or Sudra was to be fined 50, 25 and 12½ panas respectively. A Ksatriya abusing a Vaisya or a Sudra was to be fined 50 and 25 panas respectively. Lastly, a Vaisya abusing a Sudra was to be fined 50 panas. The highest fine shall be imposed for abusing a Brahmin, the King or Gods. Yajnavalkya describes the different kinds of assaults and provides for their punishment. A non Brahmin striking a Brahmin shall have his offending limb cut-off. Where the man is assaulted by many conjointly the punishment shall be doubled. Yajnavalkya also makes provision for punishing assault, committed in respect of animals and plants as well. The fine shall be doubled, when any injury is done to a tree in a sacrificial place, cemetery, boundary or a temple.154

From these elaborate provisions, Jayaswal has rightly concluded that Yajnavalkya flourished and wrote at a time, when there was a general prosperity in the country in the shape of trade and commerce.

2.3.1.3.2.3 Parasara Smriti

Parasara seems to have occupied a very prominent position among the ancient Smriti writers, so much so that he claims to be the sole guiding Smriti writer for the

153 Id. at p. 117.
154 Id. at p. 120.
Kali-age. Parashara has not said much about Vayavahara. But his Smriti is of distinguished merit. He belonged to Mithila he deals with Acharya and the Prayashchitta. To him law is essentially progressive in nature and it echoes the social needs and sentiments of the people.

Parasara has been frequently referred to and quoted by Kautilya, Vijnanesvare, Apararka, the Smriticandrika and Hemadri. There is also reference to Brihat Parasara and Briddha Parasara who are different authors. The Parasara Smriti must have been written before the 5th century A.D.\textsuperscript{155}

2.3.1.4 The late Smritis: Narada, Brihaspati, Katyayana

It has been most aptly said by Kane\textsuperscript{156} that Narada, Brihaspati and Katyayana form a triumvirate in the realm of the ancient Hindu law and composition of the legal literature. All these three jurists exhibited an excellent analytical insight and the most perfect acumen of elaborating and explaining the juristic principles and philosophy.

2.3.1.4.1 Narada Smriti

Narada Smriti is one of the most methodical books of ancient law. The first three chapters are introductory, dealing with the principles of judicial procedure. Like Yajnavalkya, are deals with the law of evidence.\textsuperscript{157}

This Smriti solely deals with forensic law, both substantive and procedural, without any reference to and other religious matters. Thus it makes a departure from the earlier works and can be regarded as purely relating to law. It deals with courts and judicial procedure and also lays down the law regulating the eighteen titles with great clarity. Narda was independent in his views and did not allow him to be bound by the earlier texts. This Smriti is remarkable for its progressive views on various matters. The procedural law laid down by this Smriti contains provisions relating to pleading, evidence (oral and documentary) as also the procedure required to be adopted by the courts of law. Some of the important and progressive changes found in the Narda Smriti compared to that of Manu are:\textsuperscript{158}

\textsuperscript{155} Supra note 150 at p. 195.
\textsuperscript{156} Id. at p. 213.
\textsuperscript{157} Dr. Shraddhakar Supakar, 'Law of Procedure and Justice in Ancient India', 1986. p.47.
\textsuperscript{158} Supra note 143, pp. 33-34.
(1) In the matter of inheritance

(i) Holds that an younger son could become a karta of a Hindu joint family;

(ii) Provides two shares to father in his self acquired property in case of partition;

(iii) After death of father, mother gets equal share with her sons at a partition;

(iv) Unmarried daughter takes a share as younger sons.

(2) Regarding law of marriage

(i) Holds that a widow as well as a wife whose husband is impotent or absconding is entitled to remarry;

(ii) A widow wife without children is permitted to secure one through Neoga;

(iii) Gambling was made a lawful amusement when carried on in a public licensed gambling house;

(iv) Fixes age of majority at 16 years and declares that contracts entered into by an infant, i.e. by a person below 16 years of age, is invalid in law.

Narada deals with plaint in all its aspects in greater details in a fresh section. Narada divides his introduction into three sections; the first section deals with legal procedure, the second with plaint and third with courts of justice. The plaintiff or claimant shall cause the plaint to be written having produced the pledge of ascertained value. The plaintiff can change his plant in any way before the answer is given by the defendant: but he is not at liberty to do so after the submission of the written statement. The answer or the written statement assumes four different forms, to writ, evil, confession, special pleas, a resjudicata each of which again of admits of further subdivision. He has also referred to the seven defects of the plaints which are known as Paroktadosa. A plaint even though otherwise correct is invalid, if it is contrary to the law an usage of the country. According to Narada whenever a man makes any significant statement in course of the trial on account of any passion or immoral motive, that statement should at once be reduced to writing by the scribe. Narada also makes a significant reference by saying that a man who institutes a suit in regard to a royal edict, a document, a written title, a grant, a pledge in writing, a sale and a purchase is known as the defendant. No judgment can be revised in appeal or revision when the defect in the case has been the result of his own conduct or confusion. The King shall see that persons convicted by the judges are duly punished and decree executed.159

159 Supra note 146, pp. 127-129.
Narada discusses insult and assault each of which may be of three different categories. A superior may be able to himself punish a Svapaka, Meda, Candala and other men of inferior classes. The abuses and assaults among people of the selfsame caste as well as of different castes have been discussed in details by Narada essentially on the same time as of Manu and Yajnakalkya. The King and the Brahmins have been declared as entitled to special protection against censure and corporal punishment as both of them regarded as sustaining the whole world. A father is not liable for the offences of his sons and the owners of animals for the harm done by him unless they were sent by the owners to do the harm. Narada smriti affords an important basis for the study of ancient Hindu legal system.\textsuperscript{160}

2.3.1.4.2 Brihaspati Smriti

Brihaspati wrote four kinds of court:

(a) Established in affixed place such as a town or a village, (Pratisthita).
(b) Mobile or circuit court, not fixed in one place (Apratisthita).
(c) The court of a judge appointed by the King, authorized to use the royal seal (mudrita), and
(d) The court in which the King presided (Sasita or Sastrita).\textsuperscript{161}

The King court was the Supreme Court, apparently the other three kinds are not arranged according to grades.

Brihaspati appears to have lain under emphasis on ordeal which he ascribes to the self-existent Brahma. He says that in charges relating to a heinous or to the misappropriation of a deposits, the King should try the case by ordeals, even though there might be witnesses. Thus he does not confine the application of ordeals only to cases where other modes of evidence are not available. Brihaspati enumerator and describes in details nine kinds of ordeals, the ordeals by ploughshare and the Dharma-Adharna ordeal being new with him.Brahaspati deals with the different topics of criminal law. He uses the word Sahasa (or violence) in two district senses- wide and narrow. In its wide sense, Sahasa virtually comprises all criminal acts such as

\textsuperscript{160} Id., pp. 141-142
\textsuperscript{161} Supra note 157. pp. 105-106
defamation, assault, homicide, theft including robbery and sexual offences and in the narrow sense it means only the last four offences.\textsuperscript{162}

Cruelty animals also were declared by Brihaspati as an offence punishable with fine. Brihaspati deals with the various kinds of heinous offences or offences involving violence, such as, homicide, theft, robbery and so on and provides for different kinds of punishment beginning with mutilation of limbs and ending with inflicting of capital punishment with might be in the shape of hanging, drawing, burning etc. The heinous offences of adultery has been described by Brihaspati in three different classes namely, forcible, fraudulent and sensual Mutilation of limb is the punishment for a man who violates an unwilling woman and for a woman who appears at another man's house and excites his concupiscence by touching his body or such other acts. A man violating a woman of the higher castes shall be put to death. In case of imposition of fines for adultery, very heavy fines be inflicted on very rich men.\textsuperscript{163}

2.3.1.4.3 Katyayana Smriti

This Smriti is regarded as the latest and most important work of extraordinary merit. The rules of law laid down in this Smriti compare remarkably with the modern advanced legal system. Unfortunately, this Smriti is also not traced fully. It deals with substantive civil and criminal law and also procedural law. Several progressive provisions, both in the matter of civil and criminal law and procedural law give the Smriti an honoured place in the legal history of India. Some of the highlights of this Smriti are set out by P.V. Kane as follows:\textsuperscript{164}

(1) Katyayana represents the high watermark of Smriti rules about procedure. In some respects he goes even beyond Narada and Brihaspati and is more stringent and elaborate than those two writers. For example, he propounds a rule similar to the rule of constructive resjudicata.

(2) He gives a more elaborate treatment of Vidyadhana than is contained in any other Smriti.

\textsuperscript{162} Supra note 146, pp.147,151.
\textsuperscript{163} Id., pp 151-152.
\textsuperscript{164} Supra note 143, pp. 35-37.
(3) He devotes at least 27 verses to stridhana, and his treatment of that topic has attained a classical rank. Narada devotes only two verses (Dayabhaga verse 8-9) to that topic and Yajnavalkya only six.

(4) The court consisted of the Judge, the sabhyas, brahmanas, and merchants.

(5) Katyayana differing from vasistha, Yajuvalkya and other sages, hold that a man has no ownership over his wife or son and cannot sell his son.

(6) Katyayana allowed the pledge of an article without possession.

(7) The law of procedural- which is given in detail in the chapter relating to administration of justice as lay down by Katyayana, shows the great advancement in procedural law. Several provisions are similar to the corresponding provisions in Modern Law. He makes precise provisions regarding presentation of plaint, filing of written statement, amendment of pleadings, law of evidence, estoppeland adverse possession.

(8) Provided for appointment of jurors to assist the court in certain types of civil and criminal cases.

(9) Provided that death sentence could be imposed on a Brahmin found guilty of certain offences and thereby took away the total community against death sentence extended to this community in the earlier Smritis.

The credit of collecting all the scattered verses of Katyayana at one place goes to Mahammahopadyaya, P.V. Kane.

2.3.1.5 Arthashastra of Kautilya

Though the Arthashastra of Kautilya does not felt in the category of Dharma Shastras, it is the most important and a masterly treatise on statecraft. The author of this great work is Chanakya or Vishnugupta who was the Prime Minister of the Magadha Empire during the reign of Chandragupta Mauriya. In the preamble to the Arthashastra, the Author has stated that it is being written as a compendium of almost all the Arthashastras composed till then by ancient authors, and undoubtedly Chanakya has made it an encyclopedia of statecraft and legal system for the guidance of all concerned. Surprisingly this great work renamed untraced, but fortunately it
was unearthed by Dr. R. Shamaasastry of the Oriental Research Institute Mysore. He translated this great work and published it in 1915. Chandragupta Maurya became the King in 322 B.C. and his son Bindusara ascended the throne in 298 B.C. It is during this period that Chanakya lived and wrote this famous work, sometimes between 322 and 300 B.C.\(^{165}\) Kautilya divided 'Arthashastra' into 14 book, sub-divided into 150 chapters in which 180 topics running into 5391 sections (slokas) are discussed.

Johann Jakob Meyer, the German Enologist and translator of the Arthasastra from Sanskrit to German language in 1927, said that the Arthasastra was not a book but a library of ancient India. L.N. Rangarajan, a diplomat whose work on the Arthasastra is no well received and widely read, has argued that in so far as the nature of human beings remained the same and states behaved in the manner as they always have done, Kautilya was relevant.\(^{166}\)

The enthusiasm of India first Prime Minister, Jawaharlal Nehru, for Chanakya (Kautiliya) was phenomenal. He devoted six pages to Chanakya in his book ‘Discovery of India’ first published in 1946, one year before Independence.\(^{167}\) As a symbol Nehru had the diplomatic enclave in New Delhi named after him as Chanakyapuri.\(^{168}\)

Historian and diplomat K.M. Parikar writes that Hindu Kings, to the last, followed the organization of Mauryan Empire in its three essential aspects- the revenue system, the bureaucracy and the police system. Kautilya's doctrines were still in force during the Muslim rule and during the British rule in India.\(^{169}\) In his lectures on Kautilya, at the Delhi school of economics, Panikar highlighted the relevance of Kautilya's rule of conduct in diplomatic relations and his doctrine, of Sama-dana-behda-danda (conciliation, gifts, rupture and force).

Historian Romila Thapar, in a recent interview,\(^{170}\) when asked about the current crises arising due to corruption as a historical phenomenon responded by quoting Kautilya- “Just as it is impossible not to taste honey or poison if placed on the tongue, similarly it is difficult for a government servant not to eat up, at least a bit of

\(^{165}\) Id., pp.37-38.
\(^{170}\) 'Many Voices of History', The Hindu, April 4, 2012.
ruler's revenue" and "Just as it is not possible to throw when the fish moving under water drinks water, similarly, it is difficult to find out when government servant employed in the work misappropriates money." Kautilya then expects the King not to let this happen by proper selection, checks and administrative procedures. This phenomenon is universal and corrupt behavior should spring no surprise. Corruptions a priority security issue today. On the subject of speech and expression, unlike Plato's Republic, the Arthasastra granted the Kusilvas (bauds, minstrels, singers, mime actors) freedom, which is now a fundamental right.171

2.3.1.5.1 Judicial Administration

The study of Kautilya's Arthasastra reveals that courts of Dharmassthas were located at the Junction of two territories or Janapadas and the Head quarters of 800, 400 and 10 villages called Sthaniya, Samgrahana and Dronamukha respectively. There was decentralization of judiciary to a great extent. Arthasastra of Kautilya deals with the rights, duties and responsibility of the King in the administration of the state including judicial administration. The systematic and exclusive treatment of law was a distinct feature of Arthasastra.172 The aim of every judicial administration is to be trust, honest and make available speedy remedy to the aggrieved person who as a last resort seeks the assistance of the courts. The entire judicial administration in ancient India functioned under the supervision of the King and the courts derived their authority from the King. The Hindu system was not prepared to trust the judgment of a single individual, howsoever learned and eminent he might have been.173

The King discharged his judicial function with the aid and assistance of his ministers, Purohit and Sabhyas. Late on times, the King due to his inability to attend personally to the judicial functions except in special circumstances used to depute the learned Brahmins to take the place and do justice. In order to give speedy and proper justice, there existed well set principles which governed the proceedings in the courts. The courts existing in the ancient India also enjoyed discretionary powers to deliver justice to the aggrieved persons. The study of the ancient Indian dispute redressal system reveals that, India was conversant with many of the modern judicial system.

173 Supra note 146 at p. 83.
The success of any dispute redressal system depends on the two basic elements, firstly a well-regulated system of courts following a simple and orderly procedure and secondly a definite, easily ascertainable and uniform body of law. Thus these two basic elements certainly learned the basis of ancient Indian judicial system.\textsuperscript{174}

A ruler is regarded in Kautilya's system as the fountain of justice and is the highest and final authority in all judicial transaction. However, the actual trial of judicial matters lies with the panel of three judges called Dharmasthas, which decides the legal cases at place at places called Dharmasthalas (courts). The courts for the administration of justice are established between two villages, in a group of ten villages, in the township of four hundred villages, in the middle of eight hundred villages, in the cities and at frontier posts. The four stages of trial law suits are: discovering the truth, examining the evidence placed by the witnesses, investigations and applying the law. Judges shall settle legal dispute by being impartial, trust worthy and free from pressure.\textsuperscript{175}

If Dharmastha Judges in civil courts and Pradestry Magistrates in criminal courts fails to administer justice properly or adopt wrong or foul proceedings so as to produce wrong judgments, they are punished with fines or corporal punishments or even removal from office. Kautilya does not make even a ruler immune from violation of justice and it adopts a novel way of punishing him by laying down that a ruler must impose or himself a fine thirty times of unjust amount.\textsuperscript{176}

2.3.1.5.2 Kautilya Theory of Crime

Kautilya holds the view and suggests that intention and gross negligence are the two main elements that constitute a crime. When intention is invoked, the crime is grave and so the punishment must be heavy. When the intention is absent and the fact has been done simply through gross negligence, the gravity of the crime is reduced, but when both these elements-intention and gross negligence- are absent, the wrongful act is no crime at all and hence no punishment to be given for it. Kautilya lays down that if a person killed another intentionally, he was to be put to death with

\textsuperscript{172} M.P. Jain, 'Outline of Indian Legal History', 2005, p. 3.
\textsuperscript{175} V.K. Gupta, 'Kautilyan Jurisprudence', 1987, p. 22.
\textsuperscript{176} Ibid.
torture. But if the death of a person resulted from the negligent behavior on the part of a man, the offender was not to be put to death, but was to be given some other minor punishment.\footnote{K.M. Aggarwal, 'Kautilya on Crime and Punishment', 1990, pp. 2-3.}

2.3.1.5.3 Kautilya Theory of Punishment

The necessity of a ruler has been forcibly emphasized in almost all the works on ancient Indian polity. Regarding the indispensability, Kautilya says that if there were no Kings, the stranger would smaller the weak. It was he who caused the administration to be carried on by punishing the wicked and rewarding the virtuous. But King's power was reinforced and made effective with the help of 'danda'. Kautilya clearly lays down that the King prevailed only with the help of 'danda'. Practically the real ruler was the danda, the King being merely an instrument. Kane rightly observed, "These eulogies of danda presuppose the theory that people obey the law and dictates of the Sastras through the fear of punishment."\footnote{Id., pp. 10-11.}

But this danda was not to be administered arbitrarily. Before inflating it the King had to consider many aspects of a thing instead of arriving hasty conclusions.

2.3.1.5.4 Modes of Punishment

Punishment prescribed by Kautilya May be put under three heads- verbal, pecuniary and corporal. Verbal punishment started with gentle admonition and ended with several reproof; pecuniary punishment began with define of one-sixteenth of a pana and ended with the confiscation of the whole property of the offender; corporal punishment began with whipping and ended with the award of capital punishment, simple or with torture.

As regards corporal punishment, death sentence was its extreme type. It was carried out in various ways.\footnote{Id., pp. 29-31.}

(i) Simple death

The simple death sentence was to be awarded when officers, subordinates and servant defalcated government money; when in-charge of royal treasury tried
to rob the treasury; when a guard misbehaved with a woman of respectable family when a person counterfeited documents and seal of the King; when a prisoner violated an Arya woman prisoner; when a person helped a prisoner to escape from the lock-up; when a person sold human flesh; when a person stole temple property; when a person kill another with a weapon; when a person misbehaved with woman whose husband was away on a journey etc. There was the crime for simple death punishment;

(ii) Burning alive

This punishment was to be awarded to a courtesan who killed her customer; to a person who coveted the Kingdom; who attacked the King’s palace;

(iii) Cooking the criminal in a big jar

This punishment was given to a person who had relations with the Kings’ wife;

(iv) Drowning in a water

This punishment was given to a person who broke a dam holding water, or gave poison to another and to a woman who slow a man;

(v) Tearing by bullocks

This punishment was given to a woman who killed her husband, or set a house on fire or gave poison or broke into a house.

(vi) Impaling on stake

This punishment was given to a person who beat a man or woman with force, who rushed upon them who held then down;

(vii) Slaying with arrows

This punishment was given to a man other than a soldier, who stole weapons and arms from the royal armory;

(viii) Causing to be bit by a cobra
These punishments were given to a person who did not believe in miraculous powers of Gods;

(ix) By Administering poison

This punishment gives to a person who did not believe in miraculous powers of Gods and Goddesses.

There were some persons, who even though guilty of serious offences, were exempted from infliction of tortures. Kautilya lays down one who was minor, old, sick, intoxicated, insane, hungry, thirsty, fatigued, feeble or overfeed, pregnant or a acumen not having passed one month after delivery were under no circumstances to be put to torture.

Next to the capital punishment cases the punishment of the amputation. In this type of punishment the offending limb of the offender was cut-off it was carried on in various ways:

(a) Cutting of the thumb and the middle finger- in case a woman did not carry out the work after receiving her wages; a cut purse or a pick-pocket committed crime for the first time; and in case a man injured the tongue or the nose of another man;

(b) Cutting off of the thumb and the index-finger- in case a man violated a mature maiden;

(c) Cutting off of all the fingers- in case an artisan manufactured substandard articles secretly;

(d) Cutting off of one hand- in case a trial, a cut purse and a pick-pocket committed the offence for the third time;

(e) Cutting off of one foot- in case a person stole a cart, a boat or a small animal;

(f) Cutting off of one hand and one foot- in case a person mounted the royal carriage or animal;

(g) Cutting off of one hand and both the feet- in cases a man set free a thief or an adulter;

\[180\] Id., pp 33-34.
Cutting off of both the feet- in case a person stole a big animal;

Cutting off of the sinews of the feet- in case a man entered in to a fort without permission;

Cutting off of the generating organ- in case a man injured the generating organ of another man;

Cutting off of the tip of nose- in case a man kills petty animals;

Cutting off of the tongue- in case a man reviled his mother, father, son, brother, preceptor or ascetic;

Rooting out of the tongue- in case a man spread evil news about the King or licked anything in a Brahmin's kitchen;

Cutting off of ears and nose- in case a man helped or aided a thief or an adulterer or an adulterous;

Cutting off of the corresponding- in case a Sudra struck a Brahmana;

Blinding off of both eyes by applying poisonous cellyrium - in case a Shudra called himself Brahmana, a person concealed temple property.

Punishment is not an end in itself but only a means to an end- the maintenance of society and the protection of all the creatures. Punishment prevents the commission of crime. If a culprit was imprisoned, amputated or was put to death, he was prevented from committing crime. Kautilya’s Arthashastra is the great Indian classic on public administration. It is very valuable as an indigenous text and reference to the administration of these times. It can be called something of a marvel for it was for ahead of its times.

The ancient law relating to contempt can be known through the study of ancient literature. The King was deemed to be fountain of Justice. In ancient times, courts or assemblies (sabhas) were protected from being scandalized. Kautilya lays down thus:¹⁸¹

Defamation of one’s own nation or village shall be punished with the finest ornament that of one’s own caste or assembly with the middle most; and that

¹⁸¹ Supra note 5, pp. 82-83.
of Gods or temple with the highest imperilment. The King and the King’s
council stood on a higher footing than the caster, village or assembly. Thus,
“any person who insults the King, betrays the King’s council, makes evil
attempts against the King…. shall have his tongue cut off.

Though it was an offence to scandalize or defame the King or King’s council
or the other courts or assemblies but there was not any special procedure for the fusel
of these offences. The law insisted upon the judges also for maintaining decorum and
adherence to the code of judicial conduct requisite for keeping administration of
justice unsullied. From the study of ancient literature it appears that in ancient times
nobody dare to scandalize or obstruct the judicial proceedings of King or King
council, because in ancient period there was horrible and inhuman punishment for
criminal persons. In short, it can be said that any violation of the sanctity of the
administration of justice was visited with a heavy penalty or highest punishment
because the authority of the King decision is final. The decision given by the courts
were the decisions of the King in law. The authority of the King travelled down to the
superior courts. No one could question the authority of the court. No one could
scandalize the courts and prejudice or obstruct the course of justice. In this way, the
decision given by the courts were the decisions of the King in law. If the King’s
authority could not be questioned, then authority of the court could not be questioned.
If the King could not be abused or scandalized, so also the courts could not be abused
or scandalized. Just as the proceedings before the King could not be prejudiced,
similarly proceeding before the court could not be obstructed or prejudiced.

2.3.2 Medieval Period (1200 to 1707 A.D.)

2.3.2.1 Muslim Period

Muslim period marks the beginning of a new era in the legal history of India.
Arabs were the first Muslims who came to India. They came in the seventh century
and settled down in the Malabor coast and in Sind but never penetrated further. This
was most unfortunate, for, if they had done so as they did in Europe, Indian culture
and civilization would not have stagnated.182

182 K.M. Panikar, 'India on the eve of Muslim Contact: A Survey of Indian History,' 1974, Ch. 12.
Quoted from infra note 183 at p. 13.
The study of history of Indian legal system reveals that the recognized Hindu period changed with the Muslims invasion. In Medieval period, the society in India was broadly divided into two parts Hindu and Muslims. The Muslim invasion was made by Mohammud-Bin-Quasim in 712 A.D. He came to India as a invader and returned thereafter. Qutubuddin Aibek made the real penetration into India. He is reality established himself firmly in India after imaging series of wars. The Muslims thereafter continued to rule over India until 1857 when the Britishers dethroned the last Mughal King Bahadhadur Shah Zafar. The judicial structure, which existed in India during Muslim rule, is studied under the ‘Sultanate Period’ from 1206 A.D. lasted up to 1750 A.D.\textsuperscript{183}

2.3.2.1.1 The Sultanate of Delhi: Civil Administration

In order to understand the set-up of the Judicial Machinery during the period covered by the Sultans of Delhi, i.e. from 1206 to 1526, it is necessary to have a brief account of the prevailing administrative units.

2.3.2.1.1 Constitution of Court

In Medieval India the sultans, being head of the state, was the supreme authority to administer justice in his kingdoms. The justice was administered in the name of the sultan in three capacities. Firstly, as the arbitrator in the disputes of his subjects, is dispensed justice through the Diwan-e-Qaza. Secondly as the head of Bureaucracy, he dispensed justice through the Diwan-e-Muzalim. Finally as the Commander-in-Chief of forces, through its military commander who constituted Diwan-e-Siyasat, tried the rebels and those changed with high treasons. As in case of ancient India during the Muslim Rule also, all more not treated as equals in the eyes of law and the Hindus as well as poor were discriminated against the Muslims and the rich respectively.\textsuperscript{184}

The judicial system under the sultan was organized on the basis of administrative diversions of the Kingdom. A systematic classification and gradation

\textsuperscript{183} M.B. Ahmad, 'The Administration of Justice in Medieval India,' 1941, p. 98.
\textsuperscript{184} H. Beveridge, 'History of India', Vol. 1, p. 102.
of the courts existed at the seat of the capital, in provinces, Districts, Parganahs and villages. Following are the classification of courts.\textsuperscript{185}

(i) Central capital

Six courts were established at the capital of the Sultanate, may be stated as follows:

The King's court, Diwan-e-Muzalim, Diwan-e-Risalat, Sadre Jehan's Court, Chief Justice's court and Diwan-e-Siyasat.

(ii) Provinces

In each province at the provincial Headquarters five courts were established, namely, Adalat Nazim Subah, Adalat Qazi-e-Subah, Governor's Bench (Nazim-e-Subah's Bench), Diwan-e-Subah and Sadre Subah.

(iii) Districts

In each Districts (sarkar), at the district headquarter, six courts were established, namely, Qazi, Dadbaks or Mir Adils, Faujdars, Sadre, Amils, Kotwals.

(iv) Pargana

At each Pargana headquarters two courts were establish, namely, Quazi-e-Pargana and Kotwal.

(iv) Villages

A Pargana was divided into a group of villages. For each group of villages there was a village assembly or Panchayat, a body of four leading men to look after the executive and judicial officers. The Panchayats decide civil and criminal cases of a purely local character.\textsuperscript{186}

2.3.2.1.1.2 Appointment of Judges and Judicial Standard

During the Sultans, Judges were impartially appointed by the Sultan; Judges were men of great ability and were highly respected on society. Ibn Batuta has stated

\textsuperscript{185} B. M. Gandhi, V.D. Kulshreshtha's, 'Landmarks in Indian legal and Constitutional History', 2006, pp. 18-20.

that the Quazis were occasionally teachers of law who had the ability to give correct judgment. Persons of doubtful character were removed their judicial officers. Even the Chief Justice was liable to be dismissed to the post of a Qazi when the sultan found him incompetent and corrupt.187

As laid down in Fatma-Alamigiri, the courts in India were to be guided by the following authorities while deciding the disputes. Firstly the scared book of Muslims the Quran; it collected the revolutions of Mohammed in a definite written form. The Mohammedens were and are still governed by this sacred book. Secondly, the Sunna, which is the words, deeds, and silent approval of prophet during his lifetime, which were reduced to writing, and came to be termed as Sunna or traditions. These traditions gradually laid the foundations of Islam.188 Thirdly, the concurrent opinion of the Prophet's companions called the Ijima, literal meaning of it is "agreeing upon." Those disputed point of law which was rescued by the agreement of the persons who have right, in the nature of knowledge, to form a judgment of their own after the death of prophet thus came to be regarded as a valid source of law. Finally, judgments according to the individual discretion of the Judges based on the doctrine of Justice, Equity and Good conscience guided the function of resolution of disputes.189

2.3.2.1.2 Judicial Reforms of Sher Shah

In 1540 Sher Shah laid the foundations of Sur Dynasty in India after defeating the Mugal Emperor Humayun, son of Babar. During the reign of Sur Dynasty from 1540 to 1555, when Sher Shah later on Islam shah ruled over India, the Mugal Empire remained in abeyance. Sultan Sher Shah was famous not only for his heroic deeds in the battlefield but also for his administrative and judicial abilities. It was said by Sultan Sher Shah that "Stability of Government depended on Justice and that it could be his greatest care not to violate it either by oppressing the weak or permitting the strong to infringe the laws with impurity."190

2.3.2.1.3 The Mugal Period: Judicial System

In India Mugal period begins with the victory of Babur in 1526 over the last Lodi Sultan of Delhi. His son, Humayun, though he lost his Kingdom to Sher Shah in
1540, regained it after defeating the descendants of Sher Shah in July, 1555. The Mugal Emperor continued from 1555-1750.

2.3.2.1.3.1 Administrative Divisions

For the purpose of civil administration the whole empire was divided into the imperial capital, provinces (subahs), Districts (Sarkars) Parganahs and villages. Just like the sultan of Delhi, the Mugal Emperor was also absolute monarchs. The Mugal Emperor was the Supreme authority and in him the entire executive, legislative, judicial and military power resided.

2.3.2.1.3.2 The Administration of Justice: Constitution of Courts

During the Mugal Period, the Emperor was considered the “fountains of Justice.” The Emperor created a separate department of justice (Mahukima-e-Adalat) to regulate and see that justice was administered properly. On the basis of the administrative divisions at the official headquarters in each province, District, parganah and village, separate courts were established to decide civil, criminal and revenue cases. At Delhi, the Imperial Capital of India, highest courts of the Empire empowered with original and appellate jurisdictions were established. A systematic gradation of courts, with well defined powers of the presiding judges, existed all over the empire. Following are the different kinds of court and punishment in Mugal period:

(i) The Imperial Capital: At Delhi, which was the capital (Dural Sultanaet) of the Mugal Emperors in India, three important courts were established. The Emperor’s court presided over the Emperor, was the highest court of the empire. The court had jurisdiction to hear original civil and criminal cases. In order to hear appeals, the Emperor presided over a Bench consisting of the Chief Justice and Qazis of the Chief Justice’s court. Where the emperor considers it necessary to obtain authoritative interpretation of law on a particular point, the same was referred to the Bench of Chief Justice’s court for opinion. The Chief Court of the Empire was the second important court at Delhi. It was presided over by the Chief Justice (Qazi-ul-Quzat). The court had the power to try original civil and criminal cases, to hear appeals from the

\[^{191}\text{Supra note 459. pp. 143-166.}\]
provincial courts. It was also required to supervise the working of the provincial courts. The Chief Revenue court was the third important court established at Delhi. It was the highest court of appeal to decide revenue cases. The court was presided over by the Diwan-e-Ala. Apart from the above stated three important courts, there were also two lower courts at Delhi to decide local cases. In each court, the four officers attached were Daroga-e-Adalat, a Mufti, a Mohtasib and Mir Adl.

(ii) Provinces: In each province (Subah) there were three courts namely, the Governor own court and the Bench, the Chief Appellate Court, the Chief Revenue Court.

(iii) Districts (Sarkars): In each District (Sarkar) there were four courts, namely, the Chief, Civil and Criminal court of the district, Faujdari Adalat, Kotwali, and Amalguzari Kacheri.

(iv) Parganah: In each Paragraph there were three courts namely, Adalat-e-Parganah, Kotwali and Kachehri.

(v) Village: The village was the smallest administrative unit. Generally, the panchayat meeting was held in public places. It was presided over by five Panchs elected by the villagers. Sarpanch was generally president of the Panchayat. No appeal was allowed from the decision of a panchayat. Village Panchayats were mostly governed by their customary law.

Litigants were represented before the courts by professional legal experts. They were popularly known as vakils. Thus the legal profession flourished during the mediaeval period. Moreland\textsuperscript{192} appears to be misinformed, where he expresses the view that the legal profession did not exist during the Muslim period in India. On the basis of other contemporary material available in India it is clear that the legal profession existed at any rate in the Mughal period.

2.3.2.1.3.3 Judicial Procedure

A systematic judicial procedure was followed by the courts during the Muslim period. It was mainly regulated by two Muslim codes, namely, Figh-e-Firoz shahi and

\textsuperscript{192} W.H. Moreland, ‘India at the death of Akbar,’ p. 35. Quoted from supra note 185, p.24.
Fatwa-i-Alamgiri. In civil cases the plaintiff or his duly authorized agent was required to file a plaint for his claim before a court of law. The defendant, as stated in the plaint, was called upon by the court to accept or levy the claim. Where the claim was deemed by the defendant, the court framed the issues and the plaintiff was required to produce evidence supporting his claim. The defendant was also given an opportunity to prove his case with the assistance of his witnesses. After all the evidence, the presiding authority delivered judgment in open court. In the criminal cases, a complaint was presented before the court either personally or through representative. To every criminal court was attached a public prosecutor. He instituted prosecution before the court against the accused. Ordinarily, the judgment was given in open court. In exceptional, where it was against the interest of the state, the judgment was not pronounced in open court.

2.3.2.1.3.4 Crimes and Punishment

During the Muslim period Islamic Law or Shara was followed by all the sultans and Mughal Emperors. The Shara is based on the principles enunciated by the Quran. Under the Muslim Criminal Law, any violation of Public rights was on offence against the state and state belongs to God; therefore, it was the primary duty of any Muslim ruler to punish the criminals and maintain law and order.

In the Ancient Hindu Law, Caste played a very important part and the Brahmins were not liable to any corporal or capital punishment. But no such distinction of caste or position was ever to be seen in Muslim Criminal Jurisprudence. Offences like drunkenness and adultery were regarded as offences against the God and offences like murder and robbery were regarded as offences against man. Four famous punishments, as recognized by Muslim Law, were- Hadd, Tazir, Kisa, and Qisas are below stated:

(i) Hadd: Hadd literally means boundary or limit. In this case there were scheduled punishments for scheduled offences and the Judges could not modify or alter them in any way. Thus instances of Hadd may be seen in the punishments of stoning or scourging for Zina or Elicit Intercourse; amputation

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193 Supra note 185, p.25.
194 Id. at p. 26.
195 Supra note 146, pp. 228-230.
of hands for theft and scourging for false accusation of adultery against a woman.

(ii) Kisa: Kisa means retaliation. According to this principle, willful killings, and some kinds of grievous hurts and maiming entitled the injured person or his relations to inflict the same injury on the wrong doer.

(iii) Tazir: Tazir was another form of punishment which meant prohibition and it was applicable to all crimes which were not classified under ‘Hadd’. It under ‘Tazir’, the courts exercised their discretion in awarding suitable punishment to the criminals. The courts were free to invent new methods of punishing the criminal e.g. cutting off the tongue, impalement, etc.¹⁹⁶

(iv) Qisas of blood: Fine was imposed in cases relating to homicide. It was a sort of blood money paid by the man who killed another man if the murderer was convicted but not sentenced to death for his offence. Qisas may be compared with the wergild of the contemporary English period. The state was authorized to punish the criminals for grave offences although the injured party might “waive his private claim to compensation or redress.”¹⁹⁷

The Muslim laws considered “Treason” (Ghadr) as a crime against God and religion and, therefore, against the state persons held responsible for treason by the court were mostly punished with death.

Contempt of the court was considered a serious offence and was severely punished in the Muslim Period. There are references of setting-up of the judicial system, qualification and conduct of the judges, offences against King and state, but it appears that there was no practice of scandalizing the judges or the Judiciary. The Islamic law of crimes was crude and archaic, the law of punishment was horrible and inhuman and the law of evidence was artificial and technical. Due to fear of horrible and rigorous punishments, it appears that there were no instances of scandalizing the Judiciary.

¹⁹⁶ Supra note 185, at p. 27.
¹⁹⁷ Dr. M.U.S. Jung, ‘Administration of Justice of Muslim Law’, p. 102. Quoted from supra note 185, p. 27.
2.3.3 British Period (1757-1947 A.D.)

The Study of the scheme of contempt law in indigenous systems, fascinating though it may be, is not of much use for our present purpose. On the one hand, we do not have a complete picture of the position in these systems to facilitate comparison. On the other hand, the present system has its origin elsewhere, i.e. in English law.198

2.3.3.1 Origin of the Law of Contempt in India

The English law of contempt which itself had a haphazard growth came to be introduced in our country in a yet more haphazard manner. Power to punish for contempt being an attribute of courts of record, the creation of different courts of record in India necessarily meant the introduction of English law of contempt in so roe measure. This is how English law of contempt came to be introduced in India first.199

When the East India Company came to India and started administration of justice they introduced the English law of contempt of courts in the country. In 1687, Company issued a charter. Thereby, in 1688, the company created a corporation at Madras comprising of a Mayor, twelve aldermen and sixty or more burgesses to administer the territory. The Mayor and the aldermen constituted a court named as Mayor’s court. The court of admiralty was established under the crown’s charter of 1683 which was empowered to hear apples from Mayor’s court of Madras. All these Court’s were ‘Courts of record’ and as such they were empowered to punish guilty of the contempt of court. Through the charter of 1726, a Mayor’s court in each of three presidency towns was established. When the Mayor’s courts were reconstituted under the charter of 1753, their status as court of record was maintained and they had power to punish persons for contempt.200

The implication of Raja Nand Kumar on the initiation of Warren Hastings was, in fact to penalize Raja Nand Kumar for the utterances made against the judicial officer and the executive together. Raja Nand Kumar, an influential man in Bengal, encouraged by the council Majority, brought some charges of corruption and bribery against Warren Hastings before the council. Warran Hastings was very much annoyed

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199 Supra note 198, Para 3.
200 Supra note 5, pp. 85-86.
at this; he even left the council meetings when these charges were being heard. A few days later, Mohan Prasad filed certain charges of forgery against Nand Kumar in the Supreme Court, Nand Kumar tried by the court, and was found guilty of having forged contain documents and was sentenced to death under an Act enacted by the British Parliament in 1728. In Indian History, perhaps, it is the first case in which the judiciary had gone up to the extent of taking the life of a citizen for the sake of pleasing the executive. There was so mutual understanding between the Judiciary and the Executive that no one could dare to raise his voices against these institutions.\footnote{Id., pp. 86, 87, 89.}

In pursuance of the Regulating Act, 1773 the Mayor's Court at Calcutta was succeeded by the Supreme Court established under a charter granted in 1774. The Mayor's court at Bombay and Madras were Superseded by the Recorder's Court at Madras. It was abolished by the Government of India act, 1800 and the Supreme Court was established in its place by the Charter of 1801. A Supreme Court was established in the place of Recorder's court at Bombay by a charter granted under the statute of 1823. The Recorder's court and Supreme Court had the same powers for punishing for contempt as the Superior Courts of England. The supreme Courts were in turn succeeded by the High Court under the High Court's Act of 1861. The High Court of Calcutta was a court of record in all its jurisdiction and therefore possessed power to commit for contempt. In 1886 the High Court of Allahabad was established under the Act of 1861 and was constituted a court of record.\footnote{Supra note 28 at p. 28.}

In the cases of some of the old provinces of India there were no High Courts but only Chief Courts or Courts of Judicial Commissioners, functioning as the highest courts in those provinces. For a long time it was not clear whether the chief courts and courts of Judicial Commissioners had the same powers in relation to contempt as the High Courts or not. It was also equally unsettled whether the jurisdiction of the High Courts in contempt extended also to contempt of courts subordinate to them. At the same time there was no general provision for the punishment to contempt of these courts.\footnote{Supra note 5, pp. 89-90.} The Indian Penal code which was passed in 1861 made only certain acts which would be punishable as contempt as specific offence. The absence of clear-cut provision in regard to the contempt jurisdiction of the Chief Courts and courts of Judicial commissioners, the uncertainty about the powers...
of High Courts to punish for contempt of courts subordinate to them, the limited character of the statutory provisions relating to punishments of contempt of Subordinate court were brought to the forefront in an accentuated form during the turn of the last century and the bargaining of the present country which witnessed revolutionary activities in the political and other fields. A particularly bad instance in which a Calcutta newspaper made unwarranted and prejudicial comments on the certain proceedings pending in the court of a Magistrate at Khulana was brought to the notice of the Provincial Government of Assam and Bengal I 1907-1908. Expert legal opinion taken in that connection indicated that the power of punishment by summary process for contempt of courts was confine to the three High Courts of Calcutta, Madras and Bombay and was only exercisable by those courts in respect of offences committed within that portion of their territorial jurisdiction where the common law of England was in force.204

2.3.3.2 Developments of Law of Contempt of Courts in India

In 1908-1909, Lord Minto’s Government consulted all the Provincial Governments as to whether legislation should be undertaken:205

(i) To enable High Courts other than chartered High Courts to protect themselves in respect of contempts of courts; and

(ii) To empower all High Courts to give a reasonable measure of protection of courts subordinate to them in respect of contempt and in proper comments on pending cases.

On the whole the weight of opinion received was in favour of legislation on the lines indicated. But by the time this opinion came to be considered in 1911, the Press Act of 1910 was already on the Statute Book and the Government felt that it was neither necessary nor opportune to proceed with the contemplated contempt legislation. However, to deal effectively with the situation, if it became acute, a Bill was prepared in 1911, penalizing contempt of authority of courts of Justice or of persons empowered by Law to record evidence on both and the publication of false or inaccurate report of pending Judicial proceedings or of comments torching persons concerned in them calculated to cause prejudice in the public mind in regard to such

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204 Supra note 198, Para 3(3).
205 Id. at para 4.
proceedings. This Bill, as revised in the light of the comments received, adopted the simple device of making certain amendments in the Indian Penal Code and certain consequential amendments in the code of criminal procedure. It sought to produce two new sections after sections 228 of the Indian penal Code. The first of these sections was intended to render punishable the bringing into contempt of:

(a) Any court of justice; or

(b) Any person empowered by law to record or directs the recording of evidence on oath, when exercising such powers.

By an explanation to this section, it was sought to be made clear that hoarest criticism, i.e. comments made in good faith which are in substance true would not ancient to contempt. The second section was intended to penalize the publication of false or misleading reports of pending judicial proceedings calculated to cause prejudice in the public mind. The Bill was introduced in the legislative council on 18th March, 1914. But the consideration of the Bill was postponed on account of the outbreak of the First World War. It was taken up again after the end of the war in 1921 and the then Law Member, Sir Tej Bahadur Sapru, reiterated an opinion given by him earlier that:

"an amendment in the Indian Penal code which would give power to subordinate courts to punish contempt amounting to what is known as 'scandalizing the court' is undesirable.... for the reason that Subordinate Courts are not....by their legal framing a traditional qualified to exercise such extraordinary jurisdiction." He added that-

"in the event of Government finding it impossible to drop the measure, the power to initiate proceedings of inferior courts should be rested in the High Court’s alone and that such proceedings might be stacked upon reference by an inferior court or on an application made by the local government or by any party to a suit or case regarding which objectionable comments are published by a newspaper".

206 Indian Penal Code 1860, Sec. 228.
207 Supra note 198, Ch. II, Para 4.
208 Ibid.
209 Ibid.
2.3.3.2.1 Contempt of Courts Act, 1926

After further consideration, government finally abandoned the 1914 Bill and decided in favour of introducing legislation on the lines of Tej Bahadur Sapru’s suggestions. Such, in short, was the genesis of the bill, which after important modification came to be enacted as the contempt of courts Act, 1926. The Bill as originally drafted perforated to define “Contempt of Court” and while assuming a power in the High Court (including chief courts and the courts of judicial commissioners) to punish for contempt of itself, sought to confer a like power on the High Court in respect of contempt of courts subordinate to it. It also sought to define the extent of the punishment which may be awarded in contempt cases. The Bill also included provisions relating to taking cognizance of offences by way of contempt and the procedure to be followed in respect of such offences.

The Bill was referred to a select committee which re-drafted it, omitting or restricting the provisions of the Bill as follows: the definition of ‘contempt of court’ was omitted on the ground that the case law on the subject would form an adequate guide; the provisions regulating the taking cognizance of offences and the powers of courts in respect thereto were omitted on the ground that the procedure then followed by the High Courts in respect of such offences was adequate, and the procedure of High Courts in respect of contempts of themselves was made applicable to offences committed against subordinate courts; Courts of Judicial Commissioners were excluded on the ground that such courts should not have power to punish for contempt; the provisions empowering the chief courts to punish for contempt were limited to contempt of themselves; simple imprisonment was prescribed and the amount of fine was limited to Rs. 2000; cases of contempt against subordinate courts provided for under the ordinary law were excluded from the purview of High Courts; provision was added recognizing the practice in relation to acceptance of apologies.

2.3.3.2.1.1 Working of the Contempt of Courts Act, 1926

Looking in retrospect, the 1926 Act may well be regarded as a step in the right direction. The greatest serviced of the Act is that it imposed specific limits as to the punishment which may be awarded in contempt cases. The intention, no doubt, was

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210 Supra note 198, Ch. II, Para 5(1).
211 Id. at Para 5(2).
to make these limits applicable irrespective of whether the contempt was that of the High Court itself or of a court subordinate to it. But in view of the interpretation placed upon the Act that the power of punishment provided in Section 3 related only to contempt of subordinate courts, the Act was amended in 1937 to make it clear that the limits of punishment provided in the Act related not only to contempt of subordinate courts but also to all cases.\textsuperscript{212}

2.3.3.2.1.2 Weaknesses of Contempt of Courts Act, 1926

There were some weaknesses also in the Act of 1926. The act did not contain any provision with regard to contempt of courts subordinate to courts, other than High Courts, i.e. the courts subordinate to chief courts and judicial commissioner’s courts. It was silent with regard to the powers of contempt of courts of Judicial Commissioners. If subordinate courts or Superior Courts in one area required protection, it was obvious that the courts in other areas also require like protection. The act also did not deal with the extra-territorial jurisdiction of High Courts in matters of contempt.\textsuperscript{213} That is why in the case of B.G. Horiman,\textsuperscript{214} it was held that the High Court of State had no power to arrest for contempt of itself a person outside its jurisdiction. So this Act was not successful in its objective.

In the matter of an advocate of Allahabad,\textsuperscript{215} which is known as leader’s case, comments to the effect that undeserving lawyers were being elevated to the Bench, was considered contempt despite Sir Tej Bahadur’s argument that no particular judge was being scandalized and no specific litigation was being affected. In a remarkable case of Debi Prasad Sharma,\textsuperscript{216} the Hindustan Times was found guilty of contempt because it carried a newspaper report of a circular sent by the Chief Justice to the Judges of the lower judiciary asking them to voluntary assist in raising funds for the war effort. The newspaper went on to suggest that the reformatory effort might well be spurious in that the Chief Justice “could not remove from the mind of a person, particularly a litigant that the request is being made by the one whom it may not be safe to displease”. This was by no means a scurrilous comment. In fact, it could even be said that it was quite an acute perception of how people might have felt about the

\textsuperscript{212}Id. at Para 6(1).
\textsuperscript{213}Supra note 5 at p. 96.
\textsuperscript{214}I.L.R. 1944 Bom. 333.
\textsuperscript{215}AIR 1955 All. 1.
\textsuperscript{216}AIR 1943 PC 202.
Chief Justice's find raising efforts. Heavy fines were imposed. But the conviction was set aside by the Privy Council which observed that it was legitimate to make comments about such activities of judges and further cancelled restraint on the part of the judges in reaching to critical comments about them. By way of these decisions it became very clear that the High Courts of India often lost sight of the differences between a fair and justified criticism of the Judiciary and an unfair and unwarranted attack or interference with the due administration of Justice.\[^{217}\]

Notwithstanding the fact that the Act of 1926 only touched the firings of the subject, the Press Law Inquiry committee, which was mainly concerned with the marking of the Press laws, inclined to the view in its report presented in 1948 that the law of contempt was not used to punish newspaper unjustly, and therefore, felt that no case had been made out for a change in the law.\[^{218}\]

Incidentally, one of the defects of the contempt of courts Act, 1926, was removed in 1950 by the passing of the Judicial Commissioner's courts (Declaration as High Courts) Act, 1950. The constitution did not make any provision with regard to contempt powers of courts of Judicial Commissioners. By reason of this act, read with Article 241(2) of the Constitution, the provision of Chapter V of Part VI of the Constitution became applicable, subject to certain exceptions and modifications (not relevant for the present purpose) in relation courts of judicial commissioners. Thus the courts of Judicial Commissioners became courts of record with the same powers as the High Courts in relation to contempt matters.\[^{219}\]

### 2.3.4 Post Independence Period

India got independence from British rule on 15 August, 1947.

#### 2.3.4.1 The Contempt of Courts Act, 1952

It is against this background of the working of the 1926 Act, the contempt of courts Act, 1952 which repealed and replace the 1926 Act. The contempt of courts Act, 1952, while largely re-enacting the provisions contained in the 1926 Act, made two important changes. Firstly by defining the expression 'High Court' to include

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\[^{217}\] Supra note 5 at p. 97.
\[^{218}\] Supra note 198, Ch. II. Para 6(3).
\[^{219}\] Id. at Para 6(4).
courts of Judicial Commissioners, the Act made it clear that these courts have power to punish contempt of subordinate courts also. Secondly, the act made it clear that the High Court (including the courts of Judicial Commissioners) would have jurisdiction to enquire into and try contempt of itself or of any court Subordinate to it, irrespective of whether the person alleged to be guilty of the contempt was within or outside such limits.\footnote{Supra note 5 at p. 101.}

2.3.4.1.1 Need for Reform of Contempt of Courts Act, 1952

The 1952 Act is sound as far as it goes while its provision may be retained, its scope requires to be widened considerably. The policy of the legislature has so far been to leave the foundation of the law of contempt to the courts. The only safeguards provided in the law are that the power to punish for contempt (subject to the limited exception as to contempt in the face of the court for which provision is made in the Indian Penal Code) is vested in the Superior Courts and limits are set to the punishment which may be awarded by the courts. Before the constitution came into force there was no statutory provision for appeals from decision of High Courts in contempt cases though the Privy Council after some initial reluctance finally asserted its Jurisdiction to hear appeals in contempt cases. The High Courts and the Supreme Court have interpreted the provision as to appeals contained in the constitution as sufficiently wide to permit appeals in such cases from High Courts to the Supreme Court.\footnote{Supra note 198, Ch. 11, Para 8(1).}

The jurisdiction to punish for contempt touches upon two important fundamental rights of the citizen which are of vital concern to him, viz., the right to personal liberty and freedom of expression rights which are of vital importance in any democratic system. The High Court’s as courts of record assert that the power to punish for contempt is inherent in them and consequently they are the final authorities to define what constitutes contempt. In the absence of an appeal as a matter of course the necessary corrective is not always available in respect of such decisions. Very often the contemnor escapes the sentence by tendering an object apology and such cases do not in any way kind to clarify the law. For it is quite conceivable that a judge who hears a contempt case may hold that there is no contempt in which a defence of unqualified apology is meaningless as that would amount to an admission.
of guilt. It may be mentioned in passing that it is not unusual for an alleged contemnor to tender an unqualified apology because if he tried to submit a qualified apology or an apology in the alternative even when justified by the circumstances of the case, more often than not he may have to pay for it heavily. Further, a person in contempt cannot be heard in prosecution of his own appeal until he purges his contempt. The few cases that have gone up in appeal either to the Privy Council in the olden days or to the Supreme Court under our constitution reveal that the High Court may not always be free from errors in this branch of the law.\textsuperscript{222}

The power to punish for contempt has often been described as arbitrary, unlimited and uncontrolled. In the circumstances would it be sufficient or proper to leave the whole matter to be regulated by the courts themselves as hitherto fore on the basis that, as courts have invariably stated that this power should be used very sparingly and only in extreme cases and always with reference to the interests of the administration of justice, it is not necessary to fetter their discretion in any way?\textsuperscript{223}

The problem has been receiving the attention of the legislature both in India and elsewhere also. The Press Commission,\textsuperscript{224} reporting in 1954, had occasion to consider this subject once again, and that body had before it several representation to the effect that the law of contempt, particularly in its application to newspapers, was much too vague and required to be crystallized; that the law could be stretched to any limits making it impossible for an honest writer to comment on judicial procedure or even on the merits of judicial decisions; that contempt should be precisely and rigorously defined and so on. The commission, however, did not recommended any change either in the procedure or practice of the contempt of court jurisdiction exercised by the High Courts. In this connection it may be pertinent to observe that a body had been appointed to inquire generally into the state of the Press in India and its present and future lines of development, and the law of contempt came to be examined by it only as an incidental matter. And in coming to that conclusion the commission was largely influenced by the observations made by courts from time to time that this power should be sparingly used and with great caution.\textsuperscript{225}

\textsuperscript{222} Id. at Para 8(2).
\textsuperscript{223} Id. at Para 8(4).
\textsuperscript{225} Supra note 198, Para 8(5).
On the other hand, in England, a committee appointed by the International Commission of Jurists (British Section) headed by Lord Shaw cross formed that the law of contempt was unsatisfactory in quite a few important respects and the recommendations of that committee, made in 1959, have already been made the basis for the Administration of Justice Act, 1960. One may recall in this connection a Resolution passed in early as in 1906 by the House of Commons that the Jurisdiction of Judges in dealing with contempt of court is practically arbitrary and implemented and calls for the action of Parliament with a view to its definition and limitation.

2.3.4.2 The Contempt of Courts Act, 1971

On the 1st April, 1960, Shri Bibhuti Bhushan Das Gupta introduced in the Lok Sabha a Bill to consolidate and amend the law relating to contempt of courts. Government appears to have felt that the law relating to contempt of courts is uncertain, undefined and unsatisfactory and that in the light of the constitutional changes which have taken place in the country, it would be advisable to have the entire law on the subject scrutinized by a special committee set up for the purpose. In pursuance of that decision the Ministry of Law on dated 29th July, 1961, set up a committee under the chairmanship of Shri H.N. Sanyal, the then additional solicitor General. This committee was required-to-examine the law relating to contempt of courts generally, and in particular, the law relating to the procedure for the punishment thereof; to suggest amendments therein with a view to clarifying and reforming the law whenever necessary; and to make recommendations for codification of the law in the light of the examination made.

The Sanyal committee submitted its report on February 28, 1963 to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto. The recommendations of the committee have been generally accepted by the government after considering the view expressed on these recommendations by the state Governments, Union Territory Administrations, the Supreme Court, the High Courts and the judicial Commissioners. The Joint select committee of Parliament on contempt of courts under the chairmanship of M.P.
Bhargava, the then member of Parliament examined the issue in detail and the committee after making some amendments submitted its report on February 23, 1970. The recommendations of the committee have been generally accepted by government and in a very practical move and in an effort to sanctify the ideal of justice, on December 24, 1971. The contempt of courts Act, 1971 came into existence.

In the existing contempt of courts Act, 1971, amendments are being made from time to time; even then the position is not satisfactory. Though an attempts was made in 2003, to amend certain provisions which, however, could not be passed. Again, in the year 2006, an Amendment Bill was introduced. Lok Sabha passed it on 21st February, 2006 and Rajya Sabha on 3rd March, 2006. It is called as contempt of court Amendment Act, 2006. This amending Act was passed for the substitution of new Section 13. After the amendments, Section 13 contains that:230

Section 13, contempt not punishable in certain cases, notwithstanding anything contained in any law for the time being in force.

(a) No court shall impose a sentence under this Act for a contempt unless it is satisfied that contempt is of such a nature that is substantially interferes or tends substantially to interfere with the due course of justice; and

(b) The court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in the public interest and the request for invoking the said defence is bona fide.

2.4 Sum up

The whole theme of contempt of court is of absorbing interest to jurists as well as commentators who have critically examined the subject in its various aspects and implications. English authors trace the origin of law to Kingship and sovereignty, inasmuch all judges administering justice derive authority from the King and sit in courts to administer, impartially, real and unalloyed justice in King’s name and as his representative. The idea of contempt of the King is referred as an offence in the laws set forth in the first half of the twelfth century in England. There was certain harsh laws in England as those persons who disobey the order of the King shall be

230 Supra note 5, pp. 110-112.
rigorously punished. There was an instance a prisoner threw a brickbat at the judge and narrowly missed him, the prisoners' right hand was ordered to be cut off, and hung on the gallows. But due to the changing circumstances of the society, the development of contempt law in England did contribute great principles to the law of contempt, which are presently followed by several common law jurisdictions. The law relating to contempt of court in the United States from the beginning of the Republic had a chequered and controversial career. But with the multi millenary growth of the organized societies, the governing systems, interrelationship between sovereign and men, some power force within a rule of law became necessary to replace the enforcing obedience and respect. As the American power of judicial contempt is the product of the transplantation of English common law. Americans courts and American legal historians have often referred to the history of English and parliament in support of their theories about contemporary congressional contempt powers.

According to the Ancient Hindu Judicature the King's duty was to protect his subjects as well as punish the wrongdoer. The King formulated certain guidelines which were termed laws. The Vedas and Smritis enjoy on the king the duty of enquiring into all wrongs himself with the assistance of his councillors. The law to be administered was the Dharma Shashtra which is not inconsistent with the Shashtras. The Dharma Shashtras are regarded even by a modern Jurisconsults Indian and foreign as the foundation or matrix from which all later law flowed forth. In times immemorial, when Dharma Shashtra held the legal field, the king was the supreme authority. The subjects had implicit confidence that the king would admonish shashtric laws, in God's name, justly, conscientiously and equitably. There could thus, hardly arise a question of contempt of court. King's word was law. He could not be disobeyed. If a person disobeyed the order of the King, he could lose his property, liberty, limbs or even his life. As the society expanded, it was not possible for the king personally to settle all the disputes. He, therefore, appointed persons to perform his duties. This is how 'Courts' came into existence. There was not an occasion, nor there any provision, for adoption of the proceedings for contempt of the kind now introduced. During the Mughal period, the ruler wielded radical powers and, either also, there was no scope for contempt of court, though an aggrieved party could chafe at and fret on, the inequity or impropriety of a tyrannous order or crude decision.
Again, if a person revolted against the authority of the ruling head or chief, the rebels could be punished summarily and adequately; and the question of contempt of authority in the sense are witness now could neither arise nor there is any authentic record left of those ancient days to suggest that there was any such contempt law in this country. During British rule the process of liberalization of rigid laws commenced and the number of laws and statutes steadily swelled. Various categories of courts were created and gradually established on a permanent basis. Thus, forced by new circumstances, British systems of contempt proceedings, was, by and by, made applicable to this country.

After achievement of Independence, the growing needs of an advancing Indian society and the increasing industrialization schemes have rendered it imperatively necessary, not only to maintain the British introduced contempt of court law, but to remould it afresh or to curtail or enlarge its scope as changing circumstances warrant or necessitate to cope with challenges to authority. The act of 1926 was the first Indian statute amended later on by Act of 1952, and now by Act of 1971. The present Act of 1971 is entirely a new departure in the law of contempt.