



## Scandalising the judiciary: A re-look into the criminal contempt jurisprudence in India

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### Abstract

The criminal contempt jurisprudence in India has been a part of several debates tracing way back from Constituent Assembly Debates to the recent Prashant Bhushan contempt case. The vigour and continuity with which the Indian courts have and are resorting to charging the alleged contemnors with contempt of court have led free speech activists to assail the provision for scandalising the court under S. 2 (c) (1) of Contempt of Courts Act, 1971. This paper intends to carry forward the argument against the impugned provision by arguing that scandalising the judiciary should not be a ground for contempt of court on several counts such as freedom of speech and expression, the ambiguity of the provision, absence of transparency etc.

This paper is discussed under five headings. The first part would give an introduction to the Indian law of contempt and trace its origin in the Constituent Assembly. The second part would address various issues that arise with the impugned provision. The third part would bring out various instances of procedural lapses that have occurred in the commencement of contempt proceedings, thereby questioning the procedural fairness aspect of the proceedings. The fourth part would elaborate on the vagueness of the impugned provision. The authors humbly submit that this vagueness has led to the application of different standards by the judiciary. Lastly, the authors discuss various provisions of law which deal with misconduct on the part of lawyers. The reason for discussing these provisions would be to argue that there already exist penal provisions in the law for misconduct by Bar and that the judiciary ought not to resort to contempt of court in every case.

**Keywords:** scandalising the judiciary, contempt of court, procedural fairness, free speech and expression, and fallibility of judges

### Introduction

Although the need for guarding the judiciary against being scandalised by malicious and reckless speech cannot be denied, it should not, however, be achieved by curtailing the freedom of speech and expression. Curtailing free speech would prevent the airing of constructive criticism and may harm the institution of courts in the long run. Since the thin line of separating free speech and outright disrespect is not devoid of ambiguity, it is necessary to tread a middle path that takes into account a balanced view.

As per the contempt jurisprudence in India, contempt of court may either be civil or criminal in nature. Scandalising court is one of the various forms of criminal contempt. This paper intends to analyse the existing discourse on criminal contempt and the issue of scandalising the court. Although contempt of court due to 'scandalising the judiciary' was meant to prevent undue interference in 'administration of justice', in reality, it is prone to be used as means for stifling criticism. Thus, the authors argue that scandalising the judiciary as a ground for contempt is arbitrary and disproportionate.

### Method

The arguments of the authors are organised under five broad headings. We start with a brief outline of the law of contempt with particular reference to Constituent Assembly Debates. Since India and the UK had similarities in their legal systems, the authors also compare the law of contempt in these two countries. This is followed by a discussion about issues relating to criminal contempt proceedings in light of the landmark cases. The third section deals with procedural fairness and highlights procedural lapses in the

commencement of the proceedings. The vagueness of legal provisions resulting in the application of 'different standards', with particular reference to the recent Prashant Bhushan case, would be highlighted in the fourth section. In the last section, the authors analyse various provisions addressing the issue of misconduct by the Bar and conclude that criminal contempt is not the only available recourse for dealing with misconduct by the Bar.

### Timeline

The issue of adopting erstwhile colonial laws relating to contempt as part of the Indian legal system was hotly debated in the Constituent Assembly, and the term "contempt of court" was adopted with considerable reluctance. Members of the Constituent Assembly were divided; one group advocating the inclusion of the term scandalising of court and the other group opposing it. R.K. Sidhva, one of the members opposing its inclusion, vehemently argued that "*Judges have not got two horns; they are also human beings. They are liable to commit mistakes*".

While Article 129 of the Indian Constitution vests the Supreme Court of India to punish on charges of Contempt of Court, Article 215 vests the same power to the High Courts. This provision has been assailed by scholars and lawyers on broadly two grounds – vague definition of contempt of court and its colonial origin.

In 1970, the Supreme Court of India (hereinafter SC), in *E.M. Sankaran Namboodripad v T. Narayan Nambiar*, observed that "*an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction with, and distrust of all judicial decisions. It weakens the*

authority of law and law courts.” This judgment sought to protect the honour of the court by preventing any speech tarnishing the honour and reputation of the court. The very next year, the phrase “scandalising the court” was adopted by way of the Contempt of Courts Act, 1971 (hereinafter the Act), which replaced the earlier 1952 Act.

As mentioned earlier, the Indian legal system draws heavily from the British legal system. Scandalising the court is one of them. Based on the recommendation by the UK Law Commission, the Crimes and Courts Act 2013 struck down the provision for scandalising the court because it was considered redundant and it curtailed free speech. However, the law remains in force in India, and the Indian judiciary uses it routinely. As per the Law Commission of India’s report, as many 568 criminal and 96,310 civil contempt cases were pending in various High Courts between 1 July 2016 and 30 June 2017. The most recent instance of its use was in the landmark contempt case against lawyer cum activist Prashant Bhushan. Contempt proceedings were initiated against him for his tweet criticising the Honourable Chief Justice of India (hereinafter CJI) for riding a motorcycle belonging to a political leader of the ruling party without a mask or helmet when the Supreme Court was not conducting physical hearings due to the pandemic. He alleged that this amounts to dereliction of duty by the CJI. He was held guilty, and a token fine of Re. 1 was imposed.

## Issues

Before discussing the issues, it is pertinent to put in perspective the elements that constitute contempt of court. S. 2 (c) of the Act envisages three situations which can be termed as constituting contempt of court. They may be discussed as follows:

1. **Scandalising the court [S. 2 (c) (i)]:** We can refer to the case of *PN Duda v Shiv Shankar and Others*, where the SC held that mere criticism of the court would not amount to contempt. It is submitted that the tweet made by Prashant Bhushan should have been able to enjoy immunity in light of this judgement.
2. **Interfering with due course of any judicial proceeding [S. 2 (c) (ii)]:** The SC held that if there is any statement against a judge which can pervert the course of justice, then this provision may be used.
3. **Interfering with administration of justice [S. 2 (c) (iii)]:** Under this provision, it is not necessary that there should be actual interference with the administration of justice. If there is an act or a statement that renders it probable that the administration of justice would be hampered or interfered with, then this provision may be availed of.

Now, there are as many as three issues that can be framed while discussing the constitutionality of S. 2 (c) (i) of the Act. They are:

**1. Freedom of speech and expression:** The specific argument against the impugned provision is that the Indian judiciary has taken a rather constricted view of criticisms levelled against it. This is evident in the SC’s judgement in *Re: Vijay Kurle and Others*:

“...No litigant has a right to attribute motives to a Judge. No litigant has a right to question the integrity of a Judge. No litigant has a right to even question the ability of a judge. When the ability, integrity and dignity of the Judges are

questioned, this is an attack on the institution. It is an attack on the majesty of law and lowers the impression of the Courts in the public eye.” The immediate consequence of this negatively worded observation is that it excludes the possibility of judges erring in their judgment or analysis. It leaves no scope for even a fair criticism because any criticism can be construed as questioning the capability and abilities of the judge or court. Another case that followed this jurisprudence is the *EM Sankaran Namboodiripad* case, where the court equated a personal criticism to that of the entire institution. To address this point, reference must be made to the *Baradanath Mishra* case where the SC observed that if the statement (alleged vilification) is against the judge as an individual, the judge is free to avail their private remedies, and the judge is not empowered to consider it as a contempt case. It is submitted that a critical statement addressed to a judge must not be construed as belittling or demeanor of the entire judicial institution.

The argument that the law is a hindrance to free speech is buttressed by the fact that ‘truth’ as a valid ground for defense was only added in 2006. Unlike civil defamation, where truth is considered an absolute defense, contempt of court considers truth as a defense only if the court is satisfied that it is in the public interest and *bona fide*. This makes the defense futile as it remains subject to ‘subjective satisfaction’ of the court.

**2. Transparency:** Another objection raised by both lawyers and academicians is that it is detrimental to transparency, an element quintessential for the smooth functioning of a democracy. There are umpteen examples where the SC and the lower courts have jeopardised transparency. *Indira Jaising v Registrar General of Supreme Court of India* is one of the notable examples. This case involved an allegation of sexual harassment charges against some judges of Karnataka High Court. A Committee, headed by the Chief Justice of that High Court, was constituted to deal with the complaint. The Committee invoked In-House Procedure whereby it would prepare a report. Notice for contempt of court was served on newspapers for merely reporting details of a case involving grave charges of sexual harassment. The very fact that S. 2 (c) (i) enables the court to shield itself from an allegation of misconduct substantiates the argument relating to its vagueness and arbitrariness. Justice William O. Douglas’ observation in *Craig v Harney* fits in the case at hand. He says: “What transpires in the courtroom is public property...” Ms. Jaising’s argument was more or less in the same line. She argued that public interest demands that the inquiry report prepared by the Committee should be published. However, the court declined the request on the ground that the report was an internal device for eliciting the truth. The court further argued that publication of the report “will only lead to more harm than good to the institution as Judges would prefer to face inquiry leading to impeachment.”

The primary argument against provision for the scandalising of the judiciary is that there is no unambiguous definition of what constitutes scandalising the court. Which act and / or statement qualify as scandalising the court is left to the subjective interpretation of the judiciary. However, there are certain questions that compel us to re-think the criminal contempt jurisprudence in our country: Can the judiciary choose to punish someone for bringing its misconduct into the public view? Does it not try to curb critical remarks and

hide misconduct by punishing anyone reporting such incidents? Does it not grant disproportionate discretion by way of empowering the CJI to act or to close proceedings “as he deems fit?” Such wide discretion can lead to undermining a serious offence relating to sexual harassment if the CJI *chooses* to close proceedings for being “not that serious”.

**3. Recognising the fallibility of the judges:** Provisions relating to scandalising the court do not recognise the fact that judges are also human and are fallible. J. Frankfurter’s dissenting opinion in *Bridges v California* encapsulates this idea in the following words: “*The purpose...[of the contempt power] is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous unfree or coerced tribunal.*” If the judiciary initiates a criminal contempt case for any report on misconduct or constructive criticism, then it implies that judges are infallible. This would only pave the way for hypersensitivity.

It also needs to be noted that in *R. Rajagopal v J. Jayalalitha*, the Madras High Court had held that a public figure could not expect the same degree of privacy as a private person. This is because the public gaze is a natural corollary to holding public office. Since judges hold public offices so, their conduct is subject to public scrutiny and cannot enjoy absolute protection from being called to account by taking recourse to scandalising the court argument.

**4. Different Standards:** One of the major drawbacks of ‘scandalising the court’ as a ground for contempt pertains to its vagueness. This grants wide discretion to the judge and leads to misuse. In fact, in *Shayara Bano v Union of India*, the Apex Court had held that the doctrine of ‘manifest arbitrariness’ could be used in challenging legislations as well. Thus, legislation can be struck down if it grants excessive discretion.

In order to curb the misuse of the law, Justice Krishna Iyer in *In Re. Shri Mulgaokar v Na*, had attempted to lay down guidelines for determining when criticisms amount to ‘scandalising the judiciary’. One of the guidelines was that while exercising the power of contempt, judges need not be hypersensitive. It further held that the court needs to differentiate between personal attacks on a judge and comments which vitiate the public confidence in the judicial system itself. However, any scurrilous attack on the judge questioning his authority in his professional capacity would amount to contempt of court. Thus, the attack must be offensive, malicious and intimidating in order to scandalise the judiciary.

In reality, uniform standards have not been used for deciding on similar cases. For instance, the Chief Minister of a State was found of contempt for opining that Judges are elitist and have class bias. On the other hand, a similar allegation by the then Union Law Minister was merely met with a request for exercising greater restraint while exercising his freedom of speech. Similarly, an ex-CJI’s comment on ‘close blood relationships’ between the judge and the lawyer vitiating fair trial was considered ‘fair criticism’ by the Bombay High Court because the comment

was aimed at improving the judiciary. If the standards laid down by J. Krishna Iyer were followed, then this comment was of much graver nature than what Prashant Bhushan had made in recent time.

### The aspect of Procedural Fairness

In any matter of court proceeding, the principle of natural justice needs to be followed for it to be fair. Generally, *nemo iudex in causa sua* (no one should be a judge in his own case) and *audi alteram partem* (let the other party be heard as well) are considered the two fundamental pillars of natural justice. While the former eliminates the possibility of ‘conflict of interest’, the latter gives the right to be heard to both parties. Furthermore, an open court trial is also considered necessary for the fair delivery of justice. Unfortunately, the jurisprudence of Contempt of Court shows incidences where these principles were not followed.

**1. Commencement of the Proceeding:** Contempt of Court Rules, 1975 (hereafter, ‘Rule’) allows contempt petition to be commenced in three ways. The court can take *suo-motu* cognisance of the matter, or it can be filed on motion by the Attorney General/ Solicitor General of India or by any private person with the consent of the Attorney General/ Solicitor General of India.

As far as the *suo-motu* cognisance is concerned, there was a difference of opinion between Justice Sabyasachi and Justice Ranganathan in the *P.N. Duda* case. While J. Sabyasachi opined that the decision of the Attorney or the Solicitor General is under the ambit of judicial review, J. Ranganathan held otherwise. He opined that once the application has been rejected, the only recourse available to the person is to request the court to take *suo-motu* cognisance.

The lack of clarity in this aspect once again came to the limelight in the recent contempt proceeding against Prashant Bhushan. In this case, the petition was directly filed in the Supreme Court without any prior approval from the Attorney or Solicitor General. However, the court admitted the petition by citing the decision in *P.N. Duda v P. Shiv Shankar*. Moreover, not even a copy of the petition was given to the contemnor despite the fact that it is mandated under Rule 6(2). This act of the court not only vitiates the principle of *audi alteram partem*, but also J. Ranganathan’s own judgment where he ruled that even in case of *suo-motu* cognisance, if the petition is not in proper form, then it will be rejected.

**2. Pecuniary and Non-Pecuniary Bias:** Pecuniary and non-pecuniary are the two kinds of biases. In the former, there exists a direct vested interest between the judge and the contemnor; in the latter, it is indirect and a bit difficult to prove. There are incidences of both types of biases in the contempt jurisprudence. An example of pecuniary bias is the contempt case against two journalists of the *Shillong Times*. The journalists wrote an article, ‘*When Judges Decide For Themselves*’, which criticised an Order of the Meghalaya High Court regarding retirement benefits to judges. The High Court held them guilty of contempt of court. Interestingly, Justice Sen, who was the subject matter of the criticism, himself passed the judgement. While the Apex Court later overruled the conviction without passing any remark regarding J. Sen’s conduct.

In a similar case in South Africa, a contempt proceeding

was instituted by a High Court judge for commenting on a judgement delivered by the judge. An in-camera trial was conducted. The contemnor was called to the chamber of the judge and asked to explain his comment and was held liable for contempt of court. While setting aside the conviction, the South African Constitutional Court held that a court could not circumvent the principles of natural justice under any circumstance. However, in the Indian context, the Chief Justice, being the 'Master of the Roaster', has absolute discretion in setting up the Bench. Thus, unless a judge recuses himself willingly from a proceeding, nothing can be done.

For non-pecuniary biases, the standard of 'Reasonable Likelihood of Bias' standard has been adopted by the Court in *Rex v Sussex Justices*. In the criminal proceeding, the Clerk appointed to the justices was found to be the partner of the law firm which had sued the defendant. However, he did not participate in the court's deliberation. After the court held him guilty, the defendant challenged it on the ground that it was improper for the court to appoint the Clerk whose firm is involved in suing the defendant. While setting aside the conviction, Lord Heward opined that '*Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice*'. It held that this single act of the judge vitiated the notion of '*justice is not only to be done, but seen to be done*'.

In *Ranjit Thakur v Union of India*, the court held that for non-pecuniary bias, there needs to be apprehension of 'Reasonable Likelihood of Bias' in the mind of the party and not the judge. However, this standard has not been followed in the Prashant Bhushan case. In this case, the contemnor had requested the Chief Justice of India to not to select a Bench having Justice Arun Mishra in it. This is because, on a number of previous occasions, J. Mishra had threatened Prashant Bhushan of instituting a contempt proceeding against him. So, there was a 'Reasonable Likelihood of Biases' in the mind of Prashant Bhushan regarding the impartiality of the trial. However, the Chief Justice of India did not intervene, and J. Mishra held him guilty of contempt of court. So, this is an example of non-pecuniary bias.

**3. Unnecessary Remarks:** It has been seen in a number of occasions where the judge had made some unnecessary remarks against the contemnor in their judgment. For example, in a contempt proceeding against a sitting Chief Minister of Kerala, E.M. Sankaran Nambooripad, the then CJI Hidayatullah reprimanded and lectured him on Marxism. This is particularly because the contemnor was a prominent Communist leader, and he criticised the judiciary by referring to Marx.

This trend has again been observed in a recent case against a film actor. The actor had made a comment criticising the Apex Court's Order of allowing NEET Exam to be conducted during the pandemic even though the Judges are themselves conducting court proceedings through video conference. A request was made by a Judge in the Madras High Court to start a contempt proceeding against the actor, but the Attorney General had declined its consent for instituting a contempt proceeding. Even though the High Court opined that this statement does not amount to contempt, still it felt to give a *judicial opinion* on the matter and started a court proceeding. It opined that "*before a scoff or a mocking comment is made, it should also be weighed as*

*to whether it is fair criticism or not. This too at the instance of one who is stated to be a philanthropist and a self-righteous person dedicated to the cause of public at large. It further opined that the comment was irresponsible.*"

Even though the court did not hold guilty of contempt of court, such *judicial opinion* was unnecessary because the contemnor was not even given an opportunity to present his arguments. It might very well be the case that the contemnor would have disagreed that his comments were irresponsible, just like Prashant Bhushan refused to apologise for his comments. In the end, such *opinions* not only vitiate the principles of natural justice but also show that Judges are prone to use this provision to show personal grudge against the contemnor.

### Alternate Remedies

Some authors believe that while the UK has abolished 'scandalising the judiciary' as a ground for contempt of court, the situation in India is different. It argues that since democracy is still at the nascent stage in India, it is pivotal to build trust in the institution. However, the authors submit that there are other remedies to save the institution of the judiciary. For instance, in *S. Khushboo v Kaniammal*, the Supreme Court had recognised the concept of *Group Defamation* where an entire group of people is maligned. The only requirement is that the group of individuals has to be recognised and distinguished from the rest of the community. This remedy could be an effective alternative to 'scandalising the judiciary' as, unlike the former, the elements of defamation have been clearly laid down under Section 499 of the Indian Penal Code.

Justice Arun Mishra, in the Prashant Bhushan contempt case, had opined that 'scandalising the judiciary' is the only remedy available to the judges against unruly behaviour of the members of the Bar. He further opined that while lawyers need to be fearless, they need to be respectful to the institution at the same time.

The aspect of 'misconduct by the Bar' is one issue that the judiciary has faced a lot of times. While mostly it involves situations where grave allegations are made against the Judges, there are incidences where things took a very ugly turn as well. For example, in the Madras High Court, the contemnor W. Peter Ramesh Kumar, who was a lawyer, barged into the court hall and started raising slogans against fellow advocates. He even challenged the Judges to initiate a contempt proceeding against him. Even though he was held guilty of contempt and sent to three months imprisonment, it is not true that contempt of court is the only recourse available to the court in such situations. The Bar Council of India has its own Code of Ethics, and punishment up to suspension from practice can be granted for its violation. Thus, 'misconduct of the Bar' cannot be a justification for contempt of court.

### Conclusion

There is an inherent chance of biases in any contempt of court proceedings. This is because every such proceeding would be an instance where the court is deciding a case where its own reputation is at stake. The vagueness in the section compliments this predicament. It gives wide discretion to the court to use this provision arbitrarily. Moreover, courts have disregarded the principles of natural justice as well. The jurisprudence of contempt of court has shown that there are instances of both pecuniary and non-

pecuniary bias. We, therefore, have other effective remedies of *Group Defamation* and also under the Advocates Act, 1961. All these lead to only one conclusion, i.e. 'scandalising the judiciary' should not be a ground for contempt of court.

### References

1. Contempt of Courts Act, 1971, s. 2 (c).
2. Delhi Judicial Service Association, Tis Hazari Court, Delhi v State of Gujarat and Ors. 1991Cri LJ 3086.
3. Constituent Assembly of India Debates (Proceedings). (Constitution of India, 17 Oct 1949) <[https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/10/1949-10-17](https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-17)> accessed 19 February 2021.
4. Puja Raghvan. Scandalising the Court: Who will be the custodian of the custodians? (Bar and Bench, 30 May 2020) <<https://www.barandbench.com/apprentice-lawyer/scandalizing-the-court-who-will-be-the-custodian-of-the-custodians>>accessed 02 February 2021.
5. E.M. Sankaran Nambodripad v T. Narayan Nambiar 1970 AIR 2015
6. Contempt of Courts Act, 1971, s. 2 (c) (1)
7. Contempt of Court: Scandalising the Court. (Law Commission, 18 Dec 2012)<<https://www.lawcom.gov.uk/project/contempt-of-court-scandalising-the-court/>> accessed 8 March 2021.
8. Offence of scandalising the court rooted in colonial assumptions: Plea in Supreme Court. (National Herald, 1 Aug 2020) <<https://www.nationalheraldindia.com/india/offence-of-scandalising-the-court-rooted-in-colonial-assumptions-plea-in-supreme-court>> accessed 14 February 2021.
9. 'Review of Contempt of Court Act, 1971 (Limited to Sec 2 of the Act) (Law Commission of India, 17 April 2018).
10. In Re Prashant Bhushan & Others, MANU/SC/0653/2020.
11. PN Duda v Shiv Shankar and Others, 1988 AIR 1208.
12. Shamsheer Singh Bedi v High Court of Punjab and Haryana AIR 1995 SC 1974.
13. Brahma Prakash Sharma v State of Uttar Pradesh 1954 AIR 10.
14. In Re: Vijay Kurle and Others: (2019) 10 SCC 219.
15. Baradanath Mishra v The Registrar of Orissa High Court 1974 AIR 710
16. Contempt of Court Act, 2006, s. 13.
17. Jain and Mishra. Scandalising the judiciary: An analysis of the uneven response of the Supreme Court of India to sexual harassment allegations against judges. International Journal of Constitutional Law, 2020;18(2):563-590.
18. Indira Jaising v Registrar General of Supreme Court of India 2003 (5) SCC 494.
19. Craig v Harney 331 U.S. 367 (1947).
20. Addl. District & Sessions Judge 'X' v High Court of M.P. (2015) 4 SCC 91.
21. Bridges v California 314 U.S. 252 (1941).
22. R. Rajagopal v J. Jayalalitha AIR 2006 Mad 312.
23. Shayara Bano v Union of India WP (Civil) 118/2016.
24. In Re. Shri Mulgaokar v Na, MANU/SC/0067/1978.
25. DC Saxena v Hon'ble CJI MANU/SC/0627/1996.
26. Vishwanath v E.S, Venkatramaih & Others, MANU/MH/0137/1990.
27. Registrar General, High Court Meghalaya v Smti. Patricia Mukhim, MANU/MG/0016/2019.
28. State v Mamabolo, [2001] ZACC 17.
29. Rex v Sussex Justices, [1924] 1 KB 256.
30. Ranjit Thakur v Union of India, 1987 AIR 2386.
31. Navroz Seervai. Unnatural Justice And The Prashant Bhushan Contempt Saga. (The Wire, 3 Aug 2020) <<https://thewire.in/law/prashant-bhushan-supreme-court-contempt>>accessed 18 February 2020.
32. In Re Suo Motu Criminal Contempt No. 791 of 2020.
33. T.R. Adhyarujina. Scandalising the Court: Is It Obsolete? (The Practical Lawyer, 2003), <[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=5&do\\_pdf=1&id=264](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=264)> accessed 24 February 2021.
34. S. Khushboo v Kaniammal, (2010) 5 SCC 600.
35. Advocates Act, 1961, s. 35.