

BOTTLING THE CRIMINAL CONTEMPT LAW – A SEARCH FOR ‘INTENTION’ IN ‘SCANDALIZING THE COURT’

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Abstract: The right to speak and express freely is arguably the most contentious fundamental right guaranteed to the citizens by the Indian Constitution. Like all the other rights and privileges in a democracy, freedom of speech is not absolute and is subject to restrictions. One such restriction is the offence of contempt of court. In doing so, courts have been successful in upholding their dignity and majesty but often at the cost of stifling criticism and instilling fear amongst the critics of the institution. There is a sense of anxiety among the citizens as they anticipate an over-disciplined regime and struggle to understand what constitutes criminal contempt and how it works. In this article, the authors have attempted to suggest a development in the existing criminal contempt law by scrutinising the mental element of the publisher or the person making the criticism.

Keywords: Criminal contempt, fair criticism, free speech, contempt of court, mens rea.

I. INTRODUCTION: A BRIEF HISTORICAL BACKGROUND

The freedom of people to express their feelings and freely voice their views is one of the most important features of a democratic way of life. If a ‘cognitive democracy’ has to be developed, existing interests of the society have to be critically evaluated. It is possible only when the people are free from external control or pressure.⁵ There are various facets of democracy and freedom of speech and expression forms one of the most essential tenets of the same. It not only helps people in their growth, it also reflects the maturity of a democracy. Freedom of speech and expression is one of the fundamental rights under article 19(1)(a) enshrined in part III of the Indian Constitution. It also provides that the state can impose reasonable restrictions in the “interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”⁶. It expressly provides that restrictions can be imposed on the freedom of speech and expression can be in relation to contempt of court. Further, by just briefly looking into article 19(1)(a) and the reasonable restrictions under article 19(2) of the Indian Constitution, one can accurately deduce that these provisions implied provide for fundamental right to criticize the actions of democratic institutions including the courts.

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⁵ John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000)

⁶ India Const. art. 19(2)

Contempt law, the “proteus of the legal world”⁷ originated in the monarchical legal system and has evolved over time with traces in the pre-historic divine origin theory, and also the more recent Social Contract theory.⁸

In India, the Courts’ power to rule on its Contempt was meant to be a deterrent and prevent interference with administration of justice under the British Rule. It was originally governed by common law principles purely. The Charter Act of 1774,⁹ provided in Clause 21 that the Supreme Court of Bengal was empowered to punish for contempt of itself. Thereafter, the High Courts were established under the High Courts Act of 1861¹⁰. The statute conferred the powers against contempt to the Chartered High Courts under Sections 9 and 11. By virtue of the Letters Patent of 1865,¹¹ these Courts further continued their designation as Courts of Record.

The first Indian Statute that dealt exclusively with the power of contempt was the Contempt of Courts Act, 1926.¹² The Act empowered the High Courts to exercise jurisdiction over subordinate courts and also punish for contempt of such courts. Post-independence, the Supreme Court of India and the High Courts were recognized as courts of record under Articles 129¹³ and 215¹⁴ of the Constitution respectively and therefore, also had the power to punish for their contempt. Contempt of court was also included as one of the restrictions under Article 19(2)¹⁵ on the right to freedom of speech and expression under Article 19(1)(a)¹⁶ of the Constitution.

The Contempt of Courts Act, 1952¹⁷ was enacted to replace the 1926 legislation which added to the powers of the High Court to institute proceedings not only for contempt of itself but also for the lower courts. The 1952 Act, however, was broad in scope, with unclear definition, and had procedural issues with initiating and conducting the contempt proceedings which necessitated the government to appoint a committee under the chairmanship of Shri H.N. Sanyal,¹⁸ to study and scrutinize the entire law relating to contempt of court in India. Apart from the above factors, maintain a balance between the judicial independence and accountability was one of the major concern due to a fear of abuse of such broad powers. The committee submitted its report on February 28, 1963, based on which the Parliament enacted the Contempt of Courts Act, 1971¹⁹.

⁷ J. Moskovitz, ‘*Contempt of Injunctions, Civil and Criminal*’ (1943) 43 Col. L. Rev. 780.

⁸ Mriganka Shekhar Dutta & Amba Uttarkak, ‘*Contempt of Court, Finding the Limit*’, 2 NUJS L. Rev (2009)

⁹ The Charter Act, 1774, § 21, No. 63, Acts of Parliament, 1774 (United Kingdom concerning India)

¹⁰ The Indian High Courts Act, 1861, § 9, 11, No. 104, Acts of Parliament, 1861 (United Kingdom concerning India)

¹¹ The Letters Patent Act, 1865, No. 15, Acts of Parliament (United Kingdom concerning India)

¹² Contempt of Courts Act, 1926, No. 12, Acts of Parliament, 1926 (India)

¹³ India Const. art. 129

¹⁴ India Const. art. 215

¹⁵ India Const. art. 19(2)

¹⁶ India Const. art. 19(1)(a)

¹⁷ The Contempt of Courts Act, 1952, No. 32, Acts of Parliament, 1952 (India)

¹⁸ H.N. Sanyal Committee, Report of Comm. On Contempt of Court, H.D. 153 at 61 (1963)

¹⁹ The Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971 (India)

The Contempt of Courts Act, 1971 is a unique legislation that seeks to safeguard the process of administration of justice, “unhampered and unsullied by wanton attacks”²⁰, to enable the courts to discharge their functions properly, and to uphold the dignity and majesty of the courts of law²¹. According to the Act, contempt can be either civil or criminal. Section 2(b) of the Act defines civil contempt as “wilful disobedience to any judgement, decree, order, direction or any other process of court or wilful breach of an undertaking given to court.”²² Criminal Contempt has been defined in Section 2(c) of the Act as:

“publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-
(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends, the administration of justice in any other manner.”²³

The purpose of civil contempt is to enforce the judgement by compelling the contemnor or the judgement-debtor to do benefit to the other party, while in criminal contempt, the proceeding is of a penal nature and enjoins punishment for a wrong done to the public at large, by interfering with the normal process of law that degrades the majesty of the court.²⁴

Broadly, contempt of court is of three kinds: (a) “contempt of court in the face of court” which is committed during the court proceedings or in the immediate vicinity of the court; (b) “contempt of court in obstructing the course of justice” where the press attempts to prejudge an issue in a trial; (c) “contempt by scandalizing the authority of court” where a judge is imputed with bias/motives or where the status or dignity of a judge or court has been affected. The scope of inquiry of this article is the third kind, i.e., the “scandalizing the authority of court” element of criminal contempt which is the most controversial in its use and language. In this article, the authors mainly trace the importance given to mental element of the accused ‘contemnor’ while adjudicating the “scandalizing the authority of court” contempt proceedings in India. Section II provides a brief overview of the existing principles as applied by the courts while dealing with cases under this class of contempt. It also begins with pointing out general fallacies in the law. Section III highlights specific contradictions in the law with the help of selected precedents. Section IV attempts to highlight the negligible weightage given by the courts and the existing legislative framework to the mental element of the contemnor while adjudicating these cases and makes a case for heightened scrutiny by the courts into the

²⁰ Commissioner, Agra v. Rohtas Singh, [(1998) 4 SCC 409]

²¹ Supreme Court Bar Association v. Union of India & Anr., [(1998) 4 SCC 409]

²² Contempt Act, 1971, *supra* note 15, § 2(b)

²³ Contempt Act, 1971, *supra* note 15, § 2(c)

²⁴ Vijay Pratap Singh v. Ajit Prasad, AIR 1966 All. 305

mens rea element. While doing so, assistance is sought from the practice as existing in other countries. Section V is the conclusion.

II. THE MANY IRREGULARITIES IN THE ‘SCANDALIZING’ JURISPRUDENCE

The phrase ‘scandalizing the authority of court’ was first used by Lord Chancellor Hardwicke in 1742 in *Roach v. Garvan (or Hall)*²⁵. The very origin of this branch has been described as both “dubious and controversial.”²⁶ The celebrated dictum of Justice Wilmot in his undelivered judgement in *Wilkes Case*²⁷, way back in 1765 is considered as the *locus classicus* on the subject and serves as the origination of the concept of “scandalizing the authority of the court”. Wilmot observed that the entire objective of the law of contempt was to keep a ‘blaze of Glory around judges’, to prevent people from making judges ‘contemptible in the eyes of the Public’.

‘Scandalizing the court’ has been defined by the Supreme Court of India, as being any publication or action which has the effect of lowering the dignity or majesty of the court in the eyes of the public and causing or likely to cause obstruction in the administration of justice.²⁸ It has the generalistic aim of preventing the undermining of public confidence in the administration of justice²⁹ from baseless attacks on the integrity or impartiality of courts and judges³⁰. Thus, it can be applicable at any time.

However, in the present day context, the foundation of the contempt law is “ill-fitting”³¹, as the Supreme Court of India still subscribes to the colonial notion that stories which appear in print in India are likely to be believed here because many Indians are ignorant, as against Englishmen who may be sceptical when they read such stories.³² In *Markarha*,³³ the Supreme Court of India held that if a ‘slight suspicion’ is created in the minds of illiterate villagers that judges pre-judge the cases, they would lose confidence in the administration of justice. In *Harijai*,³⁴ the Supreme Court of India said that something which appears in print is likely to be believed by the ignorant, which is why restrictions on the press were essential. More recently, in the *Prashant Bhushan case*,³⁵ the Supreme Court of India amplified this notion by making a far-fetched observation that the impression which the contentious tweet tended to give to an ordinary citizen is that when historians

²⁵ (1742) 2 Atk. 291, 469

²⁶ Borric & Lowe, *Law of Contempt* 3rd Edition 331 (LexisNexis Butterworths 1996)

²⁷ *R v. Almon*, 1765 Wilmot 243

²⁸ *In Re: Arundhati Roy*, AIR 2002 SC 1375; *Brahma Prakash Sharma & Ors. v. The State of Uttar Pradesh*, 1953 SCR 1169; *In Re S. Mulgaokar v. Unknown*, (1978) 3 SCC 339; *E.M.S. Namboodripad v. T. Narayan Nambiar*, 1970 SCC (2) 325; *Perspective Publications v. State of Maharashtra*, AIR 1970 SC 221; *R.K. Anand v. Registrar, Delhi High Court*, (2009) 8 SCC 106

²⁹ *Chokolingo v. AF of Trinidad and Tobago*, [1981] 1 All ER 244, ¶ 248

³⁰ *Gallagher v. Durack*, (1983) 152 CLR 238, ¶ 243

³¹ *Mriganka supra* note 4, at 55

³² Abhinav Chandrachud, *Republic of Rhetoric* 16 (Penguin Random House India 2017)

³³ *Rama Dayal Markarha v. State of Madhya Pradesh*, 1978 AIR 921

³⁴ *In Re: Harijai Singh And Anr.*, AIR 1997 SC 73

³⁵ *In Re: Prashant Bhushan and Ors.*, AIR 2020 SC 4114

look back, the impression they will get is that the Supreme Court of India had a role in the destruction of democracy. Moreover, the Court noted that the tweet reached millions of people, thus assuming that these millions of people were gullible enough to believe the tweet and develop a sense of disbelief towards the institution of judiciary.

Therefore, we can safely conclude that there is no clarity as to what constitutes ‘scandalizing the court’. The very definition is vague and indeterminate, shrouded in uncertainty.³⁶ What adds to this uncertainty and ambiguity is the inherent jurisdiction vested in the Supreme Court of India and the High Courts under Article 129³⁷ and Article 215³⁸ of the Constitution respectively. Contempt jurisdiction of the Court, derived from Articles 129 and 215 of the Constitution, is *sui generis*³⁹ and the Contempt of Courts Act, 1971 merely sets out the procedure to be followed by the courts while exercising the contempt jurisdiction. Therefore, the constitutional power of the Supreme Court of India and the High Courts to rule on their own contempt cannot be curtailed by any legislative action including the Act of 1971.⁴⁰ The Courts are not bound to stick to a specific procedure as is the case for other offences⁴¹ till the time they adhere to principles of natural justice and rule of law.⁴²

This legislative vacuum in the definition leaves much scope for the individual cases to be decided in an arbitrary manner with no clarity or uniformity in its application. An apt example of this is the consistent withering away of the difference between the judiciary and a judge. It has been held by the Supreme Court of India that there is a difference between the insinuations casted on a judge as a judge and the insinuations casted on a judge as an individual. While the former is actionable as a contempt of court, the latter isn’t. The valid action for such insinuations is a civil or criminal action for defamation.⁴³ But it has also been observed by the Supreme Court of India that libellous criticism of a judge as an individual may ridicule the judge leading to hindering the administration of justice by the particular judge.⁴⁴ Thus, the difference between the two is practically obliterated. Moreover, this distinction is more academic than practical as there have hardly been instances where aspersions or insinuations casted on judges have seen the fate of a defamation suit. It is common knowledge that every criticism of the judges or the judiciary, if it has to enter the courtroom, it is only through the passage of contempt proceedings.

³⁶ Fali S. Nariman, *Contempt of Court: NJA Occasional Paper Series No. 2*, NJA Occasional Paper Series (January 2004), http://www.nja.nic.in/Journals_Publications_Newsletters/NJA%20Ocasional%20Paper%20Series%20No.2.pdf

³⁷ India Const. art. 129

³⁸ India Const. art. 215

³⁹ *Sahara India v. SEBI*, AIR 2012 SC 3829; *R.K. Anand v. Registrar, Delhi High Court*, (2009) 8 SCC 106

⁴⁰ *Pritam Pal v. High Court of Madhya Pradesh, Jabalpur Through Registrar*, [(1993) Supp. (1) SCC 529]

⁴¹ *In Re Vinay Chandra Mishra*, AIR 1995 SC 2348

⁴² *Sukhdev Singh Sodhi v. The Chief Justice and Judges of the Pepsu High Court*, 1954 AIR 156

⁴³ *Brahma Prakash Sharma*, *supra* note 24; *Baradakanta Mishra v. The Registrar of Orissa High Court*, 1974 AIR 710

⁴⁴ *P.N. Duda v. V.P. Shankar & Ors.*, 1988 AIR 1208

This is further worsened by the initiation of *suo moto* contempt proceedings by the courts. Section 15(1) of the Contempt of Courts Act, 1971⁴⁵ enables the courts to take action on its own motion against the alleged contemnors. In the proceeding for contempt of court, the jurisdiction is unusual which combines the “judge, jury and hangman”⁴⁶ and the judges are called upon to decide the issue of harm to the reputation of their brethren judges. This makes a serious case of violation of principles of natural justice.⁴⁷

It is more sensible for the courts to enter into such enquiry only upon being approached by those who are irked by such publication. Moreover, it casts a doubt regarding the selectiveness of the courts in initiating these proceedings. For instance, the Supreme Court of India proceeded on its own motion against the lawyer and activist Prashant Bhushan for his infamous tweets against the then CJI and the last four ex CJIs.⁴⁸ Whereas, no proceedings have been initiated against the former CJI for his comments in a media event that the ‘judiciary is ramshackled’ and that ‘who goes to the court?’⁴⁹ Upon a perusal of the previous cases of contempt where similar statements have been punished, these words clearly have a *prima facie* effect of shaking people’s confidence in the judiciary. There have been many such instances which will be discussed in the next section of the article.

One of the justifications given in support of the existence of powers for punishment for contempt is that judges are incapacitated from replying to the criticisms or the insults due to the nature of the office they hold.⁵⁰ In *Re: Patrick Anthony Chinamasa*,⁵¹ a judgement of the Supreme Court of Zimbabwe Gubbay CJ stated:

*“Unlike other public figures, judges have no proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardizing their impartiality. This is why protection should be given to judges when it is not given to other important members of society such as politicians, administrators and public servants.”*⁵²

However, the observations of Lord Denning in *Regina v. Commissioner of Police of the Metropolis, Ex Parte Blackburn (No. 2)*,⁵³ must be emphasized here that “critics must remember that from the nature of our office, we cannot reply to their criticisms”, that

⁴⁵ Contempt Act, 1971, *supra* note 15, § 15(1)

⁴⁶ SC Bar Association, *supra* note 17

⁴⁷ Rakesh Shukla, *Contempt Powers of Indian Courts don’t Measure up to Principles of Natural Justice*, The Wire (5 August 2020), <https://thewire.in/law/contempt-powers-of-indian-courts-dont-measure-up-to-the-principles-of-natural-justice>

⁴⁸ Prashant Bhushan, *supra* note 31

⁴⁹ ‘Who goes to Court?’ Ex-CJI Ranjan Gogoi says Judiciary is ‘Ramshackled’, <https://www.livelaw.in/top-stories/who-goes-to-court-ex-cji-ranjan-gogoi-says-judiciary-is-ramshackled-169809> (last visited on 14 June 2021)

⁵⁰ NJA Occasional Paper Series, *supra* note 32

⁵¹ S.C. 113/2000, 6 November 2000 ¶ 24

⁵² S.C. 113/2000, 6 November 2000.

⁵³ [2002] UKHL 20

judges cannot enter into public controversy’, and that judges must rely on their conduct itself to be its own vindication.”⁵⁴ It is important for the judges to realize that they are only highlighting the persons by giving them undue importance. The judges should, instead of attempting to replying to the critics by punishing them for contempt, focus on inspiring confidence of people through their conduct and judgements.

As has been stated by Hope J. in the Australian case of *Attorney-General for NSW v. Munday*,⁵⁵:

*“There is no more reasons why the acts of courts should not be trenchantly criticized.....the truth is of course that public institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command the respect and confidence of the community; if their conduct justifies the respect and confidence of a community they do not need the protection of special rules to protect them from criticism.”*⁵⁶

Apart from these concerns, the most disturbing and triggering concern is the lack of clarity as to what constitutes fair criticism. It has time and again been reiterated by the courts in its judgements that criticism within permissible limits is essential for the proper functioning of democracy. Yet, there is no uniformity in the application of the concept by the courts (as will be shown in the next section) and the crucial question remains : what exactly is permissible criticism?

III. WHAT EXACTLY IS PERMISSIBLE CRITICISM: THE BAFFLING PRECEDENTS

This Section exhibits the contradictions and lack of uniformity in the approach of the courts while dealing with the defence of fair criticism in scandalizing cases by citing four selected judgements of the Supreme Court of India. These 4 cases are landmark cases on criminal contempt by ‘scandalization’ in India. First two cases are instances of similar speeches made by politicians with a minor caveat that accused in the second case was also a former High Court judge. In next three cases, two are related to senior lawyers and one is related to a famous author.

III.I. Namboodripad and P.N. Duda

The first case is that of *Namboodripad*,⁵⁷. In this case, the Supreme Court of India was considering the statements made by the former chief minister of Kerala, at a press conference where he had called the judiciary an ‘instrument of oppression’. He accused judges of being ‘guided and dominated by class hatred, class interests and class prejudices’, that Indian judges would decide a case in favour of a “‘*well-dressed, pot-bellied, rich man*’ against ‘*a poor, ill-dressed and illiterate person*’” and that the judiciary was “‘*weighed*

⁵⁴ [2002] UKHL 20

⁵⁵ (1972) 2 NSWLR 887

⁵⁶ *Id.*, at para 908

⁵⁷ *Namboodripad*, *supra* note 24

against workers, peasants and other sections of the working class”. He also suggested that judges should be elected not nominated as the judiciary was subject to the influence and pressure of the executive. He contended in his appeal before the Supreme Court that he based his claims on the theory of Marx and Engels. The court while finding him guilty of contempt held that he had overstepped the limits of permissible criticism under Article 19(1)(a) by presenting a “distorted and poor picture of judiciary”. The court observed that the appellant had “deliberately distorted the writings of Marx, Engels and Lenin for his purpose”.⁵⁸ Whether he deliberately did so or he genuinely misunderstood the teachings of Marx and Engel was not of its concern.

About two decades later, the Supreme Court of India dealt with similar facts in *P.N. Duda*,⁵⁹ where it was considering a speech made by Union law minister and former High Court judge, P. Shiv Shankar wherein he stated that “the Supreme Court composed of the element from the elite class had their unconcealed sympathy for the haves, i.e., the zamindars and as a result, they interpreted the word ‘compensation’ in Article 31 contrary to the spirit and the intendment of the Constitution” due to which the entire programme of zamindari abolition suffered a setback. He went on to say that:

*“Madhadhipatis like Keshavananda and Zamindars like Golaknath evoked a sympathetic cord nowhere in the whole country except the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country, ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Cooper’s case. Antisocial elements i.e. FERA violators, bride burners and a whole horde of reactionaries have found their heaven in the Supreme Court.”*⁶⁰

It is obvious that the comments made by the respondent in this case were in essence the same as those made by Namboodripad. The Supreme Court of India held that he was not guilty of contempt of court on the ground that he was only making a study of the attitude of the Supreme Court. The court observed that “in a study of accountability if class composition of the people manning the institution is analysed.....it cannot be said that an expression or view or propagation of that view hampers the dignity of the Courts or impairs the administration of justice.” It is interesting to note that the court wasn’t concerned with the factual correctness of the words in this case while for the same words in *Namboodripad*, the court sat to elaborate on the true import of the theories of Marx and Engels.

Critics pointed out that the fact that Shivshankar was a former judge of a High Court was the difference between him and Namboodripad.⁶¹

⁵⁸ AIR 1970 SC 2015

⁵⁹ Shiv Shankar, *supra* note 40

⁶⁰ 1988 AIR 1208

⁶¹ S.P. Sathe, *Accountability of the Supreme Court*, 37 E.P.W 1384 (2002), <https://www.epw.in/journal/2002/15/commentary/accountability-supreme-court.html>

III.II. Hari Singh Nagra and Prashant Bhushan

Both of these are the cases of criminal contempt against senior lawyers of the Supreme Court of India. In *Hari Singh Nagra*,⁶² the Supreme Court of India was considering statements made by senior advocate Kapil Sibal, regarding the “*questionable integrity of some of those who are in judiciary*”; “*the judges need disciplining*”; that some judges had received “*monetary benefits for judicial pronouncements, rendering blatantly dishonest judgement*” and that some judges had been “*kowtowing with political personalities and obviously favouring the government....thereby losing all sense of objectivity*”. The Supreme Court of India found that this did not amount to contempt for the reason that his message was an articulation of the concerns of a senior advocate with an experienced practice in the Supreme Court, who upon noticing that the public image of the legal community was dipping, made such statements for precautionary effect. Thus, the court was much impressed by the prowess of Sibal, that he being in the fraternity knew more and thus could fairly exercise his right to criticize. In saying so, the Supreme Court of India pacified the rather uncanny and unusual test of fair criticism laid down by it in the case of *re: Arundhati Roy*,⁶³:

*“...fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself.”*⁶⁴

The propriety of this test seems logically unpalatable. By holding so, the courts have held that only those who have considerable knowledge of the legal field are entitled to criticize the courts, and not others. As has been seen, this reasoning found favour with the Supreme Court of India in Sibal’s case. It is interesting to note that the respondent in *re: Arundhati Roy*,⁶⁵ was a Booker Prize winning author. So, if she was not viewed by the court to be enough well versed to be able to comment on the courts, then it is not clear who, except the persons from the legal community themselves, will be so able.

Quite interestingly, in the infamous case of *Prashant Bhushan*,⁶⁶ the Supreme Court of India did not seem to follow this reasoning while convicting the advocate for saying in his tweet that “*CJI rides a 50 lakh motorcycle belonging to a BJP leader without a mask or helmet at a time when he keeps SC in Lockdown mode denying citizens their fundamental*

⁶² Hari Singh Nagra & Ors. V. Kapil Sibal & Ors., 2011 Cri LJ 102 (SC)

⁶³ AIR 2002 SC 1375

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Prashant Bhushan, *supra* note 31

right to access justice” and that “*when historians in future look back at the 6 years to see how democracy has been destroyed in India even without a formal emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs*”. The Court observed that the contemnor had “*indulged in an act tending to bring disrepute to the administration of justice*”. He was expected to act as a responsible officer of the court. Hence, despite the contemnor having a practice of 30 years in the Supreme Court of India and the Delhi High Court, the test as laid down in *Arundhati Roy*,⁶⁷ was clearly not followed by the Supreme Court of India. The legal standing of the contemnor, instead of acting as an exonerating circumstance, weighed as a factor for the court to find him guilty; quite contrary to the ruling in *Hari Singh Nagra*,⁶⁸.

It is clear from these decisions and the other irregularities highlighted in the preceding section that there is no uniformity and consistency in the practice and application of law by the courts in the matter of punishing for criminal contempt and that it is surrounded by numerous contradictions. It is in these circumstances that the authors argue in the subsequent section in the favour of an inquiry into the mental element of the alleged contemnor making the contemptuous comment as one of the possible solutions to the vagueness surrounding this element of criminal contempt. The next section analyses the possibility of narrowing it down by making *mens rea* a relevant consideration for determining guilt in ‘scandalizing’ cases.

IV. **MENS REA ELEMENT IN ‘SCANDALIZING’ CASES: EXISTING PRACTICE AND SUGGESTED DEVELOPMENTS**

Mens rea is an essential ingredient of any crime along with the *actus reus*. Contempt proceedings are quasi-criminal in nature and standard of proof required is that of criminal proceedings. Thus, the charge has to be established beyond reasonable doubt.⁶⁹ Since, the nature of proceedings and the burden of proof is the same in contempt proceedings as that of criminal cases, it is not understood why *mens rea* is not operative in the case of the former and is only relevant at the stage of punishment. It must also inform the judges while finding the guilt of the respondent. In other words, there must at least be some intention or malice to publish the writing or utter the allegedly contemptuous word(s).

IV.I. **Existing Practice: Strict Liability for Scandalizing the Authority of the Court**

There are several defences available to an alleged contemnor in an action for committing contempt by scandalizing the authority of court. Section 5 of the 1971 Act provides that “a person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.”⁷⁰ Section 13(b) states that “the court may permit, in any proceeding for contempt of court,

⁶⁷ Arundhati Roy, *supra* note 59

⁶⁸ Hari Singh Nagra, *supra* note 58

⁶⁹ Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors., AIR 2001 SC 1293

⁷⁰ Contempt Act, 1971, *supra* note 15, § 5

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*.⁷¹ Both the defences are qualified and thus operate in limited sense.

Apart from these two defences explicitly stated in the Act, Section 8 provides that “nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of the Act”.⁷² There is no explicit mention of the defence of intention with respect to scandalizing the court element of criminal contempt in the 1971 Act. It has to be seen whether absence of *mens rea* was a valid defence in the judgements of the Supreme Court of India before the enactment of the Act for it to come within the ambit of Section 8. The opinions on this subject have been contradicting with the consensus heavily in favour of exclusion of the defence of intention.

In re: Marmaduke Pickthall,⁷³ one of the landmark judgements on the subject from the pre-independence era, an editor of a popular newspaper mentioned in an article that judges had been influenced by outside agency in deciding a case. Justice Shah found that the tendency of the article was to undermine the dignity of the Court and the contemnor was found guilty of contempt. While holding so, Justice Shah held that the proper approach was to look at the ‘natural and probable effect’ of the article, and not at the ‘avowed intention of the editor’. Thus, the intention was not an essential constituent in the contempt proceedings in 1923 when this judgement was pronounced.

Ten years later in *Chhaganlal*,⁷⁴ one can find the judges of Bombay High Court acquitting an assessor of contempt for lack of intention. The assessor was fined by the sessions judge for being improperly dressed in the court. The Bombay High Court found that his intention was to ensure his own comfort, not to insult the Court. As is visible from these two contrasting judgements, there was no clear and discernible trend regarding the question of intention in the contempt trials by the colonial courts. It is to be seen if the post-independence Indian courts accorded weightage to the *mens rea* element.

One of the very first and important judgements rendered by the Supreme Court of India after the enactment of the Constitution was *Brahm Prakash Sharma*,⁷⁵ wherein it was held that to constitute contempt, it is sufficient if the words are likely to interfere with the administration of justice; and it is not necessary to prove that the words actually lead to such interference. In laying so, the Court made no mention of the weight attached to the mental element of the contemnor. But the air was cleared by the Supreme Court of India in 1969 in *Namboodiripad*,⁷⁶ wherein the Court categorically ruled out the scope of intention by laying down that whether or not the effect was intended by the appellant

⁷¹ *Id.* § 13(b)

⁷² *Id.* § 8

⁷³ (1923) 25 Bom LR 15

⁷⁴ *Chhaganlal Ishwardas Shah v. Emperor*, 1933 SCC Online Bom 96

⁷⁵ *Brahma Prakash Sharma*, *supra* note 24

⁷⁶ *Namboodiripad*, *supra* note 24

is a consideration for imposition of punishment and is not germane for recording a finding of guilt. It is enough, to fix the liability, if the words are likely to interfere with the administration of justice. Hence, it can be seen that intention was not available as a defence before the enactment of the 1971 Act and is thus not covered by Section 8 of the Act. It is now to be seen if the defence of intention has been identified in the judgements delivered after the 1971 Act.

In Re: S. Mulgaokar,⁷⁷ one of the most crucial judgements from the 1970s decade after the 1971 Act came into force, Krishna Iyer J. of the Supreme Court of India laid down six rules/principles to be considered before exercising the contempt power in the cases concerning scandalizing the court. In the sixth rule, it was laid down as under:

“....after evaluating the totality of factors, if the court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike, a blow on him who challenges the supremacy of the rule of law by fouling its source and stream.”⁷⁸

With these words, Krishna Iyer J. in a sense laid the foundation for the intention as a weighing factor in the criminal contempt jurisprudence. But, Beg CJ, in his separate opinion, to an extent read it down in the following words:

“My opinion on matters touched by my learned brother Krishna Iyer is that, although, the question whether an attack is malicious or ill intentioned, may be often difficult to determine, yet, the language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the care taken in justly and properly analysing the materials before the maker of it, are important considerations. Moreover, in judging whether it constitutes a contempt of Court or not we are concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done. A decision on the question whether the discretion to take action for contempt of Court should be exercised in one way or the other must depend on the totality of facts and circumstances.”⁷⁹

Thus, the scrutiny into the *mens rea* of the contemnor was substantially read down to almost a non-existing level by Beg CJ. To what extent the judgement has shaped the law on the subject is unclear as the court ultimately dropped the proceedings and thus, didn't have an occasion to venture into the intention of the person in writing the article. The Court ultimately pacified the ‘inherent tendency’ or the ‘natural and probable effect’ test to determine the guilt in contempt cases.

The ‘inherent tendency test’ has been echoing in the judgements of the various High Courts and the Supreme Court of India till date. In *Pritam Pal*,⁸⁰ the Supreme Court

⁷⁷ (1978) 3 SCC 339

⁷⁸ Mulgaokar, *supra* note 73, at para 33

⁷⁹ *Id.*, at para 17

⁸⁰ Pritam Pal, *supra* note 36

of India after relying on Lord Justice Donovan in *Attorney General v. Butterworth*,⁸¹ pronounced that “*an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt and it is enough if the action complained of is ‘inherently likely to so interfere’*”. In *D.C. Saxena*,⁸² the Supreme Court of India completely ruled out the relevance of *mens rea* in deciding the liability by observing as under:

*“It is true that in an indictable offence generally mens rea is an essential ingredient and required to be proved for convicting the offender but for a criminal contempt as defined in Section 2(c) any enumerated or any other act apart, to create disaffection disbelief in the efficacy of judicial dispensation or tendency to obstruct administration of justice or tendency to lower the authority or majesty of law by any act of the parties, constitutes criminal contempt. Thereby it excludes the proof of mens rea. What is relevant is that the offending or affront act produces interference with or tendency to interfere with the courses of justice.....It is, therefore, not necessary to establish actual intention on the part of the contemnor to interference with the administration of justice, making reckless allegations or vilification of the conduct of the court or the judge would be contempt.”*⁸³

More recently in 2016, the Supreme Court of India in *Mahipal Singh Rana*,⁸⁴ held that intention is relevant only for the purpose of deciding the quantum of punishment to be imposed. Finally, in *Prashant Bhushan*,⁸⁵ although the judgement mentioned the word ‘malicious’ eighteen times, the court ultimately based its finding of conviction on the likely effects of the tweet, as discussed in Section III. *Notably*, the court applied the test if words were “calculated”⁸⁶ to undermine the dignity of the institution to check whether the words were contemptuous or not, much like all the earlier judgements of the courts till date. Although this might hint towards a trace of intention-searching in the judgements, it turns out to be counter-intuitive. What it really means was explained long back by the Supreme Court of India in the case of *In re: P.C. Sen*,⁸⁷ while dealing with comments made on pending proceedings, as follows:

“The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration

⁸¹ 1963 (1) Q.B 696

⁸² 1996 SCC (7) 216

⁸³ *Id.* at para 40

⁸⁴ *Mahipal Singh Rana v. State of U.P.*, (2016) 8 SCC 335

⁸⁵ *Prashant Bhushan*, *supra* note 31

⁸⁶ *CK Daphtary v. OP Gupta*, 1971 AIR 1132; *In re Hira Lal Dixit*, 1955 1 SCR 677; *Brahma Prakash Sharma*, *supra* note 24; *Mulgaokar*, *supra* note 73; *Pritam Pal*, *supra* note 36; *D.C. Saxena*, *supra* note 78; *Prashant Bhushan*, *supra* note 31; See also Professor Goodhart, *Newspapers on Contempt of Court*, (1935) 48 Harv L. Rev. 885, 898

⁸⁷ AIR 1970 SC 1821

of justice..... If, therefore, the speech which was broadcast by the Chief Minister was calculated to interfere with the course of justice, it was liable to be declared a contempt of the Court even assuming that he had not intended thereby to interfere with the due course of justice.”⁸⁸

The word ‘calculated’, in the sense it is applied by the courts means whether or not the words or actions interfere or are likely to interfere with the course of justice. Thus, it is fairly established from the practice of the courts that the intention or mental state of the alleged contemnor is not a relevant consideration while deciding the cases pertaining to ‘scandalizing the authority of court’. This is also reflected in Section 13(a) of the Act which states that 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.⁸⁹ Hence, it can be safely concluded that contempt by scandalizing the authority of court is arguably a strict liability offence in India.

IV.II. Heightened Scrutiny of *Mens Rea*: A Desirable Way Forward

It is clear beyond doubt that there is arbitrariness and uncertainty in this element of contempt as there is no uniformity in its application which seems to be whimsical. This makes the law on contempt far stricter in India than elsewhere.⁹⁰ In fact, the High Courts in India have been more keen to protect the dignity of the judges than look at the matter from the point of view of the freedom of expression.⁹¹ The ‘inherent tendency’ test, applied in India as discussed in the preceding sections, leaves no scope for the intention to be enquired into by the courts. The virtual effect of this practice and its ambiguity is that once the court makes a *prima facie* view regarding the contemptuous nature of the publication, there is hardly any substantial and certain defence available to the publisher and they are left to the unlimited discretion of the judges.

Arguably, the contempt law, especially the ‘scandalizing’ element, is an unreasonable restriction on the right of the citizens to freely criticise the judiciary and its judgements under Article 19(1)(a). It is a settled proposition of law that any restriction on a fundamental right must not be excessive and disproportionate.⁹² While exercising their power to punish for ‘scandalizing’, the courts have held that it is to protect the public interest in preserving their faith in the administration of justice and confidence in the institution of judiciary from shaking, that they exercise this power.⁹³ Thus, while exercising contempt jurisdiction, the two rights, i.e., right to criticize and the right to public interest in the administration of justice are pitted against each other and need to be

⁸⁸ P.C. Sen, *supra* note 83, at paras 8-9

⁸⁹ Contempt Act, 1971, *supra* note 15, § 13(a)

⁹⁰ Grossman, *Freedom of Speech and Expression in India*, 4 U.C.L.A.L.R. 64 (1957)

⁹¹ Rajeev Dhawan & Balbir Singh, *Publish and be Damned – The Contempt Power and the Press at the Bar of the Supreme Court*, 21 J.I.L.I. 1, 8 (1979)

⁹² Anuradha Bhasin v. Union of India, (2020) SCC Online SC 25; Justice K.S. Puttuswamy v. Union of India, (2019) 1 SCC 1

⁹³ Hira Lal Dixit, *supra* note 82; CK Daphtary, *supra* note 82; Baradakanta Mishra, *supra* note 39; Brahma Prakash Sharma, *supra* note 24; Prashant Bhushan, *supra* note 31

balanced. The manner in which the law fixes the liability strictly in ‘scandalizing’ cases is “unjust”⁹⁴ and leads to excessive curtailment of the citizens’ freedom to criticize. The balance is tilted heavily in favour of protecting the dignity of the courts in comparison to the Article 19(1)(a) right.

The authors argue that it is highly desirable that the liability for criminal contempt must, *inter alia*, be based on intention especially from the perspective of preserving the public interest in freedom of expression and in consonance with the general principles of criminal liability. The authors are of the view that the constitutional courts have conveniently adopted the route of withering away with the requirement of intention which, although creates an additional burden of proof during the trial apart from the act itself, also acts a catalyst in easing the fixation of liability by the courts by depriving the alleged contemnor of the said defence at the very threshold. It can safely be stated that the additional requirement of intention will act as a necessary check upon the powers of the courts and ensure the protection of the citizen’s right to legitimately criticize the judiciary.

While there is much for the judges to self-realize that it is not by stifling criticism, but by rendering fearless judgements that they can ensure public confidence in the judiciary; it is opined that adopting a method of ‘heightened scrutiny’ into the mental element of the publisher/contemnor will go a long way in reforming the law and preserving the precious free speech of the rights.

As regards the standard of *mens rea* inquiry, the authors suggest that the courts must endeavour to record a subjective satisfaction regarding the existence of intention basis the pleadings and evidences tendered by the alleged contemnor which is analogous to a regular criminal trial. The courts must factor-in the surrounding circumstances in which the words are uttered or published along with the mental frame of the alleged contemnor while uttering them and possible motives behind the same. It is imaginable that there occur instances where a person utters words either negligently or carelessly which though she didn’t intend to offend the dignity of justice, have the effect of irking the judges. For instance, a litigant, who after a long courtroom battle, loses the case and utters words in an outspoken manner in a sheer state of frustration although she has no intention to undermine public confidence in judiciary. In such cases, it is not proper if the person is punished by application of ‘inherent tendency’ test; the court should not be impressed solely by the tone of the words and its effect. It should rather see through the mental state of the person and ignore the comments as being in bad taste.

The test of *mens rea* element is not alien to deciding the cases for ‘scandalizing the authority of court’. *Re Hira Lal*, judgement is arguably the best and one of the only judgements where the Supreme Court of India made a substantial enquiry into the object of the contemnor in publishing the pamphlets and held that “the ‘object of writing this paragraph’ and particularly of publishing it at the time it was actually done was quite

⁹⁴ Shubham Kashyap Kalita & Raajdwip Vardhan, ‘Contempt of Court vis-à-vis Freedom of Speech and Expression in reference to the curious case of Prashant Bhushan: Paving the Way for Constructive Criticism’, 11 ICLRQ 131 (2020)

clearly to affect the minds of the Judges and to deflect them from the strict performance of their duties.”⁹⁵ The judgement is one of its kind as it heavily considered why the contemnor distributed those pamphlets in the background of the effect of distributing the pamphlet.

IV.III. Comparative Study of Scrutiny of *Mens Rea* Element in other Common Law Jurisdictions

For the purpose of maintaining homogeneity in the conditions and circumstances in which their contempt of court laws were made and evolved, the authors have majorly taken up examples of former colonies of Britain who gained full independence from the English Crown after the independence of India. While the contempt trials in India have almost patently refused to consider the intention behind the publication or the words, it is apposite to refer to these jurisdictions where the courts have been more receptive and seemingly give weightage to intention while deciding the culpability for the alleged contemptuous material.

For instance, the ‘inherent tendency’ test, as is adopted by India, has also been rejected by the Court of Appeal of Singapore in its landmark *Shadrake Alan*,⁹⁶ case on the ground that proof of intention on the respondent’s part to interfere with the administration of justice was not required under this test. The court propounded a new ‘real risk’ test.⁹⁷ Under this test, the threshold for liability is “*a real risk, as opposed to a remote possibility*”.⁹⁸

While the semantic or theoretical analysis of the term “real risk” cannot trump factual considerations which may be unique to each case, it can be seen that the real strength of the test lies in its practicality and the trust in the courts for an objective judgement, as far as possible.⁹⁹ However, the weakness of the real risk test lies in this very discretion of the courts.

It should be noted that the ‘real risk’ test also steers clear from the inclusion of *mens rea* as a parameter to determine contempt.¹⁰⁰ This was explained in the English case of *Odhams Press Ltd., ex p. Attorney-General*,¹⁰¹ wherein the Divisional Court stated that “*the test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result.*”¹⁰²

Post the *Shadrake Alan case*¹⁰³ in 2011, the judiciary once again was faced with the question of whether *mens rea* requirement is to be seen while determining the offence

⁹⁵ Hira Lal Dixit, *supra* note 82

⁹⁶ *Shadrake Alan v. Attorney General*, [2011] SGCA 26

⁹⁷ *R v. Glennon*, (1992) 173 CLR 592; *Wong Yeung NG v. Secretary for Justice*, [1999] 2 HKC 24

⁹⁸ *R v. Duffy, ex parte Nash* [1960] 2 QB 188 ¶ 200; *Attorney-General v. Times Newspapers Ltd* [1974] AC 273 ¶ 298-299; *State v. Mamabolo* 2001 (5) BCLR 449 at 68 ¶ 45

⁹⁹ *Shadrake*, *supra* note 92, at para 29

¹⁰⁰ *John Fairfax & Sons Proprietary Ltd. v. McRae*, (1955) 93 CLR 351 ¶ 371

¹⁰¹ [1957] 3 All ER 494

¹⁰² *Ibid.*, ¶ 497

¹⁰³ *Shadrake*, *supra* note 92

of scandalizing the court in *Au Wai Pang*¹⁰⁴. Here also, the Supreme Court of Singapore denied any requirement of intention and continued with the ‘real risk’ test. What is evident from this is that the requirement of intention is limited only till the fact that a contemnor intended to “publish or act” in the contemptuous manner, that is *mens rea* is restricted to intention or knowledge of *actus reus* and is not extended to whether there was intention to bring about the effect of undermining the judicial system and interfering with administration of justice through such *actus reus*.

Keeping the above in mind, it is important to note that while the Singapore jurisdiction does not require “intention to bring about the effect of undermining the judicial system” for the entirety of the cases falling within contempt of court including scandalizing of the court, however, it does not exclude it too. The Singapore courts have interpreted Section 3(1)(d) read with Section 3(6) of the Administration of Justice (Protection) Act, 2016¹⁰⁵ as following:

“...Section 3(1)(d) of the AJPA

38 Turning to contempt under s 3(1)(d) of the AJPA, the actus reus is the act of either insulting the judge or causing any interruption or obstruction to the judge while the judge is sitting in court proceedings. This limb concerns acts of contempt in the face of the court i.e., ex facie contempt, which disrupts the court process itself.

39 The mens rea is the intention to offer such insult or cause such interruption or obstruction. Further, s 3(6) of the AJPA provides that the contemnor is liable if he “knows or ought to have known that the act would prejudice or interfere with or obstruct or pose a real risk of prejudice to or interference with or obstruction of the course of the court proceeding [emphasis added].” Compared to scandalising contempt under s 3(1)(a), there is an additional mens rea requirement as to the effect of the act on the court proceeding... ”¹⁰⁶ [Emphasis Supplied]

Thus, *mens rea* requirement as to the performance of the contemptuous act itself is a necessary requirement in Singapore jurisdiction¹⁰⁷ and though the extended *mens rea* as to the effect of the performance of the contemptuous act is not applicable to cases of scandalizing the court, it is used to bottle certain other forms of criminal contempt. This arguably sets a precedent for future adjudication of even scandalizing the court cases using the extended-*mens rea* requirement if the Courts so choose to self-regulate themselves on this front. Such usage can streamline the contempt jurisprudence giving clarity and form to its application.

The famous South African decision of *S v. Van Niekerk*,¹⁰⁸ has also held that the *mens rea* requirement features in the offence of scandalizing. Claasen J. explained in

¹⁰⁴ *Au Wai Pang v. Attorney-General*, [2016] 1 SLR 992

¹⁰⁵ The Administration of Justice (Protection) Act, 2016, No. 19, Acts of Parliament (Singapore)

¹⁰⁶ *Attorney General v. Ravi s/o Madasamy*, [2023] SGHC 78

¹⁰⁷ *Attorney-General v. Xu Yuan Chen*, [2023] SGHC 87]

¹⁰⁸ 1970 (3) SA 655 (T)

the case that the contemnor’s actions might well have amounted to contempt, from an objective standpoint, but upon applying a subjective test of *mens rea* the contemnor was relieved of liability. He observed:

*“Before a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the judges in their judicial capacity into contempt or casting suspicion on the administration of justice. For this type of intention it is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of court and was reckless as to the result.”*¹⁰⁹

The approach of the South African courts, while still not consistent to a sufficient degree to make *mens rea* requirement a part of contempt law, has more or less been to narrow the offence of scandalizing the court.¹¹⁰ One of the methods to narrow down and make consistent the offence of scandalizing the court is to make *mens rea* requirement a necessity as to the “undermining” effect of the *actus reus*.

The question of *mens rea* requirement is most conclusively answered in the Mauritian case of *Dhooharika v. Director of Public Prosecutions*¹¹¹. The initial position of Mauritian law on scandalizing the court was similar to the one that exists in Singapore now, that is, there was a requirement of intention only to the extent of performance of contemptuous act and the same did not extend to whether there was intention to actually undermine the authority of the courts. The challenge to this position was once again taken up in *Dhooharika*. The judges therein went into the question of *mens rea* subsequent to their study of the position in the law of England and Wales. They referred to the remarks of Lord Atkin in the English case of *Ambard v. Attorney-General for Trinidad and Tobago*¹¹²:

*“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, they are immune.”*¹¹³

Basis the above consideration, the Mauritian Board concluded that if the defendant acts in good faith, then he is not liable and the burden of establishing bad faith on the defendant’s part was on the prosecution. This is evident from the following passage of the judgement:

“...Thus, at any rate once the defendant asserts that he acted in good faith, the prosecution must establish that he acted in bad faith. If the prosecution establish that he either intended to undermine public confidence in the

¹⁰⁹ 1970 (3) SA, ¶ 657

¹¹⁰ Mambolo, *supra* note 94.

¹¹¹ [2014] 3 WLR 1081

¹¹² [1936] AC 322

¹¹³ [1936] AC 322

administration of justice or was subjectively reckless as to whether he did or not, that would in the opinion of the Board, be evidence of bad faith..."¹¹⁴

This clarifies that the approach taken by the Mauritian court herein was that *mens rea* for scandalizing the court should be an "intention to undermine public confidence in the administration of justice". This is a stricter test of *mens rea* than seen in the Singapore jurisdiction and is similar to the test evolved in the South African case of *R. v. Van Niekerk*.

For the purpose of effective bottling of the offence of scandalizing contempt and streamlining it to ensure consistency in precedents, it is not advisable for India to adopt the 'real risk' test of Singapore in its full spirit. Rather, the test as adopted by South Africa and Mauritius seems more suitable for the purpose of making a heightened scrutiny into the intention of the contemnor. Even the approach as manifested in *Hira Lal*,¹¹⁵ will go a long way in facilitating the intention search.

V. CONCLUSION

As discussed above, there is no consistency in the application of the "scandalizing" jurisdiction of courts. There is no uniform code for its execution. The interpretation and application of law is entirely up to the wisdom of individual judges, thus resulting in a 'Rule of Men, not Law'. This is surely counter-productive as the courts in their exercise of contempt jurisdiction, aim to preserve the very holy constitutional principle of rule of law.

This article has made a comparative analysis across several common law jurisdictions viz., Singapore, South Africa, Mauritius and England, and their treatment of 'scandalizing the authority of the court'. Such comparative analysis has aided us to identify different tests and their degrees in the determination of the offence of 'scandalizing contempt'. It also highlights the extents of *mens rea* itself, one being limited to "intentionally publishing or performing the contemptuous article or act, respectively" and second being an expanded requirement of "intention or knowledge of the undermining effect of such contemptuous act".

This article cannot conclude in a certain and straightforward manner whether there is an accepted practice of using 'expanded' *mens rea* as to the effect of the contemptuous act, as one of the essential conditions of scandalizing contempt. But it can, through the comparative analysis, show that criminal contempt is a contentious issue in most of the former colonies of England. Each jurisdiction has dealt with 'intention in contempt' in a different manner after their independence. In terms of this treatment of 'intention in criminal contempt', there are three types of jurisdictions. *One*, jurisdictions having a mature understanding of *mens rea* in scandalizing contempt, for instance, Mauritius. Though, a disclaimer is definitely needed with regards to Mauritius and its lack of sufficient cases to see whether the *mens rea* proposition there is indeed a long lasting and good law. *Second*, jurisdictions like Singapore that are still traversing how *mens rea* is to be applied to the question of contempt. Though not fully evolved in their understanding, their path

¹¹⁴ Dhoocharika, *supra* note 107, Para 48

¹¹⁵ Hira Lal, *supra* note 82

is comparatively streamlined with legislation and judicial pronouncements working in tandem. *Third*, jurisdictions like South Africa and India that do not have a streamlined approach to answering the question of criminal contempt. Judicial pronouncements in such jurisdictions are dependent on the political nature of case and the sensibilities of the individual judges adjudicating on the question. This is not to say that there are no instances of courts in these countries taking a recourse to *mens rea* to see if the offence of scandalizing the court is made out. While these cases give sound reasoning, they fail to establish any jurisprudential milestone for future adjudications due to their intermittent nature.

The authors suggest the Indian courts shall be inspired from the development of the criminal contempt law, specifically the ‘scandalizing’ element, in these jurisdictions and move a step ahead by tracing more deeply into the mental element involved. The object behind this *mens rea* tracing boils down to the following two aspects:

- a. The form of criminal contempt law becomes concrete which can serve as a reference for the person making a critique as well as for the public that has to save itself from gullibility and resultant swaying against the judicial process as a potential result of such critique;
- b. This permits giving the expression ‘reasonable restrictions’ in Article 19(2) of the Indian Constitution a comparatively exhaustive interpretation. This will lead to a better balance between protection of the judiciary and the fundamental right of the citizens. It is time that the lawmakers and the judges of the higher courts focus to overhaul the existing law so as to repair the damage done over years in the way of suppressing legitimate criticisms and keeping everyone clueless of what exactly can invite the liability for contempt.

The nuances of the inquiry into the intention are to be worked out by both legislative and judicial efforts, however, it is suggested that the *mens rea* consideration as carried out by the Indian courts during regular criminal trial effectively provides a solution to the contempt trials as well inasmuch as the courts adopt a holistic approach and refuse to oust the defence with respect to intention tendered by the alleged contemnor. This, the authors vehemently believe, will go a long way in making the ‘scandalizing’ element more certain and consequently, the restoration of the people’s entitlement to freely ventilate their ‘fair criticisms’ against the judiciary.

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