CHAPTER – 6

CONCLUSIONS AND SUGGESTIONS

Law, as a social reality, exists at various constantly transforming levels. As such, solving problems created by the law is not just an analytical juristic problem but requires an examination of the manner in which laws are used, abused and manipulated. The contempt jurisdiction itself has proved to be an instrument for the protection of the courts as an institution, an instrument of oppression, used by the courts and others as a vehicle to embarrass the judiciary and a means to continue to harass private opponents. That the contempt jurisdiction has been used in this way is not peculiar to India. It has also been politically and socially transformed for various purposes in England and America as well. Although the law of contempt was a subject of reformatory legislation as late as 1971, there is a case for re-examining the law of contempt because all the earlier attempts at reform have not been wholly satisfactory. The Contempt of Courts Act, 1971 has had a very limited impact. The contempt jurisdiction is virtually being used in the same way as it was before. The courts have not given full effect to the changes made in the Act.\(^1\)

Though, contempt of court has its Star Chamber origin, one never thought Indian court would manage to reproduce its absolutist form prevailing during the Stuart Rule now. The law of the contempt is one of the legacies of the British rule in this country. Even after independence this particular law has continued to be understood and interpreted as in the old days of the *British Raj*, causing much resentment among citizens, authors, journalists and others alike. Our judges have often tended to forget

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that they are no longer the King’s or Queen’s judges but judges of the Republic of India.²

They have sometime overlooked that the ‘administration of justice’ in free Indian Republic cannot have the same connotation as in the days of the Raj, more especially when our Constitution enshrines fundamental rights in respect of freedom of expression and speech.³ It was expected of the judiciary that it could adjust itself to criticisms and comments without being needlessly sensitive so that the judiciary functions under the effective vigilance of the people and of public opinion. The Press and the public should be free even to say that so and so should not sit on the Bench. Unfortunately, this is not the case today. The legacy or the Raj seems to have weighed heavily on the judiciary and administration.⁴

Very often criticism of the conduct of a judge or palpably insufferable orders made by him is not made with a view to diminishing the institution in public gaze but to enhance the prestige of the institution by criticising the erring judge. The adage that a judge can decide wrongly or rightly never meant that the judge has the privilege to defiantly err. It only recognises the limitation that a judge is fallible like anybody around and a realisation of this fact should impart to him a sense of sobriety in his conduct as a judge. This power is traced to the sovereign (king) and it is

² “……. It is necessary to protect the judicial process and institution from scandalisation or contumacious violation. But this must be according to democratic principle, not authoritarian hubris, lest the citizen’s basic rights be destroyed by judge’s wrath …”, Iyer, VR Krishna, ‘Contempt Power — Cipherise its User’ in Off the Bench (2006) at P. 233. Also Bhargava Committee Report (note 71, Chapter-I), Minutes of Dissent.

³ Article 19(1) (a) guarantees fundamental right to freedom of speech and expression to citizens. Article 21 declares that no person shall be deprived of his life or personal liberty except according to procedure established by law.

⁴ Note 1, Chapter-I.
spoken of as an aspect of Royal power. In this country this myth making is blown out of all proportion by the very institution, which claims this power under the Constitution. The institution adjudicates its own power and the rhetoric by which it justifies its necessity is profoundly inane. This is one power, which is totally out of tune with our constitutional system and democracy. This power is no exception to Lord Acton's profound admonition to power wielders.

Manifestation of judicial tyranny has become too frequent to be ignored. It has been seen that very often this power is used as a shield to ward off serious charges of misbehaviour and the complainant pitifully standing as accused before the court while his counsel cravenly tendering apology to the court and genuflecting for a reprieve. Unfortunately, this major assault on free speech and expression did not receive the attention it deserves. In fact by initiating contempt proceedings against these persons they have considerably diminished respect for the institution and the constitutional position they are holding. As a device of executing orders there may be necessity to confine the contempt powers to enforce orders passed in writ and other proceedings against the government and other instrumentalities of the State. The Supreme Court shoulders this responsibility, if it is to avoid legislative inroads into its independence. An over subservient Bar is our greatest misfortune. A genuflecting profession inebriates power.

It will not be denied that the work of the judiciary has to be protected against physical interference and may be certain other forms of interference also. But the interference must amount in all cases to genuine obstruction, an obstruction which may be assessed in objective
terms. Whatever may be the rhetoric and platitudes uttered in seminar halls on the question of ‘contempt jurisdiction of the courts’ when issues come before them in courts the conduct of the judge, or the wholly unjustified order he passed are quarantined in the debate and by a process of legal legerdemain transform the criticism of a judge into an accusation against the institution and the contemner punished. The present theory of ‘scandalising the court’ has little sense and all that it amounts to is that it justifies wide powers for the judges to punish people for contempt of court. Moreover, this aspect of the contempt law must strictly relate to the court in the course of the honest and diligent discharge of its duties. Outside the courts, the judges should be open to public criticisms and they may take recourse to the ordinary legal provisions such as defamation, if they have been ‘scandalised’. It is against the spirit of democracy and republicanism that the judges outside the court or in relation to their conduct not connected with any judicial proceedings should enjoy special immunity.  

Even in the matters connected with an actual judicial proceeding, there should not be any fetters on public criticisms against the behaviour

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5 Lord Morris in *Macleod vs. St. Aubyn* (1899) AC 549 observed over a century ago that committal for contempt by scandalizing the court itself has become obsolete in England because courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous to public. Further, Robertson & Nicol, *Media Law* at Pp. 297, 298 observed:

“‘Scandalising the court is an anachronistic form of contempt. Lord Diplock has described it as ‘virtually obsolescent in the United Kingdom and it has not been used for fifty years’…… It is inconceivable that action could be brought against publications which criticize the courts in moderate language, even if the criticism is misplaced. Lord Halisham has said ‘nothing really encourages courts of Attorney General to prosecute this type of contempt in all but the most serious example, or courts to take notice of any but the most intolerable instance’. The Law Commission has proposed that the only circumstances under which 'scandalising' the courts charges should be brought are when false allegations of corrupt judicial conduct by judges or magistrates are published when the publisher knows they are false or is reckless as to their truth but intends them to be taken as true.”
of a judge towards this or that party to the judicial proceedings, towards the members of the Bar, witnesses, etc., or towards public issues. Why should there be restraint on public comments on how a judge behaves? Why should it be assumed that a judge is going to be flattered by praise or frightened by adverse criticism? Is there any objective standard to assess what type of criticism calls for contempt proceedings? Is judging judges and the quality of the administration of justice excluded from right to free speech and expression? Does the myth of a court of record amount to reasonable restraint and does this myth qualify for being called a law in relation to contempt power?

The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of public opinion. It is a prized privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect. Public interest in administration of justice has literally banned free speech and expression on matters pertaining to the performance of courts.

In our Constitution, we have two provisions, among others one is Article 19 (1) (a) which gives citizens freedom of speech, and another Articles 129 and 215 which gives the Supreme Court and High Court the power of contempt law. It becomes problematic as to how these provisions to be reconciled. It is stated that Article 19 (1) (a) is the right of the people who are supreme in a democracy, while Articles 129 and 215 are power of the judges, who are servants of the people, the reconciliation can only be done by holding that freedom of speech is primary, while the contempt
power is only secondary. It follows that the contempt power cannot be exercised because people are criticizing a judge. It can only be exercised if someone makes the functioning of the judge impossible. In no case ideological and theoretical criticisms and even attacks on the judiciary or way thereof, should constitute a contempt of court.6

The contempt jurisdiction as described by Krishna Iyer J. is an archaic, vague and wandering jurisdiction with uncertain frontiers and a suspect power to punish that lies in the hands of the prosecutor itself. Such a law, regardless of public good, may unwittingly trample upon civil liberties. Apart from its in-built unfairness where judge acts in his own cause, serves himself as prosecutor, judge, jury and hangman a great deal of uncertainty marks the offence of scandalising the court. The contempt proceedings are quasi-criminal in nature which has a penal consequences yet summary procedure is accorded to contemner to defend his case. No charges are framed, no evidence is led and thus endangering the valuable right to personal liberty and freedom of speech. This is obviously, cut short of due process requirement under the Constitution. The definitions are also ambiguous leaving enormous subjectivity upon the judges. It is important to note that though Acts provides defence of truth as justification in a contempt proceedings but it is ineffective practically.

The Supreme Court, which has time and again exposed the insecure attitude of the judiciary when it comes to the respect and prestige it seeks to command. The Court has more than once failed to realize that the authority

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6 Since the courts are not democratically elected and are practically not accountable, at least they should show great deference to democratic institutions particularly freedom of speech as it is one of the most fundamental pillar of democracy.

‘If judges decay, the contempt power will not save them and so the other side of the coin is that judges, like Caesar’s wife must be above suspicion’, Per Iyer, VR Krishna in Baradakanta Mishra vs. Registrar of Orissa High Court AIR 1974 SC 710.
of the court which is imposed by penalties under contempt powers can procure submission, but not respect. It would be a better option to earn the respect through benevolent handling of the instances of contempt of court. The several cases already discussed show a disturbing trend of subjective approach of the court and lack of uniformity in such decisions resulting in an unhealthy uncertainty concerning the exercise of the powers of contempt of court. Whether the archaic notion of admiration that contempt law seeks to protect at all exists, and whether the public is viewed as so gullible to the opinions of the media as to undermine the image of the court are issues subject to many a doubt.

Therefore, the power of contempt must be exercised with deliberation and operated with utmost caution by the higher judiciaries. The court must vigilantly protect free speech even in the face of severe criticism and dispense justice, which is sacred duty demanding the highest levels of tolerance and detachment.

Here the words of Lord Atkin can be recalled for the proper administration of contempt law in India, which are as follows:

"No wrong is committed by any member of the public who exercised the ordinary right of criticism in good faith in private or public the public act done in the seat of justice. The path of criticism is public way, the wrong-headed are permitted to err therein, provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impart the administration of Justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the
scrutiny and respectful even though outspoken comments of ordinary men”

Suggestions

From the foregone, it is concluded that the definition of the contempt is vague, ambiguous and susceptible to different connotation. It has also been said that judiciary is not giving proper meaning to the present Act in true spirit. Contempt power which is to be used sparingly are being used on the comments and action which are essential for the proper growth of the democratic setup. Recent judicial pronouncement shows disturbing trends in regard to contempt, where in other democratic country this power is treated as obsolete, the Indian judiciary is more akin to hold this power in its hand. Therefore, the following suggestions are made to overcome the drawback in the present Act and to make amendments to incorporate the same in the present Act so that the law of contempt be in tune with the changing society.

(i) Truth as a defence

The contest is between truth and its suppression. The choice then is between the plea of truth to expose judicial misconduct and the attempt to stifle such publication by the use of the contempt power. Before 2006, justification by truth was not recognized as valid defence in case of contempt proceedings. Later on, National Commission to Review the Working of the Constitution recommended introduction of ‘truth’ as defence in matters of contempt of court, by way of amendment to

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7 Andrew Paul Terence Ambard vs. The Attorney General of Trinidad and Tobago AIR 1936 PC 141.
the Constitution of India. The Commission was of the view that as the power of the Supreme Court and the High Courts to punish for contempt is enshrined in the Constitution\textsuperscript{10} itself mere legislation to amend the Contempt of Courts Act, 1971 alone may not suffice. Subsequently, Contempt of Courts Act, 1971 was amended by the Contempt of Courts (Amendment) Act, 2006 whereby clause (b) was inserted in Section 13 of the Contempt of Courts Act, 1971. The provision now states that the court may permit, in any proceeding for contempt of court, \textit{justification by truth} as a valid defence if it is satisfied that it is in \textit{public interest} and the request for invoking the said defence is \textit{bonafide}.\textsuperscript{11}

The Commission, while giving justification on the above recommendation observed that judicial decisions have been interpreted to mean that the law as it now stands; even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. Article 19(1)(a) of the Constitution guarantees to all citizens the right to freedom of speech and expression. Article 19(2) of the Constitution saves reasonable restrictions on the exercise of freedom. Therefore, Article 19(2) of the Constitution will not save any law in relation to contempt of court, if it impinges upon the right to freedom of speech and expression, unless the restrictions are reasonable and are in public interest. If the restrictions that operate upon such rights are unreasonable, they will stand annulled by the operation of Article

\textsuperscript{10} The Commission, thus, suggested a proviso be added to Article 19(2) of the Constitution as under:

“Provided that, in matters of contempt, it shall be open to the court to permit a defence of justification by truth on satisfaction as to the \textit{bona fides} of the plea and it being in public interest.”

\textsuperscript{11} Infra note 48, clause (b).
19(1)(a) of the Constitution. A total embargo on truth as justification may be termed as unreasonable restriction. It would, indeed be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto of ‘satyamevajayate, in the High Courts and ‘yatho dharma statho jaya’ in the Supreme Court, the courts could rule out the defence of justification by truth.\textsuperscript{12}

Parliament instead of bringing amendment to the Constitution effected the change in the Contempt of Courts Act, 1971 by inserting clause (b) in section 13 thereof. It may be noted that the reasons cited by the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice\textsuperscript{13} to which the Contempt of Courts (Amendment) Bill, 2004 was referred for examination and report for not effecting the amendment to the Constitution as suggested by the National Commission to Review the Working of the Constitution is the opinion of the then Attorney General that “an amendment to the Constitution would be lengthy and a time consuming process.”\textsuperscript{14} Hence the Contempt of Courts Act, 1971 was, instead, amended to provide the defence of truth in a contempt action to introduce fairness in procedure and meet the requirement of Article 21. Further allaying the apprehensions of some members of the Committee whether the proposed amendment in the Contempt of Courts Act, 1971 would be recognized by the judiciary, the Secretary replied that Attorney General had gone into the long history of the Indian Judiciary and his entire premise was built on the fact that the higher judiciary--the

\textsuperscript{14} Ibid at Para 11.
Supreme Court and the High Courts, are known for their fairness and reasonableness.\textsuperscript{15}

Our Constitution has been amended many a times according to requirement and necessity of the time since it was adopted by us. Thus, the reason given by the Attorney General and subsequently, believed by the members of the Committee is highly ridiculous. Further, it is the member of the committee and not the Attorney General who are better equipped and having knowledge in understanding the difficulty encountered while amending the Constitution. Still further, it is beyond conception that why the Parliament will face difficulty effecting the change in the Constitution on the basis of the Report of a Commission which the Government itself has constituted. It is highly unlikely that the member would have thwarted the amendment in the Constitution keeping in mind the public interest. It seems the view of the Attorney General reflects the reluctance of the Government in amending the Constitution than any imaginative ‘lengthy and time consuming processes.’\textsuperscript{16}

Further the assumption of the Attorney General that whether the higher judiciary would recognize the proposed amendment in the Contempt of Courts Act, 1971 as the power of the Supreme Court and High Courts to punish for their contempt was recognized in the Constitution, it is submitted that it was very unlikely that the Supreme Court and the High Courts would act in disregard of a statutory provision which might, in essence,

\textsuperscript{15} Supra note 13.
\textsuperscript{16} Article 368 of the Constitution deals with the power of Parliament to amend the constitution and procedure thereof. The only limitation on such powers is that in exercise thereof the Parliament cannot amend the basic feature of the Constitution. \textit{Keshavananda Bharti vs. State of Kerala} AIR 1973 SC 1461.
sub serve the requirement of fairness and reasonableness is too naive and puerile to merit any acceptance.\textsuperscript{17}

Not only that the courts have belied such assumption of respect to the statutory provision in the past, not only that they have asserted their inherent power to punish for contempt over and above any statute but even after the passage of the amendment law the courts have disregarded such provision. It is stated that the Indian judiciary, instead of showing fairness and reasonableness in this branch of law, have virtually gagged the citizens, writers and the Press from exercising their fundamental right to freedom of speech and expression.\textsuperscript{18}

Apart from the above it is submitted that even amended law as it stands today, assuming that it would be respected by the judiciary is highly unsatisfactory.\textsuperscript{19}

The expression used in Section 13 (b) \textit{“the court may”}\textsuperscript{20} confers discretion on the court to permit or not to permit the defence of justification. And this is so even if the court is satisfied that it is in \textit{public interest}\textsuperscript{21} and that the request for invoking the said defence is \textit{bona fide}.

Thus, the court has to be satisfy on two counts to permit truth as a defence when it is raised before it

(a) When the contemptuous act is in public interest; and

\textsuperscript{17} The Supreme Court has disregarded the applicability of the Contempt of Courts Act, 1971 to itself. \textit{Supreme Court Bar Association vs. Union of India} AIR 1998 SC 1895 and \textit{Zahira Habibullah Sheikh vs. State of Gujarat} AIR 2006 SC 1367.

\textsuperscript{18} Ibid.

\textsuperscript{19} Chapter-4, for discussion on recent amendments to the law.

\textsuperscript{20} Emphasis Supplied.

\textsuperscript{21} Emphasis Supplied.
(b) The request made by the contemnor to invoke the defence is *bona fide;*

The amended clause is unlikely to achieve the object and would virtually defeat the objective for which it has been enacted. First, an overriding discretion has been conferred on the Court although it is the Court against which the concerned allegation has been made. Secondly, it was an additional burden imposed on a person accused of contempt to prove to the satisfaction of the court that it is in public interest. Thirdly, it is the court which will decide as to whether the request by the contemnor for invoking the defence is *bona fide.*

It is obvious that on each of the factors mentioned in clause (b), there could arise serious litigative controversy in many cases. It is important to remember that the ultimate arbiter of the question which may arise in respect to Clause (b) is the Court and a fulfillment of the conditions mentioned in clause (b) will in substance reduce the court to the position of an accused. The apprehension that the court, in such circumstances, may not permit or even if it permits to invoke the defence, would in the ultimate analysis, a case of the accused trying the accuser. This would not only be violative of the principles of natural justice but would hold up the system in public ridicule.\(^\text{22}\)

It is submitted that the word public interest and bona fide inserted in the clause be deleted. Further, any law which imposes restriction on the fundamental right to freedom of speech expression and does not admit truth as a defence is, *ex facie,* unreasonable, hence unconstitutional.

Moreover, the amended law would be inapplicable to contempt proceedings before the Supreme Court.\textsuperscript{23}

\textit{(ii) Mens Rea in criminal contempt}

A criminal offence committed must have the intention on the part of the accused. This is recognized in one of the best known maxims of the criminal law, i.e., \textit{actus non facit reum nisi mens sit rea}.\textsuperscript{24} In this famous phrase there is a clear distinction between a person’s ‘deed’\textit{(actus)} and his mental processes \textit{(mens)} at the time when he was engaged in the activity which resulted in the deed.

The maxim recognizes that there are two necessary elements in a crime, a physical element and a mental element, and it makes plain that no man may be found guilty of crime and therefore legally punishable, unless in addition to having brought about harm which the law forbids, he had at the time a legally reprehensible state of mind.

Criminal contempt does not recognize lack of intention for the deed as a defence. In \textit{D.C. Sexana, In re},\textsuperscript{25} the Supreme Court put it plain by holding that \textit{in a contempt proceeding of summary nature, the proof of mens rea is absolutely unnecessary}. What is material is the effect or the tendency of the act, conduct or the publication of the words, written, spoken or by signs or by visible representation or otherwise and whether it scandalizes or tends to scandalize or lowers or tends to lower the authority of the court or prejudices or tends to prejudice or interferes or tends to interfere with the due course of any judicial proceedings or

\textsuperscript{23} \textit{Supreme Court Bar Association vs. Union of India} AIR 1998 SC 1895 and \textit{Zahira Habibullah Sheikh vs. State of Gujarat} AIR 2006 SC 1367.

\textsuperscript{24} An act does not make a person guilty unless his mind (or intention) is guilty.

\textsuperscript{25} AIR 1996 SC 2481.
interferes or tends to interfere with or obstruct the administration of justice in any other manner. The tendency due to the publication, whether by words; written or spoken or signs or by visible representation or otherwise, of any matter or the doing of any other act whatsoever is relevant and material.

The plain conclusion to be drawn from the above is that in criminal contempt the principle of strict liability applies.\textsuperscript{26}

It is also settled that although the absence of \textit{mensrea} is not a defence, it is mitigating circumstance in considering the question of punishment.\textsuperscript{27} Thus, as the law stands today, \textit{mensrea}, is not an essential ingredient of the offence of contempt. To import the strict liability into the domain of contempt law is a sure invitation to anarchy. An innocent distributor, on this basis, who had no reasonable grounds for believing that a publication he had distributed contained matter prejudicial to a pending trial is liable to punishment. No such distributor can be expected to read every page of every publication he is distributing; a duty which would be plainly intolerable. Further, every hawker or street vendor who goes about selling newspapers in the streets would be equally liable.\textsuperscript{28}

It is submitted that such a law cannot pass the test of ‘due process,’ hence would be constitutionally void. It is suggested that the law should

\textsuperscript{26} It is submitted that the rule of strict liability has been very widely stated by the Supreme Court in this case.

\textsuperscript{27} \textit{In re, P.C. Sen} AIR 1970 SC 1821.

\textsuperscript{28} However, section 3 of the Contempt of Courts Act, 1971 states that a person shall not be guilty of contempt of court on the ground that he has published any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.
clarify the definition of ‘criminal contempt’ to make mensrea an essential ingredient of this offence.\textsuperscript{29}

(iii) Punishment

Section 12 of the Contempt of Courts Act, 1971 provides that a contempt of court may be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. By way of proviso it is provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court. An explanation further provides that an apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bonafide.\textsuperscript{30}

\textsuperscript{29} Section 2(b) which defines ‘civil contempt’ already contains the word willful thus, incorporating the requirement of intention for ‘civil contempt’.

\textsuperscript{30} Section 12 of the Contempt of Courts Act, 1971:

12. Punishment for contempt of court-(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation—An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any other law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person:
It is submitted that the provisions give too much subjective satisfaction to the court in accepting the apology of the contemners. Instead, it is suggested that the explanation should provide that an apology shall be accepted, even if it is qualified or conditional. If the accused acted in good faith or believing that he was acting in public interest, he should not be prosecuted.

The working of the law in this branch shows a disturbing tendency on the part of the courts in demanding unqualified and unconditional apologies from the contemners. It is submitted such an approach, besides being undemocratic, is clearly despotic which tramples the free speech of citizenry. Moreover, this provision is meaningless as far as the Supreme Court is concerned in view of the judgment of the Supreme Court in *Supreme Court Bar Association vs. Union of India*\(^{31}\) and *Zahira Habibullah Sheikh vs. State of Gujarat*\(^{32}\) making inapplicable the provisions of the Contempt of Courts Act 1971 to the contempt proceedings initiated by it. Thus it is necessary to make it explicitly clear that the provisions of the Contempt of Courts Act, 1971 shall apply to the contempt proceedings before the Supreme Court of India.

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Provided that nothing contained in the sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explaination.—For the purposes of sub-sections (4) and (5),—

(a) “company” means anybody corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

\(^{31}\) AIR 1998 SC 1895.

\(^{32}\) AIR 2006 SC 1367.
as well since it is not desirable to leave such wide powers unregulated without any limit whatsoever.

(iv) Summary procedure

The Contempt of Courts Act, 1971 retains the summary procedure in case of contempt in facie curiae. In the matter of what is termed constructive contempt, i.e., contempt as to acts or writings outside the proceedings of court, the summary procedure is retained.

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33 Section 14 of the Contempt of Courts Act, 1971:

"14. Procedure where contempt is in the face of the Supreme Court or a High Court—(1) When it is alleged, or appears to the Supreme Court or the High Court upon its own view, that a person has been guilty of contempt committed in its presence or hearing, the Court may cause such person to be detained in custody, and, at any time before the rising of the Court, or as early as possible thereafter, shall—
(a) cause him to be informed in writing of the contempt with which he is charged;
(b) afford him an opportunity to make his defence to the charge;
(c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge; and
(d) make such order for the punishment or discharge of such person as may be just.

(2) Notwithstanding anything contained in sub-section (1), where a person charged with contempt under that sub-section applies, whether orally or in writing, to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the Court is of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such direction as he may think fit to issue as respects the trial thereof.

(3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1) which is held, in pursuance of a direction given under sub-section (2), by a Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed to appear as a witness and the statement placed before the Chief Justice under sub-section (2) shall be treated as evidence in the case.

(4) Pending the determination of the charge, the Court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify:

Provided that he shall be released on bail, if a bond for such sum of money as the Court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Court:

Provided further that the Court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid.
court which is brought later to the notice of the court the procedure is different.\textsuperscript{34}

\textsuperscript{34} Sections 15, 17 & 18 of the Contempt of Courts Act, 1971:

15. Cognizance of criminal contempt in other cases—(1) In the case of a criminal contempt, other than a contempt referred to in section 14, the Supreme Court or High Court may take action on its motion or on a motion made by—
(a) the Advocate-General, or
(b) any other person, with the consent in writing of the Advocate-General, or
(c) in relation to the High Court for the Union Territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer.

(2) In the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court, or on a motion made by the Advocate-General or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty.

Explanation—In this section, the expression "Advocate-General" means—
(a) in relation to the Supreme Court, the Attorney-General or the Solicitor-General;
(b) in relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established;
(c) in relation to the Court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

17. Procedure after cognizance—(1) Notice of every proceeding under section 15 shall be served personally on the person charged, unless the court for reasons to be recorded directs otherwise.

(2) The notice shall be accompanied—
(a) in the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded; and
(b) in case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.

(3) The Court may, if it is satisfied that a person charged under section 15 is likely to abscond or keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable.

(4) Every attachment under sub-section (3) shall be effected in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908), for the attachment of property in execution of a decree for payment of money, and if, after such attachment, the person charged appears and shows to the satisfaction of the court that he did not abscond or keep out of the way to avoid service of the notice, the Court shall order the release of his property from attachment upon such terms as to costs or otherwise as it may think fit.

(5) Any person charged with contempt under section 15 may file an affidavit in support of his defence, and the court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary, and pass such order as the justice of the case requires.

18. Hearing of cases of criminal contempt to be by Benches—(1) Every case of criminal contempt under section 15 shall be heard and determined by a Bench of not less than two Judges.

(2) Sub-section (1) shall not apply to the Court of a Judicial Commissioner.
The settled position of law is that proceedings of contempt of court are *sui generis and sui juris*. The provisions of Code of Criminal Procedure, 1973 and The Evidence Act or the Code of Civil Procedure, 1908 does not applies to proceedings in contempt. Only the principles of natural justice was said to apply i.e. the proceedings must conform to fairness and objectivity, and having absence of prejudice towards the person facing the charge of contempt and also the opportunity to defend the charge must be given. In such situation Summary procedure to deal with contempt matters is not justified. It is submitted that as contempt proceedings being quasi-criminal in as much as the same entail penal consequence (including sentence) and hence a summary procedure as provided under the law and as practiced by the courts is procedurally unjust, unfair and unreasonable.

It is further submitted that a contemner is entitled to a fair procedure in contempt proceeding, hence the summary procedure is highly undesirable and violative of the requirements of Article 21 of the Constitution.35

(v) *Ambiguous definition*

The Contempt of Courts Act, 1971 for the first time in the history of our legal system defined the law of contempt of court. This supposedly is an achievement from the point of view of the Press and the public. It was hoped that, henceforth, it will not be possible for the judiciary to arbitrarily define contempt through judicial pronouncements as

35 *Borrie & Lowe, The Law of Contempt* (3rd ed., 1996) observed at Pp. 472-73: “Although the practice of trying contempts summarily has been criticized from time to time it remains the method most common commonly resorted to in the United Kingdom and the major Commonwealth jurisdictions. Repeated use, however, does not in itself justify the process and there does seem a need to justifying recourse to the summary process no matter what form it may take. The more extreme the summary process the greater is the need to justify it.”

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it likes. This is a safeguard against interference with the freedom of expression, whether by the Press, or otherwise by the public.

The definition is not satisfactory. Whereas in the case of the ‘civil contempt’, it has been provided that the offence must be ‘wilful’, in the case of the criminal contempt, however, there is no such provision? It is submitted that nothing should constitute criminal contempt unless the offence is wilful. The law has been made by bringing within its scope comment which tends to scandalise or tends to lower the authority of any court or tends to interfere with the due course of any judicial proceeding or tends to interfere with or tends to obstruct the administration of justice in any other manner.

Further, the concept of ‘publication’ in section 2(c) is not clear and can mean any kind of ‘publication’ or ‘publications’ to the general public. ‘Private conversation’ should not be deemed to be contempt. Some element of publication in a public forum or public place or to the general public or a public institution should be introduced.37

36 Section 2(b) of the Contempt of Courts Act, 1971:
“Civil contempt” means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.
Section 2(c) of the Contempt of Courts Act, 1971
"criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any a court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.
37 Supra note 1 at P. 187.
Committal for contempt by scandalising the court itself has become obsolete in England because courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous.\textsuperscript{38}

The lack of settled criteria to assess what ‘scandalises’ the courts, the provision that truth is not a defence against criminal contempt and the fact that the judge and the prosecutor are the very same in such proceedings have complete ramifications.\textsuperscript{39} The law is in a shambles. It is being stretched to cover judges conduct outside the court. It is misinterpreted to exclude truth as a defence. Its ambit is being widened arbitrarily in curtailment of freedom of speech and expression, precisely while judicial power is being extended arbitrarily to areas which belong to executive and legislative power.\textsuperscript{40}

In an atmosphere surcharged with intolerance, the judiciary’s misapplication of its contempt power is disquieting. By far the most frequently invoked clause in section 2 of the Contempt of Courts Act, 1971 is ‘scandalising the court’. To begin with, it is strictly limited to the judges’ conduct in ‘court’. It means any hostile criticism of the judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of libel and slander. It is

\textsuperscript{38} McLeod vs. St. Aubyn (1899) AC 549.

\textsuperscript{39} As submitted in Chapter-4 the recent amendments to the Contempt of Courts Act, 1971 are grossly inadequate to allow the plea of truth as an effective defence.

\textsuperscript{40} Verma J.S., ‘Judicial Activism - Maintaining the Equilibrium of Trinity’, Vol. 2, Issue 12, December, 2007 at P. 8:

“The implications of judiciary’s involvement in this process, which is essentially an executive function, are wide. Several questions arise: what and where is the remedy for any illegality committed in these operations? Are there judicially manageable standards for this exercise? Judiciary having no machinery for implementation of the orders, what happens in the event of refusal or failure of the executive to co-operate?”

Also recent ruling of the Supreme Court in \textit{DM, Aravalii Golf Club vs. Chander Hass} 2007 (14) SCALE 1 on judicial overreach.
proposed that this branch of law i.e., contempt by scandalisation being undesirable should be removed from the Statute Book altogether.\textsuperscript{41} It shall be open to a judge who is accused of soliciting favours for himself or his children, or of participating in parties in dubious company or whose privacy at home is violated to sue for libel or invasion of privacy. He should not be permitted to invoke the contempt power. The ancient law of contempt must be adapted to present times. No doubt it has a historical basis, but it is misleading. Its object is not to protect the dignity of the courts but to protect the administration of justice.\textsuperscript{42}

The concept of criminal contempt has various difficulties, which stem partly from the ambiguity of its definition. There are no settled or objective criteria of what kind of behaviour or action may scandalise a court. For that matter, it is also difficult to spell out what exactly constitutes an interference with the administration of justice; another cause of action for criminal contempt.

\textsuperscript{41} However Wilmont J. in \textit{R. vs. Almon} (1765 Wilm 243 at p. 255) explains the necessity for this branch of contempt:

“The arraignment of the justice of the Judges, is arraigning the King's justice: it is an impeachment of his wisdom and goodness in his choice of his Judges, and excites in the minds of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them: and whenever men's allegiance to the law in so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever”.

Justice VR Krishna Iyer joins and submits:

“... Wilmont J. is dead and so too his regal ratio in Almon. ... I had dwelt on the Almon case ... and repelled the Kingly basis of contempt law while going closer to the people-oriented approach of the US justice system. This shift in legal philosophy will broaden the base of the citizen's right to criticize and render the judicial power more socially valid. We are not subjects of a King but citizens of a republic ... To cite vintage rulings of English courts and to bow to decisions of British-India days as absolutes is to ignore the law of all laws that the rule of law must keep pace with the rule of life...” \textit{Off the Bench} (2006) at Pp. 234-35.

\textsuperscript{42} “In European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalizing the court. The judge has to file a criminal complaint or institute an action for libel”, Divan, Anil, ‘Contempt of Court and the Truth’, \textit{The Hindu}, October 29, 2007 at P. 10.
It is submitted that the definition of ‘criminal contempt’ is too vague and grants too much subjectivity to the judges in ascertaining as to what is criminal contempt. Such ambiguity in the law, in the light of decided cases, has turned out to be a sure recipe for disaster. It is submitted that the definition should be narrowed down accordingly. \[43\]

(vi) Trial by Media

For any judicial system, there are serious dangers when parallel trials are conducted by media. The judges, prosecution and investigating agencies are definitely affected by the media. Media, particularly 24x7 TV channels, pick sensation over substance, taking on the roles of witness, investigator, prosecutor, judge, and executioner. Reportage on the Aarushi case crossed all boundaries of fairness and decency. In the Sheena Bora case, selective leaks were being made to the Press by the Mumbai Police. The glitz of TV is too attractive to ignore. Nobody can deny the importance of investigative journalism. At the same time, right to a fair trial is a cardinal principle of justice. In the Jessica Lal, Priyadarshini Mattoo, Nitish Katara and even the BMW hit-and-run cases, the media played a vital role in highlighting the failure of justice. The accused were rich and influential and tried to manipulate the system to get off the hook. The media exposed the lapses in investigation, and ensured that the victims' families got justice. However, the fine line between generating public opinion and compromising ongoing court proceedings is getting blurred. High-profile cases are no longer treated as news

\[43\] Chapter-2 for critical appraisal of the definition of 'criminal contempt'. It has been noticed therein that vagueness in the definition has resulted into inconsistent judicial approach bordering on waywardness.
or information to be conveyed to the public. The objective of such reporting appears to be to package it as entertainment and a spectacle.\textsuperscript{44}

It is necessary to create a just balance between the freedom of speech and expression guaranteed in Article 19(1)(a) and the due process of criminal justice required for a fair criminal trial, as part of the administration of justice. Though Article 19(2) does not refer to the imposition of reasonable restrictions for the purposes of administration of justice, the reference in Article 19(2) that restrictions can be imposed for purpose of the contempt of courts clearly indicates that the Contempt of Courts Act, 1971 take care of the protection of the administration of justice and due course of justice.\textsuperscript{45}

It is submitted that provisions of section 3, particularly the explanation to section 3, must be brought into conformity with the decision of the Supreme Court in A.K. Gopalan vs. Noorden\textsuperscript{46} wherein, after referring to freedom of speech and expression, the Supreme Court held that publications made \textit{after the arrest} of a person could be criminal contempt if such publications prejudice any trial later in a criminal court. As the explanation now stands, ‘pendency of a criminal proceeding’ is defined as starting from the filing of a charge sheet or challan or issuance of summons or warrant by a criminal court. The Supreme Court in the above case held that publication made even after arrest and before filing of charge sheet could also be prejudicial. If so, that guarantee must be implied in the ‘due process’ under Article 21 as explained in Maneka

\textsuperscript{44} A.P. Shah J. Interview published in Times of India dated 30.09.2015 “\textit{Arushi case crossed all boundaries}”.

\textsuperscript{45} Articles 19(1) (a) and 21 of the Constitution of India.

\textsuperscript{46} 1969 (2) SCC 734.
Gandhi's case\textsuperscript{47} and to that extent, it is permissible to regulate publications by media made after arrest even if such arrest has been made before the filing of the charge sheet or challan.

Therefore, the word ‘pending’ used in section 3 at different places must he substituted by the word ‘active’ because the word ‘pending’ gives an impression that a criminal case must be actually pending and further a criminal proceeding may be defined as being ‘active’ from the date of arrest.

So far as breach of Section 3, as proposed, when even a prejudicial publication is made after arrest or after a charge sheet is filed, or summons or warrant is issued, at present, if there is criminal contempt of subordinate courts, those courts have no power to punish for contempt but can only make a reference under section 15(2). This provision is good except that in the special case of contempt by publication offending provisions of section 3, the procedure is cumbersome and time consuming. Much damage by publication can result if the contempt power has to be exercised by the High Court for purposes of section 3 violations through a reference to the High Court.

Thus, it is suggested that a separate section may he inserted for the purpose of enabling the court to punish for criminal contempt by publication under sub-clause (ii) and (iii) of section 2(c), so that action can be taken directly in the High Court in the manner stated under section

\textsuperscript{47} Maneka Gandhi vs. Union of India, (1978) 1 SCC 248.
15(1) either *suomotu* or on the application of any person; such as accused or suspect or others affected by the prejudicial publication.\(^{48}\)

(vii) *Contenpts not punishable in certain cases*

Section 13(a) of the Contempt of Courts Act, 1971 provides that no court shall impose a sentence under this Act for a contempt unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.\(^{49}\)

It is submitted that the provision provides safeguard against sentence but not against conviction. It is submitted that there should be no conviction in a charge of contempt of court unless the contempt is of such a nature that it substantially interferes with due course of justice. The law should not penalise technical contempts unless the alleged contempts substantially interfere with the due course of justice. In practice, however, the judiciary has virtually supplanted even the little safeguard provided by the law.\(^{50}\)

\(^{48}\) Also Law Commission of India (200\(^{th}\) Report, 2006) on “Trial by Media: Free Speech vs. Fair Trial under Criminal Trial”.

\(^{49}\) Section 13 of the Contempt of Courts Act, 1971:

"13. Contempts 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 of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

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

\(^{50}\) Chapter-5 wherein it is found that the courts without framing issue/charge on the question of substantial interference have awarded sentences in complete defiance of statutory limitations.
(viii) Explicit applicability of provisions of the Contempt of Courts Act, 1971 to Supreme Court and the High Court in exercise of their constitutional powers to punish for contempt

As the Parliament is competent to legislate in relation to the law of contempt, it should be appropriately amended by the Parliament to clear the explicit applicability of provision of Contempt of Courts Act, 1971 to the Supreme Court as well as to the High Courts, in the exercise of their powers under the Constitution.

Thus it would make difficult for the Supreme Court and High Court to go against the law enunciated in the Contempt of Courts Act, 1971.

(ix) Restriction on Publication or Gag orders

Prior restraint as pointed by the Supreme Court in Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express is a serious encroachment on the right of the Press for publication under Article 19(1)(a) and cannot be interfered with merely because the publication interferes or tends to interfere with the course of justice in section 2(c) or section 3 of the Contempt of Courts Act, 1971. Prior restraint requires more stringent conditions.

51 In the section 1 of the Contempt of Courts Act, 1971, sub-section (3) should be added reading as under:
“The provisions of this Act shall apply to the Supreme Court of India and to the High Courts in exercise of their respective powers and jurisdiction under Article 129 and Article 215 of the Constitution of India.”

52 Zahira Habibullah Sheikh vs. State of Gujarat AIR 2006 SC 1367. In this case the Supreme Court awarded a sentence of one year over and above the maximum sentence prescribed under the Contempt of Courts Act, 1971 invoking its inherent powers to punish for contempt under the Constitution.

53 1988 (4) SCC 592.
There is always presumption of open Justice under the common law. However, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in *Ranjitsing Brahmeetsing Sharma vs. State of Maharashtra*\(^{54}\) vis-à-vis presumption of open Justice. The Courts of Record *suomotu* or on being approached or on report being filed before it by subordinate court can under its inherent powers, when other alternative measures such as change of venue or postponement of trial are not available will pass such an order of postponement. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of open Justice and the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or mis-information, in other words, where the court is satisfied that Article 21 rights of a person are offended. It is proposed that a suitable provision may be incorporated in the law enabling the High Court to issue a direction, wherever it appears to it to be necessary, that any matter the publication of which may cause real risk of serious prejudice to the cause of such proceeding or to the administration of justice in those proceedings or in any other criminal proceedings or any part of such proceeding, active or imminent, shall

\(^{54}\) (2005) 5 SCC 294.
not be published by the media or any person.\textsuperscript{55} \textit{Postponement of publication does not result in an absolute prohibition}.\textsuperscript{56}

\textbf{(x) The right to know the proceedings of court}

It may be stated that “open Justice” is the cornerstone of our judicial system. It instills faith in the judicial and legal system.\textsuperscript{57} It is in public interest that court proceedings should be open to the public and there should, as far as possible, be as few restrictions on reporting on court proceedings as possible. Any restrictions that are imposed must be statutory exceptions as discussed and proposed above.\textsuperscript{58}

The publication of pleadings and proceedings should not be restricted. The only exception to the general principles should have been the public comment in respect of pending matters.\textsuperscript{59}

\textbf{(xi) The right to participate in respect of matters and issues before the courts}

The public has a right to participate in respect of issues and matters pending before the courts.\textsuperscript{60} The Press or any other person can seek to persuade litigants to alter their litigational aims or strategy. But such pressure should not amount to intimidation. Intimidation is not just

\begin{footnotesize}
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\item \textsuperscript{55} Supra note 47.
\item \textsuperscript{56} Emphasis Supplied.
\item \textsuperscript{57} \textit{Kehar Singh vs. State (Delhi Administration)}, AIR 1988 SC 1883.
\item \textsuperscript{58} Chapter 5 for defences to contempt charge.
\item \textsuperscript{59} Ibid.
\item \textsuperscript{60} “To jettison freedom of expression in the name of immunizing fair hearing is poor compliment to justice as if they are so soft and feeble as to be swayed in their judgment by passing media winds. Are American robes made of sterner stuff? ... the First Amendment now protects Press comment on matters \textit{sub judice} no matter how strident the effort to rouse public pressure to influence the course of justice”, Iyer, VR Krishna, ‘Contempt Power — Cipherise its User’ in \textit{Off the Bench} (2006) at Pp. 237-38.
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limited to the threat of unlawful or illegal acts. The Press, and any other person, has a right to comment on issues and matters before the courts as long as they do not foreclose the determination of issues by the courts.\textsuperscript{61} This is, however, subject to the right of the accused as to fair trial.

(xii) \textit{Pending matters before the Court}

To expect that every citizen of India should make comments, speech or writing on the merits of subject-matter of any case at the risk of being hauled up and found guilty of contempt and sentenced thereunder by the court, would stifle his right to freedom of speech as it might be considered to mean an unreasonable restriction on the fundamental right. Even if a person knew of the existence of proceedings it shall be a defence to show that the impugned comments incidentally touched on the pending proceedings and were made in good faith and with no intent to commit contempt.\textsuperscript{62}

The court cannot on the ground of pending proceeding pull the whip of contempt to the general public.

(xiii) \textit{Standard of proof}

The general principle of any criminal trial is that the guilt of the accused must be proved ‘beyond reasonable doubt’. The contempt proceedings are quasi-criminal in nature entailing penal consequences; hence the contemner should also be given similar protection. But the view of the judiciary is not in consonance of the above principle. The courts in cases discussed in previous chapter have considered ‘preponderance of

\textsuperscript{61} Supra note 1 at P. 187.
\textsuperscript{62} Supra note 59.
probabilities’ instead of ‘proof beyond reasonable doubt’ as sufficient to hold the contemners guilty. This must stop by sticking to the principle stated above and the safeguard should not be lowered.\textsuperscript{63}

\textit{(xiv) Constitutional safeguard of Article 20(3) be made available to contemner also}

Contempt proceedings are quasi-criminal in nature; hence the constitutional safeguard available in Article 20(3)\textsuperscript{64} of the constitution should be extended to a contemner as well. As discussed earlier, the proceedings for contempt of court have been held not proceedings for criminal offence, the defence of privilege against self-incrimination would not be applicable. This is not a satisfactory state of law. Even for a petty offence entailing fine by way of sentence if such constitutional safeguard is available, it defies any logic as to why the same, on parity of reasoning, should not be available in contempt proceedings where sentence can be by way of imprisonment and fine also.\textsuperscript{65}

\textit{(xv) Acts punishable under other Statute is not contempt}

Section 10 of the Contempt of Courts Act, 1971 provides that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is

\textsuperscript{63} Recent trends in lowering the standard of proof in contempt proceedings to probabilities are highly disturbing. \textit{Zahira Habibullah Sheikh vs. State of Gujarat} AIR 2006 SC 1367 (‘highly probable’) and \textit{Rajendra Sail vs. Madhya Pradesh High Court Bar Association} 2005 (4) SCALE 295, (‘Preponderant Circumstances”).

\textsuperscript{64} Article 20(3) declares that no person accused of any offence shall be compelled to be a witness against himself.

\textsuperscript{65} ‘Chapter-4: Defences in Contempt Proceedings’ for fuller discussion of the issue. It is, however, submitted that non-applicability of right against self-incrimination is premised on the basis that contempt charge is not an offence, then by parity of logic no constitutional or other legal safeguard would extend (including double jeopardy) to these proceedings. A result so horrendous that needs to be eschewed at once.
an offence punishable under the Indian Penal Code. The protection is available only in a limited manner as the act constituting contempt should be committed in respect to subordinate court only. Thus an act which is punishable under IPC when committed in respect of the High Courts or Supreme Court, may be tried under the Contempt law. It is submitted that the said provision be amended to include all such cases of contempt whether committed in respect of the High Courts or Supreme Court. If the contempt alleged constitutes an offence under the criminal laws of the land then no action in contempt should be permitted.

At present in the contempt law, for the same offence of contumacious act the one accused are tried under summary procedure devoid of practically any safeguard held in respect of the High Courts or Supreme Court, and another accused under normal criminal trial having all safeguard. The applicability of the said section 10 in respect to High Courts or Supreme Court will remove such discrimination between two classes of contemners.

Further, as the contempt as per the current judicial opinion is not considered as an ‘offence’ and hence it is possible to punish a contemner first under the contempt law and then under the criminal law which is against the doctrine of double jeopardy and in direct conflict with the protection provided under Article 20(2) of the constitution. This cannot be described as fair process.

(xvi) Contempt Law needs ‘due process’ complaint after Maneka’s Gandhi’s Judgment

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66 Section 10, the Contempt of Courts Act, 1971.
The Supreme Court in 1978 stated in *Maneka Gandhi’s case* that every law enacted whether substantive or procedural must be due process complaint. The contempt of court act i.e. the present law was enacted in 1971 which seems hardly in compliance with due process requirement.\(^67\) It is therefore submitted that the Act of 1971 requires a fresh look and be made in consonance with the principle stated in the case stated above.

(xvii) *International Standard in respect to Contempt Law*

International standards and laws of other democracies would be informative and enable us to arrive at the right standards. Professor Michael Addo of the University of Exeter has collected the views of many European experts in “Freedom of Expression and the Criticism of Judges.”\(^68\)

In European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalising the court.\(^69\) The judge has to file a criminal complaint or institute an action for libel. Summary sanctions can be imposed only for misbehaviour during court proceedings.\(^70\)

In Belgium, the media have been very critical of the functioning of the administration of justice and have strongly criticised individual judges. This tension between the Press and the judiciary led to a seminal pronouncement of the ECHR (European Court of Human Rights). The courts had to enjoy public confidence and judges had to be protected against destructive attacks that were unfounded. The Press also had a duty to impart

\(^{67}\) Supra note 46.
\(^{69}\) “Neither Latin American nor European civil law legal systems use any device of the nature or proportions of our contempt power”, Iyer, VR Krishna, ‘Contempt Power — Cipherise its Users’ in *Off the Bench* (2006) at P. 231.
\(^{70}\) Supra note 67.
information and ideas of public interest and the public had a right to receive them. There is no summary right of committal for contempt and the judges have to adopt proceedings for libel.\textsuperscript{71}

Professor Addo concludes that although all countries in Europe had an offence relating to the criticism of judges on their books only a few continue to punish for this offence and there is an emerging common European standard.

In the U.K., the offence of scandalising the court has become obsolete. The judiciary is being vigorously criticised by the English Press.\textsuperscript{72}

In the United States, contempt power is used against the Press and publication only if there is a clear imminent and present danger to the disposal of a pending case. Criticism however virulent or scandalous after final disposal of the proceedings will not be considered as contempt. The U.S. Supreme Court observed: "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste on all public institutions ... And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect."\textsuperscript{73}

The basic principle in a democracy is that the people are supreme. It follows that all authorities — whether judges, legislators, ministers,

\textsuperscript{71} Supra note 46.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
bureaucrats—are servants of the people. Once, this concept of popular sovereignty is kept firmly in mind, it becomes obvious that the people of India are the masters and all authorities (including the courts) are their servants. Surely, the master has the right to criticise the servant if the servant does not act or behave properly. It would logically follow that in a democracy the people have the right to criticize judges. Why then should there be a Contempt of Courts Act, which to some extent prevents people from criticising judges or doing other things that are regarded as contempt of court? In a democracy, the purpose of the contempt power can only be to enable the court to function. The power is not to prevent the master (the people) from criticising the servant (the judge) if the latter does not function properly or commits misconduct.74

The responsibility to maintain the rule of law lies on all individuals and institutions. Much more so on the three organs of the State. Our Constitution has separated and demarcated the functions of the Legislature, the Executive and the Judiciary.75 Each has to perform the functions

75 In Ram Jawaya vs State of Punjab AIR 1955 SC 549 at Para 12 it was observed by a Constitution Bench of the Supreme Court :
“The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another.”
Also in Asif Hameed vs. State of Jammu & Kashmir AIR 1989 SC 1899 at Paras 17-19 it was observed :
“….. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribedtherein...”
Also refer to Montesquieu, The Spirit of Contempt Law Chapter-XI.
entrusted to it and respect the functioning of the others. None is free from errors, and the judiciary does not claim infallibility. It is truly said that a Judge who has not committed a mistake is yet to be born. Our legal system in fact acknowledges the fallibility of the courts and provides for both internal and external checks to correct the errors. The law, the jurisprudence and the precedents, the open public hearings, reasoned judgments, appeals, revisions, references and reviews constitute the internal checks while objective critiques, debates and discussions of judgments outside the courts, and legislative correctives provide the external checks. Together, they go a long way to ensure judicial accountability. The law thus provides procedure to correct judicial errors. Abuses, attribution of motives, vituperative terrorism and defiance are no methods to correct the errors of the courts. In the discharge of their functions the courts have to be allowed to operate freely and fearlessly but for which impartial adjudication will be impossibility. Ours is a constitutional government based on the rule of law. The Constitution entrusts the task of interpreting and administering the law to the judiciary whose view on the subject is made legally final and binding on all till it is changed by a higher court or by a permissible legislative measure. Those living and functioning under the Constitution have to accept and submit to this obligation of respecting the constitutional authority of the courts. Under a constitutional government, such final authority has to vest in some institution. Otherwise, there will be a chaos. The court's verdict has to be respected not necessarily by the authority of its reason but always by reason of its authority. Any conduct designed to or suggestive of challenging this crucial balance of power devised by the
Constitution is an attempt to subvert the rule of law and an invitation of anarchy.

Fair and reasonable criticism of a judgment which is a public document on which is a public act of a judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility. A fair and reasonable comment would even be helpful to the Judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. Such permissible criticism would itself provide a sensible answer to sometimes ill-informed criticism of judges as living in ivory towers. But then the criticism has to be fair and reasonable. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that the judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. Ordinarily, the judgment itself will be the subject-matter of criticism and not the judge. But when it is said that the judge had a pre-disposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he has a wayward bent of mind is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule if not infamy. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly reposes in the courts of law as courts of justice, the criticism would cease to be fair and
reasonable criticism but would scandalise courts and substantially interfere with administration of justice.

There is an increasing need of recognition by the courts of the requirement to be sensitive in a democracy to the right of citizens to criticise institutions, including the administration of justice. The classic statement is to be found in *Ambard vs. Attorney-General for Trinidad and Tobago*, where the Privy Council speaking through Lord Atkin formulated the modern approach to scandalising:

“...whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

Further, the following observations of Lord Denning in *Regina vs. Commissioner of the Metropolis ex parte Blackburn* are highly illuminating:

76 (1936) AC 322 at P. 335.
77 (1968) 2 WLR 1204.
"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.\textsuperscript{78}

It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.\textsuperscript{79}

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.\textsuperscript{80}

We have been carrying this colonial baggage knowing full well that the Constitution brought about a severance with the past; between the

\textsuperscript{78} Emphasis Supplied.
\textsuperscript{79} Emphasis Supplied.
\textsuperscript{80} Emphasis Supplied.
purpose of a colonial administration and the struggle for independence and the vision and value system it provided us with. The most important institutions of a democracy are tethered to the colonial past the privileges of the representative institutions of the State and the Centre and the contempt jurisdictions of the courts. A fresh, modern, democratic approach, like that in England, the United States, and Commonwealth countries, is now required in India to do away with the old anachronistic view. The Indian judiciary needs to heed these sober observations. The reform of the law of contempt is long overdue.

The need for change in the Contempt of Courts Act was felt by the Joint select Committee (minutes of dissent) of Parliament on Contempt of Court\(^{81}\) in these words:

> “Witnesses are rather influenced by the police. Many of our so-called investigating officers are professors in the area of perjury and the some of them even use third degree method to tutor witnesses. Our police stations are known to have at their beck and call sets of professional witnesses. Rarely, have we come across a case in which a police officer has been punished for contempt of court, notwithstanding such criminal interference in administration in justice.

> Big land lords and other similar other exploiters are indulging in large scale interference with the administration of justice behind the scene by falsifying documents by bribing, tutoring witnesses, by corrupting the investigating officers. Big money thus stands in the true administration of justice.

In such a situation, it is pointless to chase the citizen with the sword of the contempt of court law in hand. By and large........ We are not living in a society which abounds in contemners or would be contemners so that a draconic law of contempt is necessary to ensure the unhindered administration of justice or the sanctity of our judiciary or the dignity of our learned judges and other judicial officers. If anything, it is necessary to so change the laws and the structure and character of the judiciary that they conform to the changed times through which we are now passing.
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