

**REPORT ON  
THE OFFENCE OF SCANDALISING  
THE COURT IN INDIA**

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# REPORT ON THE OFFENCE OF SCANDALISING THE COURT IN INDIA

## 1. INTRODUCTION

### 1.1 Purpose of the report

This report considers whether current Indian law on the offence of scandalising the court is justified, and if not, how the law should be amended. It is intended that this report be submitted to the Standing Committee On Personnel, Public Grievances, Law And Justice, the Standing Committee having invited suggestions on the *Contempt of Courts (Amendment) Bill 2004* [‘the Bill’]. The Bill introduces a defence to a charge of contempt of court, namely that:

*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 the public interest and the request for invoking the said defence is bona fide*

In this context, it is worthwhile to determine whether the Bill is necessary, and secondly, whether the amendment as proposed by the Bill is adequate.

### 1.2 Limited focus of the report

It should be noted that this report does *not* consider forms of contempt of court other than scandalising the court. Other forms of contempt of court include, for example: civil contempt for disobeying an order of the court, commenting *sub judice* on current or pending proceedings, or causing disruption in the face of the court. In a sense, all of these forms of contempt have a direct bearing upon the everyday operations of the court. In contrast, the offence of scandalising the court is concerned with the somewhat nebulous notion of *public confidence* in the administration of justice. Its link to the actual operations of the court is more tenuous than other forms of contempt; its practical importance to the administration of justice is less readily demonstrated. Accordingly, the case for reforms of the offence of scandalising the court may be stronger than for other forms of contempt of court.

As such, any recommendations made in this report are intended to relate to cases involving the offence of scandalising the court, unless the report explicitly states otherwise.

### 1.3 Synopsis

This report concludes that the proposed Bill does not go far enough. Further amendments need to be made to the substantive and procedural law that governs cases in which a person has been accused of scandalising the court. [Such cases shall hereafter be denoted as ‘scandalising cases’, and the offence of scandalising the court shall hereafter be denoted as the ‘scandalising offence.’].

Initially, some basic issues relating to the scandalising offence will be canvassed. The report then describes current substantive and procedural laws governing the scandalising offence. It will be shown that while the scandalising offence is expansive in its scope, the defences available to a scandalising charge are uncertain, and the procedure for dealing with scandalising cases is questionable.

Based on legacies of abuse of the scandalising offence in other jurisdictions, the report then highlights the potential for misuse of the scandalising offence in India. Therefore, it is sensible to ‘nip this problem in the bud’ by limiting the scope of the offence, clarifying the defences available to the offence, and improving procedural safeguards for the accused.

Having demonstrated the need for reform, the report then makes several recommendations. Essentially, these recommendations include amending the *Contempt of Court Act, 1971*, to:

- limit the conduct which may amount to scandalising the court;
- require intention to undermine public confidence in the administration of justice, and publication to the public at large, to be elements of the scandalising offence;
- establish several new privileges from prosecution for scandalising the court, as well as several new defences; and
- provide further procedural safeguards to the accused, including abolishing the power for courts to summarily try scandalising cases.

The report also concludes that the Constitution of India must be amended to ensure that reforms in the *Contempt of Court Act, 1971* take proper effect.

## 2. BASIC ISSUES RELATING TO THE OFFENCE OF SCANDALISING THE COURT

Before considering the scandalising offence in great detail, it is worthwhile to canvas a number of issues that will be explored in this report.

### 2.1 What is the offence of scandalising the court?

In India, scandalising the court is a criminal offence, punishable as a contempt of court. Although scandalising the court is an offence in many Common Law jurisdictions, there is no simple, universally accepted definition of the offence. A loose working definition might be:

*Scandalising the court involves any illegitimate act that seriously undermines public confidence in the administration of justice.*

India inherited the concept of scandalising the court from English law during the colonial period. Today many other former British colonies recognize the offence, albeit in differing forms, such as Australia, Canada, Fiji, Hong Kong, Malaysia, New Zealand, Pakistan, the Republic of Ireland, Singapore, South Africa, Sri Lanka, the United States and Zimbabwe. The notion of scandalising the court – or at least notions analogous to it – are also recognized in some Civil Law jurisdictions, but differs in several respects.<sup>1</sup> As such, the focus of this paper will be on the law of scandalising the court, as understood in Common Law jurisdictions.

The concept of scandalising has existed for hundreds of years in English law.<sup>2</sup> The classical statement of English law on scandalising the court is contained in the judgment of Lord Russell of Killowen CJ, in *R v Gray*:<sup>3</sup>

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is contempt of Court. That is one class of contempt...[a] category which Lord Hardwicke LC characterised as 'scandalising a court or a judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no Court could or would treat that as contempt of Court'.

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<sup>1</sup> M. Chesterman, "Contempt: In the Common Law, but not the Civil Law" (1997) 46 *ICLQ* 521.

<sup>2</sup> Arlidge & Eady: *The Law of Contempt*, 1982, p. 158, paras 4-19.

<sup>3</sup> [1900] 2 QB 36, at 40.

Adopting the English position as a starting point, Indian courts have re-expressed the definition of scandalising in a variety of ways. For example, courts have described scandalizing the court as:

- “[A]n expression of scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice.”<sup>4</sup>
- “[T]he publication of the disparaging statement [that] tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice.”<sup>5</sup>
- “[I]mputing partiality, corruption, bias, improper motives to a judge...Even imputation of lack of impartiality or fairness to a judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice.”<sup>6</sup>

Section 3 considers in greater detail what specific acts might constitute scandalising the court. For the moment, it suffices to say that the offence potentially covers a wide degree of conduct, and its precise scope is somewhat vague.<sup>7</sup>

## 2.2 The rationale of the scandalising offence

The offence of scandalising is concerned with upholding public confidence in the integrity of the administration of justice. Scandalising involves an attack on the ‘majesty’, ‘dignity’, ‘integrity’, ‘blaze of glory’ or ‘authority’ of the administration of justice, to use some of the myriad of phrases coined in the cases. The rationale of the offence, as recently explained by the Supreme Court of India in *In re: Arundhati Roy*, is that an effective rule of law requires a Judiciary to be “respected and protected at all costs.”<sup>8</sup> The Supreme Court elaborated:

After more than half a century of independence, the Judiciary in the country is under a constant threat and being endangered from within and without. The need of the time is of restoring confidence amongst the people for the independence of Judiciary. Its impartiality and the glory of law has to be maintained, protected and strengthened. The confidence in the courts of justice, which the people possess, cannot, in any way, be allowed to be tarnished, diminished or wiped out by contumacious behaviour of any person. The only weapon of protecting itself from the onslaught to the institution is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be... Otherwise the very corner-stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society.

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<sup>4</sup> *In re: Arundhati Roy*, 2002 SOL Case No. 138, paragraph 20.

<sup>5</sup> *Brahma Prakash Sharma and others v. The State of Uttar Pradesh*, 1953 SCR 1169.

<sup>6</sup> *Dr. D.C. Saxena v. Hon'ble the Chief Justice of India*, 1996(5) SCC 216

<sup>7</sup> Joseph Moscovitz described contempt of court as “the Proteus of the legal world, assuming an almost infinite diversity of forms”: J. Moskovitz, ‘Contempt of Injunctions, Civil and Criminal’ (1943) 43 *Col. LR* 780.

<sup>8</sup> 2002 SOL Case No. 138, paragraph 1.

Time and time again, courts have distinguished between publications undermining public confidence in the administration of justice, on the one hand, and publications merely causing personal harm to a specific judge, on the other. In the case of the latter, there is no contempt of court, although there may be a private action for defamation or libel. For example, if a publication suggested that a judge committed domestic violence, then the publishers could not be charged with scandalising the court.<sup>9</sup> This is because the private acts of a judge, outside of the judge's role as an official of the court, cannot be said to relate to the administration of justice in general. In contrast, if the publication suggested that a judge had been corrupt, then this would potentially be punishable, because it casts aspersions on the performance of the judge's official duties.

There are other, less important rationales for the scandalising offence. These rationales, along with the main rationale of upholding public confidence in the courts, will be scrutinized in Section 6.

### 2.3 Scandalising vis-à-vis freedom of expression and criticism of the Judiciary

The scandalising offence is controversial, because it potentially suppresses public criticism of the Judiciary or judicial system. For instance, suggestions that a judge has been corrupt, or swayed by political considerations, are potentially punishable as contempt of court. Even more generalized criticism, such as suggesting that the Judiciary has a general predisposition to ignore certain views, is theoretically punishable.

It must be understood that, in India at least, the scandalising offence is not legally subservient to any rights of freedom of speech or expression. Article 19(1)(a) of the Indian Constitution establishes the basic human right to freedom of speech and expression. However, Article 19(2) of the Constitution permits legislation to place reasonable restrictions on this right to freedom of speech in relation to contempt of court. It is therefore inaccurate, at least in a technical legal sense, to suggest that the right to freedom of speech overrules contempt of court laws in India.<sup>10</sup> In fact, most jurisdictions have held that the scandalising offence is a reasonable restriction on freedom of speech.<sup>11</sup>

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<sup>9</sup> Vinod A Bodge, 'Scandalising the Court' (2003) 8 SCC (Jour) 32; *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138.

<sup>10</sup> *E.M. Sankaran Namboodripad v. T. Narayanan Nambiar*, 1970(2) SCC 325.

<sup>11</sup> For a discussion of the scandalising offence in the constitutional and human rights context, see O Litaba, 'Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113, 135-143.

While the scandalising offence is not overruled by freedom of speech, courts in India and elsewhere have emphasized that the scandalising offence should not be used to suppress legitimate criticism of the Judiciary. As Lord Atkin famously stated:<sup>12</sup>

But 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, 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.

In other words, this statement suggests that legitimate criticism of the court will not be punished. But this begs the question: what is legitimate and what is not? And who decides what is legitimate and what is not? Determining whether a publication was made “in good faith” and without “malice” is highly subjective. As will be discussed in detail in Section 3.5, courts around the world have produced uncertain and inconsistent tests for when criticism of the Judiciary is punishable. Arguably, the offence needs to be narrowly defined to avoid potential misuse.

## 2.4 Procedural issues in the hearing of scandalising cases

Procedural issues are particularly important in the hearing of scandalising cases. This is because there is an obvious potential conflict of interest in scandalising cases. On the one hand, a judge may have a personal interest in a case, having been the subject of criticism. On the other hand, the very same judge may be hearing the case. It is therefore vital that procedural safeguards are put in place to minimize the potential for injustice. Justice must not only be done, but must also be seen to be done.

The scandalising offence raises several specific procedural issues. One issue is how prosecutions for scandalising are to be instigated and investigated: who should be able to lay charges? Another issue is how trials for scandalising are to be conducted: are summary procedures permissible, and to what procedural safeguards is the accused entitled? A third issue is the appropriate punishment for scandalising, and whether there should be any limits to such punishment. Finally, there is the delicate issue of who should be able to decide scandalising cases, particularly given the personal interest that a presiding judge (or a close colleague of the presiding judge) may have in a case being heard before him. These issues will be considered in greater detail in Section 4.

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<sup>12</sup> *Ambard v Attorney-General of Trinidad and Tobago* [1936] AC 322, 335.

## 2.5 Efforts to reform the scandalising offence

Because of its controversial nature, the scandalising offence has been the subject of extensive review and reform throughout many jurisdictions. These reviews have tended to recommend that the offence be maintained, but with a narrowed scope, and subject to a greater number of defences. In Sections 6-8, the recommendations of some of these reviews will be considered in greater detail.

## 2.6 Summary

- Scandalising the court is a criminal contempt of court in India.
- Scandalising may loosely be thought of as any act that seriously undermines public confidence in the administration of justice.
- The main rationale of the offence is that public confidence in the administration of justice must be protected at all costs to ensure a viable rule of law.
- Because of its broad and vague nature, scandalising has the potential to suppress legitimate criticism of the Judiciary. This makes the offence controversial.
- Procedural safeguards are vital in scandalising cases, particularly given the potential conflict of interest that judges may face in hearing scandalising cases.
- Scandalising has been the subject of extensive review and reform throughout the world.

### 3. SUBSTANTIVE LAW ON SCANDALISING THE COURT

#### 3.1 Comparing India with overseas

It is always dangerous to generalize across legal systems. The law of scandalising in India may differ from that in other jurisdictions. Nevertheless, there are certain commonalities that can be identified, and it is useful, if only by way of comparison, to consider the scandalising offence in other jurisdictions. This section thus considers the substantive law from various jurisdictions concurrently, emphasizing differences with the Indian approach where necessary.

#### 3.2 Relevant legislative provisions

Before considering international cases, it is important to outline the legislative scheme establishing the substantive content of the scandalising offence in India.

##### a) **The Contempt of Court Act, 1971**

The *Contempt of Court Act, 1971* [‘the Contempt Act’] establishes the criminal offence of scandalising the court. Under section 2(c) of the Contempt Act, scandalising the court is defined as a form of criminal contempt of court:

*“Criminal contempt” means the 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.*

*(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.*

The Contempt Act does not define the term ‘scandalise’. As such, it is necessary to refer to case law to determine the meaning of the term, including, where necessary, English case law.<sup>13</sup>

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<sup>13</sup> *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and another*, 1974(1) SCC 374.

However, the Contempt Act does stipulate that certain acts are *not* contempt of court. There are several such acts potentially relevant to the issue of scandalising the court. First, fair and accurate reporting of judicial proceedings cannot be contempt.<sup>14</sup> Second, fair criticism of a judicial act is not contempt.<sup>15</sup> However, criticism of a judicial act that transgresses the limits of fair and *bona fide* criticism may amount to contempt of court.<sup>16</sup> Once again, it is necessary to refer to case law to determine what ‘fair and bona fide’ criticism actually means (see section 3.5 below).

Importantly, the Contempt Act provides that no contempt of court is committed unless the court 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.<sup>17</sup>

## **b) The Constitution of India**

The Constitution of India [‘the Constitution’] also has some bearing on the offence of scandalising the court. As noted previously, the Constitution expressly permits the legislature to place reasonable restrictions on the right to freedom of speech in relation to contempt of court.<sup>18</sup>

Furthermore, Articles 129 and 215 of the Constitution recognize the powers of the Supreme Court and High Court respectively to punish for contempt of itself. This is an inherent power of these courts, irrespective of the Contempt Act. An important consequence of this, as noted by the National Commission to Review the Working of the Constitution [‘NCRWC’], is that mere amendment of the Contempt Act will not amend the Courts’ inherent power to punish for contempt.<sup>19</sup> The implications of this inherent power will be further discussed in Section 9.

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<sup>14</sup> Contempt Act, section 4.

<sup>15</sup> Contempt Act section 5.

<sup>16</sup> *S.I. Aswini Kumar Ghose v. Arbinda Bose* (1953) SCR 215, 217; *Thakur Jugal Kishore Sinha v. Sitamarhi Central Coop. Bank Ltd.*, AIR 1967 SC 1494.

<sup>17</sup> Contempt Act, section 13.

<sup>18</sup> Article 19(1)(a).

<sup>19</sup> The National Commission to Review the Working of the Constitution, *Review of the Working of the Constitution*, 31 March 2002, paragraph 7.4.2.

### 3.3 ‘Scandalising’ the court: what does it actually mean?

The Contempt Act leaves it for case law to define ‘scandalising’. It is at this point that it is worthwhile to introduce foreign cases, because these cases provide useful points of comparison with Indian law. We begin by looking at the basic types of acts which have been held to scandalise the court.

#### a) Scurrilous abuse

Perhaps the least contentious form of scandalising is scurrilous (ie vulgar or coarse) abuse of the court. Most jurisdictions recognize this form of scandalising, including India.<sup>20</sup>

The classic example of this type of case is the 1932 English case of *R v Gray*.<sup>21</sup> (In fact, this is the last conviction for scandalising in England). The contemnor, a newspaper, had published an article about a judge stating that “there is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty-headedness...” The article further claimed that the judge failed to understand his judicial duties properly, and would have been better off as a bus conductor!

#### b) Allegations or imputations of corruption

Many jurisdictions recognize this as a form of scandalising the court.<sup>22</sup> Indian law is replete with scandalising cases involving allegations of judicial corruption.<sup>23</sup> Clearly, allegations of corruption strike at the heart of the public’s confidence in the integrity of the administration of justice.

#### c) Allegations or imputations of bowing to external pressures

As with the case of corruption, allegations of bowing to external pressures may scandalise the court.<sup>24</sup>

A useful example is the Australian case of *AG (NSW) v Munday*.<sup>25</sup> The contemnor was a trade unionist who had just won an appeal against a conviction for unrelated charges. While being interviewed by the media outside the court, he suggested that the court, in allowing the appeal, had been influenced by industrial action protesting the original convictions. The trade unionist was subsequently charged with, and convicted of,

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<sup>20</sup> *In re Ajay Kumar Pandey* 1998 SOL Case No. 533.

<sup>21</sup> (1900) 2 QB 36

<sup>22</sup> See, for example, *R v Hoser* [2001] VSC 443 (Australia); *The State (DPP) v Walsh* [1981] IR at 421 (the Republic of Ireland).

<sup>23</sup> Eg *In re Ajay Kumar Pandey* 1998 SOL Case No. 533, *T. Deen Dayal v High Court of Andhra Pradesh* 1997 SOL Case No. 182, *LD Kaikwal v State of U.P* 1984 SOL Case No. 014; *Vishwa Dev Sharma v State of Rajasthan* 1993 SOL Case No. 023; *C. Ravichandram v Justice A.M Bhattacharya* (1995) 5 SCC 457.

<sup>24</sup> Eg *MB Shanghi Advocate v High Court of Punjab and Haryana* 1991 SOL Case No. 071.

<sup>25</sup> *Attorney-General (New South Wales) v Munday* [1972] 2 NSWLR 887.

contempt of court. Notably, the judge decided that the circumstances did not warrant punishment for the conviction.

A variation on this type of case is an allegation of political bias. This commonly occurs when there is a suggestion that a judge has been appointed for political reasons, to serve the interests of his appointees.<sup>26</sup>

#### **d) Allegations or imputations of bias due to personal characteristics**

It is commonly accepted that allegations of bias on the part of an individual judge, by virtue of his personal background or characteristics, is a form of scandalising. It is less clear that allegations of bias at an *institutional* or *Judiciary-wide* level will amount to scandalising.

##### **(i) Allegations against individual judges**

In the case of allegations of bias against a single judge, it is obvious that allegations of bias undermine the perceived impartiality of judges. A suggestion that judge has been influenced by religious, racial, gender or political prejudices can amount to contempt.<sup>27</sup> For example, a suggestion that a conservative judge has been biased against a husband, because the judge has allegedly criticized the husband for claiming maintenance from his wife, was held to scandalise the court.<sup>28</sup>

##### **(ii) Allegations against the Judiciary as an institution**

There is some uncertainty as to whether generalized allegations of bias are punishable as contempt. For example, in the English case of *Bennett v Southwark LBC*,<sup>29</sup> the Court was prepared to leave unpunished a barrister's comments that "If I were an Oxford-educated white barrister with a plummy voice I would not be put in this position." On the other hand, in the South African case of *S v Van Niekerk*,<sup>30</sup> the Court held that, objectively speaking, a research report suggesting that the Judiciary was biased against Black defendants was in contempt of court.

In India, it would appear that generalized allegations of bias are unlikely to be punishable as contempt, although this has not always so. In 1970, E.M.S Namboodiripad was found guilty of contempt for suggesting that judges were biased in favour of the rich and against

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<sup>26</sup> Eg *Director of Public Prosecutions v. The Belize times Press Ltd and Another* [1988] LRC (Const) 579 SC Belize

<sup>27</sup> See eg *New Statesman (Editor), ex p DPP* 44 Times LR 301 (1928); *A-G v Connolly* [1947] IR 213; *Re Colina and another; Ex Parte Torney* (1999) 166 ALR 545.

<sup>28</sup> *Padmahasini @ Parmapriya v C.R Srinivas* 1999 SOL Case No. 690.

<sup>29</sup> (2002) EWCA Civ 223.

<sup>30</sup> 1970 (3) SA 655 (T),

the exploited peasants and working classes.<sup>31</sup> However, in 1988, the Supreme Court took a more liberal view in the *Shiv Shankar* case.<sup>32</sup> In that case, the Law Minister, P. Shiv Shankar, referred to the elite background of the judges in a speech at the Bar Council of Hyderabad, and made broad assertions of bias. The Court was prepared to ignore these comments, noting that “times and climes have changed” since the *EMS* case.

**e) Allegations of judicial manipulation or misuse of court processes**

This category of case has been particularly prominent in India. It involves a suggestion that a judge or judges have abused court processes, or bent rules governing judicial conduct, for improper purposes.

Several convictions for contempt of court arose out of allegations made in 2000 against the (then) Chief Justice of India.<sup>33</sup> The allegations suggested that the Chief Justice had falsified his age on official forms, so as to avoid compulsory retirement. In holding that such allegations were in contempt of court, the Supreme Court stressed that the allegations had been dismissed earlier in 1991 by the President of India. As such, any repetition of the claim was scandalous.

Another well-publicized example of this type of scandalising was the case of *In re: Arundhati Roy*.<sup>34</sup> The facts are controversial, and warrant detailed examination. Roy was a Booker Prize-winning novelist and an outspoken opponent of the construction of a dam on the Narmada River. Tensions had arisen between Roy and the Supreme Court over her previous criticism of the Court’s handling of the Narmada Dam litigation.<sup>35</sup> In October 2000, the Supreme Court had delivered a final judgment permitting construction of the dam. In response to the decision, a protest was held outside the Court. Lawyers representing the Government building the dam alleged that they were abused by the protesters, and petitioned the Supreme Court to issue a contempt of court notice against several alleged leaders of the protest, including Roy. The Supreme Court issued such a notice. In an affidavit in response to this notice, Roy denied the charges, noting that the police had decided not to lay any charges on the day of the protest, and that the contempt charges were deficient in their drafting. In her affidavit, Roy also commented:

“On the grounds that the judges of the Supreme Court were too busy, the Chief of India refused to allow a sitting judge to head the judicial enquiry into the Tehelka scandal, though it involves matters of national security and corruption in the highest places.

Yet when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people, who have publicly- though in markedly different ways- questioned the policies of the government and severely criticized a recent judgment of the Supreme Court, the Court displays a disturbing willingness to issue notice.

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<sup>31</sup> *E.M Sankaran Namboodiripad v T. Narayanan Nambiar* (1970) 2 SCC 325.

<sup>32</sup> *P.N. Duda v P. Shiv Shankar* (1988) 3 SCC 167.

<sup>33</sup> *Madras High Court Advocates Association v Dr A.S. Anand, CJ of India* 2001 SOL Case No. 104; and *In re S.K Sundaram* 2000 SOL Case No. 734

<sup>34</sup> 2002 SOL Case No. 138.

<sup>35</sup> In fact, Roy had been charged with contempt of court previously for misrepresenting the judicial decision: see *Narmada Bachao Andolan v Union of India* 1999 SOL Case No. 639.

It indicates a disquieting inclination on the part of the Court to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm."

On 28 August 2001, the Supreme Court dismissed the contempt of court charges issued against the alleged leaders of the protest.<sup>36</sup> However, the Court took umbrage at the comments (quoted previously) of Roy in her affidavit of response, and ordered the issue of fresh contempt charges against Roy. Finally, in June 2002, the Supreme Court convicted an unrepentant Roy for contempt of court, sentencing her to 'symbolic' imprisonment of one day, as well as a fine of Rupees 2000.

The judgment generated considerable controversy. For the moment, the key point to appreciate is that Roy was convicted for suggesting, essentially, that the Judiciary was using its contempt of court powers to muzzle dissent and harass her.

#### **f) Intimidation of the court**

A person will be in contempt of court if they criticize the court in order to intimidate the court. In most cases, it would probably be more accurate to view such intimidation as an interference with justice rather than scandalising conduct. It may be recalled that interference is a separate form of criminal contempt. Be that as it may, intimidation of the court continues to arise in scandalising cases.

At its simplest, the intimidation may take place *in facie* or in the courtroom itself. In India, for example, convictions have been recorded for hurling a shoe at a judge and shouting scurrilous abuse during a trial,<sup>37</sup> and also for constantly interrupting the judge with the insult that judges were "anti-national".<sup>38</sup>

Intimation of the court may also be more subtle. In the Hong Kong case of *Wong Yeung Ng v Secretary for Justice*,<sup>39</sup> a very popular newspaper published a series of abusive articles accusing the Judiciary of bias and questioning the integrity of the courts. It also launched a three-day, 24-hour 'paparazzi' pursuit against a Court of Appeal judge who had refused to rule in its favour. The editor of the newspaper was convicted for being in contempt of court in two respects: scandalising the court, and pursuing the judge. This raises an interesting question: could the mere fact that a criticism is constantly put forward, even if the criticism is not of itself scandalising, be construed as a scandalising act? Although the answer is far from clear, this is a distinct possibility.

In India at least, agencies or Government officials who abuse formal powers to investigate court conduct could potentially be held in contempt for intimidating the court. The most striking example of this type of conduct is the case of *Income Tax Appellate*

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<sup>36</sup> *J.R. Parashar, Advocate v Prasant Bhushan, Advocate* 2001 SOL Case No. 501.

<sup>37</sup> *In re: Mr Nand Lal Balwani* 1999 SOL Case No. 148.

<sup>38</sup> *Mohd. Zahir Khan v Vijai Singh and ors* 1992 SOL Case No. 303.

<sup>39</sup> [1999] ICHRL 12

*Tribunal Through President v V. V. K. Agarwal*.<sup>40</sup> The Contemnor was the Law Secretary, Ministry of Law and Justice, the Government of India. His role included administrative supervision and control of the Income Tax Appellate Tribunal. The Contemnor received a pseudonymous complaint regarding inconsistent judgments from the Tribunal. Acting upon this complain, he sent a letter to the members of the Tribunal demanding an explanation for the contradictory judgment, which allegedly disclosed “judicial impropriety of the highest degree.” In fact, the Contemnor had been ill informed, as there were no inconsistent judgments. The Court found the Law Minister guilty of criminal contempt. It noted that the legitimate exercise of supervisory powers over judicial bodies would not amount to contempt.<sup>41</sup> However, in the instant case, the tone of the Law Minister’s letter, combined with his lack of investigation into the truth of the pseudonymous complaint, demonstrated an intention to intimidate the Tribunal and threaten its independence.<sup>42</sup> It must be understood that the conviction in this case was *not* for scandalising the court – it was under section 2(c)(iii) of the Contempt Act for interfering with the administration of justice. However, it seems clear that a scandalising charge could arise in similar circumstances – perhaps where a Government Official makes an official public statement condemning a judicial officer without having made proper investigations. Theoretically, even a public criticism arising from proper investigations could scandalise the court, although the court would have to show great temerity to lay charges in such circumstances.

### **g) Misrepresentations of judicial decisions**

In India and elsewhere, a person may scandalise the court by misrepresenting a judicial decision to an extreme degree. (Of course, this raises the question of what is ‘extreme’ in this context). Most commonly, this involves a report being critical of a judicial decision, and selectively misrepresenting the judgment so as to create a misleading sense of injustice. Thus, in one Irish case, a reporter and editor were in contempt of court for distorting the court’s handling of a dispute over custody of children.<sup>43</sup> The report had deliberately set out to sensationalize and over-simplify a difficult case to resolve.<sup>44</sup> Similarly, in the first contempt of court case against Arundhati Roy, the Supreme Court of India held that Roy had scandalised the court in the following passages.<sup>45</sup>

I stood on a hill and laughed out loud.

I had crossed the Narmada by boat from Jalsindhi and climbed the headland on the opposite bank from where I could see, ranged across the crowns of law, baid hills, the tribal hamlets of Sikka, Surung, Neemgavan and Domkhedi. I could see their airy, fragile homes. I could see their fields

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<sup>40</sup> *Income Tax Appellate Tribunal Through President, Applicant V. V. K. Agarwal And Another, Respondents* 1999 (1) SCC 16 (SC). See also *Delhi Judicial Service Association v State of Gujarat and ors* 1991 SOL Case No. 164, where the local police abused their powers to intimidate a Magistrate.

<sup>41</sup> *Ibid* at paragraph 21, citing *Rizwan-ul-Hasan v. State of U.P.* [AIR 1953 SC 185 : 1953 SCR 581]

<sup>42</sup> *Ibid*, paragraph 24.

<sup>43</sup> *In Re Kennedy and McCann* [1976] IR 382 (Sup Ct).

<sup>44</sup> A similar finding of contempt was made in the Australian case of *Fitzgibbon v Barker* (1992) 111 FLR 191, also involving misrepresentation of a Family Law matter.

<sup>45</sup> *Narmada Bachao Andolan v Union of India* 1999 SOL Case No. 639.

and the forests behind them. I could see little children with little goats scuttling across the landscape like motorized peanuts. I knew I was looking at a civilisation older than Hinduism, slated - sanctioned (by the highest court in the land) - to be drowned this monsoon when the waters of the Sardar Sarovar reservoir will rise to submerge it."

Why did I laugh ?

Because I suddenly remembered the tender concern with which the Supreme Court Judges in Delhi (before vacating the legal stay on further construction of the Sardar Sarovar dam) had enquired whether tribal children in the resettlement colonies would have children's park to play in. The lawyers representing the Government had hastened to assure them that indeed they would and what's more, that there were seesaws and slides and swings in every park. I looked up at the endless sky and down at the river rushing past and for a brief moment the absurdity of it all reversed my rage and I laughed. I meant no disrespect."

.....

"Who owns this land ? Who owns its rivers ? Its forests ? Its fish ? These are huge questions. They are being taken hugely seriously by the State. They are being answered in one voice by every institution at its command - the army, the police, the bureaucracy, the courts. And not just answered, but answered unambiguously, in bitter, brutal ways".

.....

"According to the Land Acquisition Act of 1894 (amended in 1984) the Government is not legally bound to provide a displaced person anything but a cash compensation. Imagine that. A cash compensation, to be paid by an Indian government official to an illiterate tribal man (the women get nothing) in a land where even the postman demands a tip for a delivery ! Most Tribal people have no formal title to their land and therefore cannot claim compensation anyway. Most tribal people - or let's say most small farmers - have as much use for money as a Supreme Court Judge has for a bag of fertilizer.

The Supreme Court held that such criticism misrepresented the Court's treatment of the Andolan dam matter to such a degree that the criticism scandalised the court.

In contrast, in an important decision of the Supreme Court of the United States, a newspaper was held not to have been in contempt of court, even though its report had "deliberately distorted the facts to abase and destroy the efficiency of the Court."<sup>46</sup> This decision reflects the lenient approach of the US courts in general, as will be discussed below in Section 6.3.

## **h) Allegations of judicial negligence**

In India at least, an allegation that a judge has been inept can scandalise the court. In *Brahma Prakash Sharma and others v. The State of Uttar Pradesh*,<sup>47</sup> an Executive Council of a Bar Council had passed a resolution alleging gross incompetence on the part of two judges. All of the members of the Council who had passed the resolution were found guilty of contempt.

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<sup>46</sup> *Pennekamp v Florida* 328 US 331, 349.

<sup>47</sup> 1953 SCR 1169.

### **i) Critical reviews comparing the performance of individual judges**

This form of scandalising involves a publication critically evaluating and comparing the performance of current judges. In the *Wah India Case*,<sup>48</sup> the High Court of Delhi held that such a publication scandalised the court. The publication was the product of a survey of 50 lawyers described as ‘Senior Counsel’ of the High Court. The results cast several judges in a poor light. In its judgment, the High Court was particularly scathing of the inaccuracies apparent in the article, such as the article’s gross overstatement that the fifty respondents to the survey represented approximately 10% of the Delhi Bar.

In contrast, similar publications in the US and Canada have not been held to be in contempt of court.<sup>49</sup> In fact, it is probably fair to say that the US publications were far more acerbic in their criticism of judges than the Indian publication. Once again, this reflects a more lenient approach to contempt of court amongst the US Judiciary.

## **3.4 What factors determine whether an act is scandalous?**

In addition to identifying *types* of acts that may scandalise the court, it is also possible to identify *factors* that could arguably affect whether an act is in contempt of court.

### **a) Status of the contemnor**

The status of the contemnor has been relevant in a variety of (not entirely reconcilable) ways to determining whether an act constitutes scandalising the court.

#### **(i) Ability of the contemnor to influence public opinion**

Several commentators have noted the abundance of scandalising cases involving public figures, such as politicians, trade unionists or respected journalists.<sup>50</sup> The reason for this is intuitive: a critic with a greater influence over public opinion is more likely to damage public confidence in the administration of justice than another critic with no such influence. In fact, it is sometimes said that the law of scandalising discriminates against public figures.<sup>51</sup>

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<sup>48</sup> *Shri Surya Prakash Khatri v Smt. Madhu Trehan and others* CrI. Contempt Petition No. 8 OF 2001, High Court of Delhi, May 28, 2001.

<sup>49</sup> See the Heads of Argument of the Amicus Curiae in the case of *S v Mamabolo* (2001) 3 SA 409 at paragraph 5.7, available at <<http://www.concourt.gov.za/>>

<sup>50</sup> eg The Law Reform Commission of Ireland, *Consultation Paper On Contempt Of Court* (1991), page 270; M. Chesterman, *Criticism of Judges*, para 85 (1984); The Law Reform Commission of Australia, *Report on Contempt of Court*, para 435; O Litaba, ‘Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?’ (2003) 8 *Deakin Law Review* 113, 119.

<sup>51</sup> The Law Reform Commission of Ireland, *Consultation Paper On Contempt Of Court* (1991), page 270

**(ii) Lack of specialized knowledge in legal matters**

This factor was identified by the Indian Supreme Court in *In re: Arundhati Roy*. This case was concerned, as discussed previously, with a popular writer's criticism of the Supreme Court for entertaining a faultily drafted petition against alleged leaders of an earlier protest. The Supreme Court suggested that a person without specialized knowledge in legal matters is more likely to scandalise the court than a person with such knowledge.

This observation arose when the Court was distinguishing the instant case with the earlier *Shiv Shankar* case.<sup>52</sup> In the *Shiv Shankar* case, a Law Minister was invited to speak at a seminar organized by the bar council, and made several disparaging remarks against the Indian Judiciary. Distinguishing these circumstances from those of Roy, the Supreme Court in *In re: Arundhati Roy* noted:

In the instant case the respondent has not claimed to be possessing any special knowledge of law and the working of the institution of Judiciary. She has only claimed to be a writer of repute. She has submitted that "as an ordinary citizen I cannot and could not have expected to make a distinction between the Registry and the Court". It is also not denied that the respondent was directly or indirectly associated with the Narmada Bachao Andolan and was, therefore, interested in the result of the litigation. She has not claimed to have made any study regarding the working of this Court or Judiciary in the country and claims to have made the offending imputations in her proclaimed right of freedom of speech and expression as a writer. The benefit to which Mr. P. Shiv Shanker, under the circumstances, was held entitled is, therefore, not available to the respondent in the present proceedings.

This logic is clearly debatable. For after all, if the scandalising offence is concerned with public confidence in the administration of justice, then surely the comments of a legal expert would influence the public more than a non-expert? Perhaps it could be argued in the Supreme Court's favour that the opinion of a legal non-expert is likely to be uninformed or distorted. But such an argument focuses too much on the status of the accused, rather than the merits of the *content* of the accused's statement. A valid statement is valid regardless of whether it is made by a Law Minister or an ordinary citizen.

**(iii) Whether the accused merely reproduced another's statements**

It is *not* a defence that the accused merely published or reproduced the scandalising comments of another. Both in India<sup>53</sup> and elsewhere<sup>54</sup>, newspaper publishers, editors, printers and distributors are commonly joined as defendants with writers whose articles have scandalised the court.

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<sup>52</sup> *P.N. Duda v P. Shiv Shankar* (1988) 3 SCC 167.

<sup>53</sup> Eg *In re: Vishwa Dev Sharma* 1993 SOL Case No. 023.

<sup>54</sup> *R. v. Editor of New Statesman, ex parte DPP* (1928) 44 TLR 301. A recent example of this type of case occurred in Singapore in *Attorney-General v. Lingle* [1995] 1 SLR 696.

## **b) Publication**

Publication may be relevant in several ways to whether an act scandalises the court.

### **(i) Publication is no pre-requisite**

From the outset, it must be acknowledged that under the Indian Contempt Act, publication is not a pre-requisite for contempt of court. Section 2(c) of the Contempt Act makes this clear by stating that either a “publication...or the doing of any other act whatsoever” may amount to criminal contempt.

It may be that in other jurisdictions, publication is a pre-requisite for scandalising of the court. The Australian Law Reform Commission suggested as much, although it added the qualification that “a relatively low degree of dissemination will suffice.”<sup>55</sup>

### **(ii) Reach of the publication**

In some jurisdictions, courts have suggested that if comments are made to a small audience, the comments are unlikely to scandalise the court.<sup>56</sup> However, this does not appear to be the case in India. In *In Re: S.K. Sundaram*,<sup>57</sup> for example, a telegraph was sent from the contemnor to the Chief Justice of India containing disparaging remarks. The court noted that the audience of the telegraph was limited to the Chief Justice himself, and perhaps a few nosy clerks at the offices handling the transmission of the telegraph. Nevertheless, the remarks were held to scandalise the court.

Perhaps the most accurate statement of the law is to say the existence of a small audience will not prevent a finding of contempt, but that the existence of a large audience will make a finding of contempt more likely. Thus, for example, in the Hong Kong case of *Wong Yeung Ng v Secretary for Justice*,<sup>58</sup> the Court was clearly mindful of the popularity of the offending publication in making its finding of contempt of court.

### **(iii) The relevance of satire?**

In *Borrie & Lowe*,<sup>59</sup> it is suggested that disparaging comments made in a humorous or satirical publications “most information can be taken with a pinch of salt and so could hardly be said to undermine public confidence in the administration of justice.” Citing this passage, the Irish Law Reform Commission notes that statement may hold true to some extent, but that there is certainly no general rule that a satirical publications is immune from prosecution.

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<sup>55</sup> Australian Law Reform Commission, Report No 35, *Contempt* (1987), para 411.

<sup>56</sup> Eg *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48 (New Zealand); *Saltalamaccia (Prothonotary of the Supreme Court of Victoria) v Parsons* [2000] VSCA 83, paragraph [10] (Australia).

<sup>57</sup> 2000 SOL Case No. 734, paras 24-25.

<sup>58</sup> [1999] ICHRL 12

<sup>59</sup> The Law Reform Commission of Ireland, Consultation Paper On Contempt Of Court (1991), p 44.

It is difficult to find any Indian scandalising cases dealing with satirical commentary, and it is therefore not possible to make any firm conclusions about the state of Indian law in this respect. Perhaps the lack of cases reflects the fact that no one has yet seen the need to lay charges in relation to satirical comments for scandalising the court.

**(iv) *The nature of the audience of the publication***

In addition to the *size* of the audience of the scandalising the act, the *nature* of the audience is sometimes said to be relevant.<sup>60</sup> A gullible audience is more likely to be swayed against the court than a discerning audience. This logic is sound in the abstract, but becomes somewhat dubious when applied to real cases. It is quite an assumption – not to mention distinctly patronizing – to suggest that one particular audience is more vulnerable to sophistry than another.

Taken to its extreme, this logic leads to the idea of ‘cultural relativism’ in the law of scandalising. In *McLeod v. St Aubyn*, the Privy Council commented that:<sup>61</sup>

[c]ommittals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Courts for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

Nearly a century later, the Privy Council reiterated this logic in *Ahnee & ors v DPP*,<sup>62</sup> noting that while the continued need for the offence of scandalising is uncertain in England, it is permissible to take into account that on a “small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater.”<sup>63</sup>

Latching on to this notion of cultural relativism, several such ‘vulnerable’ colonies have justified expansive notions of scandalising the Court.<sup>64</sup> Indeed, there seem to be a kind of siege mentality underlying the Indian Supreme Court’s recent remark that:<sup>65</sup>

After more than half a century of independence, the Judiciary in the country is under a constant threat and being endangered from within and without. The need of the time is of restoring confidence amongst the people for the independence of Judiciary.

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<sup>60</sup> *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48

<sup>61</sup> [1899] A.C. 549, 561.

<sup>62</sup> (1999) AC 294.

<sup>63</sup> *Ibid* paragraph [20].

<sup>64</sup> See, for example, the Malaysian case of *Attorney General and Others v. Lee* [1987] LRC (Crim) 580 Mal SC.

<sup>65</sup> *In re: Arundhati Roy* 2002 SOL Case No. 138.

### c) Context in which the act takes place

In some jurisdictions, courts have paid particular attention to the context in which disparaging comments against the court have taken place. For instance, where the speaker is an unsuccessful litigant, the public may pay little heed to his comments, viewing them as “no more than the whining of an unhappy loser.”<sup>66</sup> A variation on this theme is the Irish case of *re Hibernia National Review Ltd*,<sup>67</sup> where a student had sent a letter to a newspaper containing scandalising remarks made earlier at an undergraduate meeting. The Court decided not to convict the student, observing that the defendant:<sup>68</sup>

is a young man and the generation to which he belongs frequently hold their views with passion and express them in extreme language. Such views as those in his letter have been, to the knowledge of the Court, expressed at meetings of undergraduates in the two university colleges in Dublin. Their expression at a meeting of undergraduates is a technical contempt but it is a wiser policy to ignore them. It is altogether different when these views are expressed in a newspaper which is printed for sale to adults.

The common rationale of these examples is that context may affect the credibility of source of comments disparaging the court; an unsuccessful litigant or hot-headed student radical do not have much credence with the wider public.

In India, it is at least arguable that the contexts in which statements are made has a bearing on whether the statements scandalised the court. In the *Shiv Shanker case*,<sup>69</sup> the Supreme Court acquittal of the Law Minister appeared to take into account the fact that the statements had been made in the context of a Bar Association seminar. And it seems clear that even if context does not prevent the *conviction* for scandalising the court, it may mitigate against *punishment* for scandalising the court. Thus, for example, Indian courts have given lenient sentences on the basis that the contemnor had been furious after 15 years of protracted litigation<sup>70</sup> or had been deranged after a marital break-up.<sup>71</sup>

### d) Nature of the statements

Finally, courts sometimes suggest that a vulgar attack on the court is less likely to scandalise the court than a calculated, less obscene attack. Thus, in the Australian case of *Anissa Pty Ltd v Parsons*, the Court brushed aside a solicitor’s vulgar insult against a judge, remarking that “the words spoken by the defendant do not undermine public confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them.”<sup>72</sup>

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<sup>66</sup> *R v Kopyto* (1987) DLR (4<sup>th</sup>) 213, 11 (Cory JA). See generally O Litaba, ‘Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?’ (2003) 8 *Deakin Law Review* 113, 120.

<sup>67</sup> [1976] IR 388 (Sup Ct).

<sup>68</sup> *Ibid* 392.

<sup>69</sup> *P.N. Duda v P. Shiv Shankar* (1988) 3 SCC 167.

<sup>70</sup> *In the Matter of Anil Panjwani* (2003) SOL Case No. 313.

<sup>71</sup> *Padmahasini v C.R. Srinivas* 1999 SOL Case No. 690.

<sup>72</sup> *Anissa Pty Ltd v Parsons (on the application of the Prothonotary of the Supreme Court of Victoria)* [1999] VSC 430, para [22].

### 3.5 What are the proper limits of criticism of judges?

Judgments in scandalising cases invariably stress that criticism of the courts, within proper limits, will not be in contempt of court. The difficulty is defining the precise nature of the proper limits of criticism. In fact, the outstanding characteristic of scandalising law is its uncertainty.

There are several notions that attempt to draw proper limits to criticism of the courts, the underlying rationales of which tend to overlap. The Law Reform Commission of Ireland commented:<sup>73</sup>

While courts have at different times addressed one or more of these notions, they have not sought to analyse them in conjunction or to examine whether they might, with benefit to conceptual clarity be merged into a single concept. There is therefore something artificial, and potentially damaging to clear thought, in analysing each of the five concepts seriatim; nonetheless, since this reflects judicial practice, it seems best to adopt this course before attempting a synthesis.

These comments apply equally to the following analysis, which considers several overlapping notions of proper criticism.

#### **a) Criticism of the merits of a judgment, rather than the courts themselves**

Section 5 of the Contempt 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.*

This section raises two distinct issues. First, when is a comment on the merits of a judgment, as opposed to the court hearing the case? Second, what is the meaning of “fair” comment?

##### **(i) When is a comment on a judgment, as opposed to a court?**

In many cases it will be obvious that a comment relates to the merits of a judgment. A comment that entirely relates to the internal reasoning or logic of decision would clearly relate to the judgment, not the judicial system.

In other cases it may be less clear whether the comment relates to the merits of the judgment. As the Indian Supreme Court has noted, personal criticism of the judge is impermissible in the guise of criticizing a judgment.<sup>74</sup> The difficulty arises where a comment ascribes certain extraneous factors to a court’s decision. Commentary on a judgment could presumably say that a court was influenced by unspoken policy concerns, but such commentary would become an attack on a court if it suggested that the court was

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<sup>73</sup> The Law Reform Commission of Ireland, Consultation Paper On Contempt Of Court (1991), 57.

<sup>74</sup> *J.R. Parashar v Prasant Bhushan* 2001 SOL Case No. 501, para [15].

influenced by bias towards one class of society. This difficulty was discussed in the Australian case of *Attorney-General v Munday*:<sup>75</sup>

[T]he boundaries between what is and what is not contempt involve questions of degree, and therefore uncertainty...it does not necessarily amount to contempt of court to claim that a court or judge has been influenced, or too much influenced, whether consciously or unconsciously, by some particular consideration in respect of a matter which has been determined. Such criticism is frequently made in academic journals and books, and the right cannot be limited to academics...On the other hand, it may and generally will constitute contempt to make unjustified assertions that a judge has acted *mala fide*, or has failed to act with the impartiality required of judicial office. However, the point at which other forms of criticism pass into the law of contempt is a matter in respect of which opinions can differ, and differ quite strongly.

It is tentatively submitted that a comment will be seen to reflect on the court, rather than a judgment, where:

- the comment ascribes an extraneous consideration to the decision; and
- the comment alleges or imputes that this consideration was taken into account by the court because of the personal characteristics or affairs of the judge delivering the decision.

**(ii) *When is a comment on a judgment fair?***

Assuming that a comment relates to a judgment, it may still be necessary to show that the comment was fair.

It would seem in most jurisdictions, criticism of judicial decisions, however intemperate, will rarely be in contempt of court. The Privy Council's classic statement of fair criticism from *Ambard v Attorney-General of Trinidad and Tobago*<sup>76</sup> continues to form the law of India today:<sup>77</sup>

[N]o 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, they are immune.

Thus, provided that the criticism relates to the merits of the decision, rather than attributing improper motives to the court, then the criticism cannot generally be in contempt of court, no matter how misplaced the criticism may be.

It is unlikely that this rule applies in India. The fact that section Five of the Contempt Act refers to 'fair' comment suggests that 'unfair' comments may be punished. If the Contempt Act intended to adopt the idea that criticism of judicial decisions, however intemperate, could not constitute scandalising the court, it could have done so explicitly.

<sup>75</sup> [1972] 2 NSWLR 887, 910 (Hope JA).

<sup>76</sup> [1936] 1 All ER 704.

<sup>77</sup> See *J.R. Parashar v Prasant Bhushan* 2001 SOL Case No. 501, paragraph 15.

Even if section Five was intended to codify the prevailing position in other common law exceptions, there are two arguable exceptions to this general common law rule. First, scurrilous criticism of the merits of a judgment may still scandalise the court.<sup>78</sup> Second, it is arguable that a misrepresentation of a judgment may also be an exception to this rule.<sup>79</sup> As the Indian Supreme Court observed:<sup>80</sup>

We wish to emphasise that under the cover of freedom of speech and expression no party can be given a license to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule.

## b) Legitimate criticism of the courts themselves

As referred to previously, the Privy Council's authoritative position in *Ambard* was that criticism of judgments may be wrong-headed, provided it is *bona fide* and does not impute improper motives to those taking part in the administration of justice. It does not follow from this statement, however, that *all* criticism attributing improper motives to the Judiciary will scandalise the court. The Privy Council recently reviewed *Ambard* in the case of *Ahnee & ors v DPP*,<sup>81</sup> and it sounded a word of caution:

The classic illustration of such an [scandalising] offence is the imputation of improper motives to a judge. But, so far as *Ambard* may suggest that such conduct must invariably be an offence their Lordships consider that such an absolute statement is not nowadays acceptable. For example, if a judge descends into the arena and embarks on extensive and plainly biased questioning of a defendant in a criminal trial, a criticism of bias may not be an offence. The exposure and criticism of such judicial misconduct would be in the public interest. On this point their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence: *Rex. v. Nicholls* (1911) 12 C.L.R. 280.

It is therefore clear that not all imputations of judicial misconduct or bias will scandalise the court. The line dividing valid criticism from scandalising criticism is, however, painfully unclear.

One *possible* factor is whether the allegation of impropriety was made in good faith. In *In re: SK Sundaram*,<sup>82</sup> the Indian Supreme Court seems to have assumed that there is a defence of good faith to a charge of contempt. The Court discussed the meaning of 'good faith' at length, noting that acting in good faith requires the defendant to have conducted reasonable and prudent investigations to ascertain the truth.<sup>83</sup> So, for example, if a defendant can back up a claim of judicial bias by demonstrating that the judge has a personal financial interest in the outcome of a case, the defendant will not be guilty of

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<sup>78</sup> *Attorney-General v Munday* [1972] 2 NSWLR 887, 910.

<sup>79</sup> It is debatable whether a misrepresentation of a judgment, made simply to criticize the *merits* of a judgment, could scandalise the court. It is clearer that a misrepresentation made to impute illegitimate motives to the court could scandalise the court.

<sup>80</sup> *Narmada Bachao Andolan v Union of India* 1999 SOL Case No. 639.

<sup>81</sup> (1999) AC 294.

<sup>82</sup> 2000 SOL Case No. 734.

<sup>83</sup> *Ibid* para 30.

contempt.<sup>84</sup> However, this notion of a good faith defence is certainly not universally accepted, both in India and elsewhere. It would take a brave individual to make an allegation of judicial misconduct in reliance of a good faith defence.

**c) A lack of intent, or absence of *mens rea*?**

As a criminal offence, scandalising the court requires both an illegal act (the *actus reus*) and requisite state of mind to commit the illegal act (*mens rea*). There is considerable uncertainty over whether a defendant could rely on an absence of the requisite intent to scandalise the court to avoid being in contempt of court. Several questions arise here.

The first question is whether intent (of any form) is a necessary element of the crime of scandalising the court. Indian cases are littered with references that might be construed as importing a requirement of intent, with use of phrases such as “deliberately”<sup>85</sup> or “calculated”.<sup>86</sup> The *mens rea* requirement was emphasized in the South African case of *S v Van Niekerk*.<sup>87</sup> However, most jurisdictions appear to *not* require a *mens rea*.<sup>88</sup> It is also likely that Indian courts, notwithstanding loose references to the contrary, do not require a *mens rea*. For example, in *Brahma Prakash Sharma and others v. The State of Uttar Pradesh*,<sup>89</sup> an Executive Committee of a Bar Council passed a resolution alleging gross incompetence on the part of two Indian judges. The Court held that the Committee had not been actuated by any personal or improper motive, and that their statement was not intended to interfere with, but rather to improve, the administration of justice. Nevertheless, irrespective of their intent, the members of the Committee were found guilty of contempt.

The second question arises if intent is required to scandalise the court (which, as has been just pointed out, seems unlikely). What is meant by the reference to intent? Is it an intent to merely do the scandalising act, or an intent to publish the act, or an intent to actively undermine confidence in the administration of justice? Cases are divided here, although it appears that in India, the only intent necessary (if at all) is the intent to commit the scandalising act, regardless of the motive behind the act.<sup>90</sup>

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<sup>84</sup> *Chetak Construction Ltd v Om Prakash* 1998 SOL Case No. 321.

<sup>85</sup> *Narmada Bachao Andolan v Union of India* 1999 SOL Case No. 639, paragraph 5.

<sup>86</sup> *R v Gray* (1900) 2 QB 36, quoted approvingly in *In Re Arundhiti Roy*

<sup>87</sup> 1970 (3) SA 655 (T).

<sup>88</sup> eg *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 (Australia); *New Statesman (Editor), ex p DPP*, 44 Times LR 301, at 303 (1928) (England); *AG v Butler*, [1953] NZLR 944, at 948 (New Zealand); *Re Borowski*, 19 DLR (3d) 537, at 546 (Man QB, Nitikman, J, 1971) (Canada).

<sup>89</sup> 1953 SCR 1169.

<sup>90</sup> See Rakesh Shukla, ‘Contempt and Punishment: A critical look at the Contempt Power of Indian Courts’ *Combat Law ???*

#### d) A defence of truth or justification?

There is a great deal of uncertainty internationally over whether truth or justification can form a defence to a charge of scandalising the court. Although some commentators have concluded that there is no such defence,<sup>91</sup> others have persuasively argued that a defence exists in several jurisdictions.<sup>92</sup>

Whatever the position in other jurisdictions, it would appear that truth is not a defence in India. As Vinod Bobde has written in relation to Indian contempt proceedings:<sup>93</sup>

In contempt proceedings, the truth or otherwise of the allegation against a judge is irrelevant... In contempt proceedings, fact-finding is an anathema because the truth is happily irrelevant and all that the court is concerned with is the effect or tendency of the allegation.

### 3.6 Summary

- A wide variety of acts may scandalise the court, such as making scurrilous abuse against the court, misrepresenting a court decision, or making an allegation of judicial corruption, bias or negligence.
- An act need not be published for it to scandalise the court.
- Courts may take into account a variety of factors when considering the effect of the act upon the public, such as the credibility of the actor, the extent to which the act was published, and the nature of the audience.
- Courts have developed the idea of cultural relativism, suggesting that in some societies, the Judiciary is in greater need of protection than others.
- Although courts continually insist that legitimate criticism will not scandalise the court, in practice it is very difficult to ascertain the precise limits of reasonable criticism. Uncertainty abounds, and in India at least, truth or justification is no defence to scandalising the court.

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<sup>91</sup> eg see Australian Law Reform Commission, Report No 35, Contempt (1987), para 415.

<sup>92</sup> Eg see O Litaba, 'Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113, 121-124.

<sup>93</sup> Vinod A. Bobde, 'Scandalising the Court' (2003) 8 *SCC (Jour)* 32.

## 4. PROCEDURAL LAW ON SCANDALISING THE COURT

The majority of commentary on scandalising the court is devoted to substantive issues. However, there are clearly important procedural issues that must also be considered. In this section, the focus is solely on procedural issues under Indian law for hearing scandalising cases.

### 4.1 Are the courts bound by procedural rules under the Contempt Act?

It was earlier noted that under Articles 129 and 215 of the Constitution, the Supreme Court and High Courts of India are respectively vested with the inherent power to hear contempt of cases. It would seem, at least in the eyes of the Judiciary, that this power includes being able to set *procedure* for trying contempt cases. In contempt cases, the Court is free “to adopt its own procedure.”<sup>94</sup>

This constitutional power to set procedure cannot be limited by any legislation, including the Contempt Act. In *Pritam Pal v High Court Of Madhya Pradesh, Jabalpur*,<sup>95</sup> the Supreme Court rejected the argument that courts were bound to follow the procedure for hearing contempt cases set out in the Contempt Act, noting:<sup>96</sup>

[T]he constitutionally vested right cannot be either abridged by any legislation or abrogated or cut down. Nor can they be controlled or limited by any statute or by any provision of the Code of Criminal Procedure or any Rules...[T]he submission of the contemnor that...Article 215 of the Constitution of India is to be read in conjunction with the provisions of Sections 15 and 17 of the Act of 1971, cannot be countenanced and it has to be summarily rejected as being devoid of any merit.

It is difficult to reconcile this holding with section 23 of the Contempt Act, which permits courts to make rules, *not inconsistent with the provisions of this Act*, providing for any matter relating to its procedure [emphasis added]. Quite simply, courts appear to ignore section 23, perhaps implicitly assuming that the constitutional power to set procedure overrides any legislative attempts to limit this power.

The *Pritam Pal* case demonstrates that courts may disregard, if they wish, the procedure set out in the Contempt Act. For the most part, however, courts seem to follow the procedure under the Contempt Act. Nevertheless, the inherent – and expansive – inherent powers of the court to summarily try contempt cases must be borne in mind for the rest of this chapter.

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<sup>94</sup> *Sukhdev Singh Sodhi case* 1954 SCR 454, 463.

<sup>95</sup> *Pritam Pal V. High Court Of Madhya Pradesh, Jabalpur Through Registrar*, 1993 SCC-0529 (SC).

<sup>96</sup> *Ibid* paras 41-42.

## 4.2 Contempt in the face of the court vs contempt outside of the court

Procedural rules differ depending upon whether the alleged contemptuous act occurred in the face of the court or outside the court.

An act in the face of the court is an act made in the court's presence, directly witnessed by the court. Because of their inherent power to set procedure, courts are able to try such acts of contempt summarily. When the contempt occurs in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. In other words, a person alleged to be in contempt does not enjoy the benefit of some of the safeguards of the ordinary criminal law such as those provided by the defendant in criminal trials. However, in the *Pritam Pal case*, the Court qualified this power to try summarily in the following way:<sup>97</sup>

The caution that has to be observed in exercising this inherent power by summary procedure is that the power should be used sparingly, that the procedure to be followed should be fair and that the contemnor should be made aware of the charge against him and given a reasonable opportunity to defend himself.

An act outside the court is obviously not directly witnessed by the court, and consequently attracts more procedural safeguards.

## 4.3 Who may initiate contempt of court proceedings?

The Contempt Act distinguishes between acts of contempt that occur in the face of the court, and acts that occur outside of the court.

For acts of contempt in the face of the court, only the court may bring charges.<sup>98</sup>

For criminal acts of contempt outside of the court, the court may take cognizance of the contempt either on its own motion, or on the motion of the Attorney-General or any individual with the written consent of the Attorney-General.<sup>99</sup> This provision was considered in detail in *J.R Parashar v Prasant Bhushan*.<sup>100</sup>

The underlying rationale of [the Contempt Act, section 15] clauses (a), (b) and (c) appears to be that when the Court is not itself directly aware of the contumacious conduct, and the actions are alleged to have taken place outside its presence, it is necessary to have the allegations screened by the prescribed authorities so that the Court is not troubled with frivolous matters. [See *S.K. Sarkar v. Vinay Chandra Misra*, 1981(1) SCC 436]. The Sanyal Committee which had been set up in 1961 to consider and suggest reforms to the existing law of contempt and whose recommendations formed the basis for the present Act, explained the need for this screening : "In the case of criminal contempt, not being contempt committed in the face of the Court, we are of the opinion

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<sup>97</sup> *Pritam Pal V. High Court Of Madhya Pradesh, Jabalpur Through Registrar*, 1993 SCC-0529 (SC), para [41].

<sup>98</sup> Contempt Act, section 14.

<sup>99</sup> Contempt Act, section 15. In the case of the Supreme Court, the Solicitor-General may also issue a charge, or provide authorization for any individual to bring a charge.

<sup>100</sup> 2001 SOL Case No. 501, para [20].

that it would lighten the burden of the Court, without in any way interfering with the sanctity of the administration of justice, if action is taken on a motion by some other agency. Such a course of action would give considerable assurance to the individual charged and the public at large".

The Court noted that it was theoretically possible for a court to bring charges *suo motu* (on its own accord) in relation to acts outside of the court. However, it sounded a word of caution:

In any event the power to act *suo motu* in matters which otherwise require the Attorney-General to initiate proceedings or at least give his consent must be exercised rarely. Courts normally reserve this exercise to cases whether it either derives information from its own sources, such as from a perusal of the records, or on reading a report in a newspaper or hearing a public speech or a document which would speak for itself.

Despite this statement, it must be said that it is not particularly rare for courts to issue charges *suo moto*. For after all (as the statement of caution above itself acknowledges), any act that is published or recorded may come to the attention of the Court. The regularity with which courts take cognizance of acts occurring outside the court is arguably belies the system originally intended by the Sanyal Committee.

#### 4.4 Which courts have jurisdiction to hear contempt of court proceedings?

As already discussed, Articles 129 and 215 of the Constitution give the Supreme Court and High Courts respectively *inherent* jurisdiction to hear contempt of court proceedings. No other court or tribunal has such inherent jurisdiction.

However, several pieces of legislation bestows jurisdiction to deal with contempt of court matters upon various other judicial bodies. For example, the *Administrative Tribunals Act 1985*, section 17, gives various tribunals powers to deal with contempt of court equivalent to those enjoyed by the High Courts.

#### 4.5 In relation to which courts are the Supreme Court and High Court able to hear contempt matters?

It is well-established that the Supreme Court may hear contempt matters in relation to any court or judicial body in India.<sup>101</sup> It is also clear that a High Court may hear contempt matters in relation to any itself, or any court or judicial body subordinate to it,<sup>102</sup> including courts or judicial bodies in other states.<sup>103</sup>

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<sup>101</sup> *Income Tax Appellate Tribunal Through President, Applicant V. V. K. Agarwal And Another, Respondents*. 1999 (1) SCC 16 (SC), paragraph 11.

<sup>102</sup> Contempt Act, section 10.

<sup>103</sup> Contempt Act, section 11.

#### 4.6 Do the principles of natural justice apply to contempt cases?

The principles of natural justice apply to contempt cases, regardless of whether the court is acting within its inherent powers or under the Contempt Act.

In the case of contempt in the face of the court, section 14 of the Contempt Act provides that the court shall:

- cause the defendant to be informed in writing of the contempt with which he is charged;
- afford him an opportunity to make his defence to the charge;
- 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
- make such order for the punishment or discharge of such person as may be just.

Even if a court proceeds summarily without reference to the Contempt Act, principles of natural justice must still be followed. Accordingly, the contemnor should be made aware of the charge against him and given a reasonable opportunity to defend himself.<sup>104</sup>

In the case of contempt that is not in the face of the court, the procedural requirements are a little more extensive. Upon cognizance of the charge, section 17 of the Contempt Act provides that:

- 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.
- The notice shall be accompanied-
  - 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
  - in case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.
- Any person charged with contempt under section 15 may file an affidavit in support of the 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.

#### 4.7 Which judges are entitled to hear contempt cases?

As alluded to previously, contempt cases often involve an inherent conflict of interest. The judge may have a personal interest as the victim of the contemptuous act, and may also have acted as prosecutor by bringing the contempt charges. Yet the very same judge may nevertheless also hear the case, supposedly in an impartial and dispassionate manner. Clearly, this possibility of the judge acting as victim, prosecutor and arbiter all at

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<sup>104</sup> *Sukhdev Singh Sodhi v. Chief Justice and Judges of the PEPSU High Court* 1954 SCR 454, 463-464.

once poses a potential problem. The Contempt Act appears to deal with this problem in several ways.

In the case of contempt in the face of the court, the Contempt Act provides that an alleged contemnor may apply to have the charge against him tried by some judge other than the judge or judges in whose presence the offence is alleged to have been committed. If the court is of opinion that it is practicable and in the interests of proper administration of justice to allow the application, it shall place the matter, together with a statement of the facts of the case, before the Chief justice for such directions as he may think fit to issue as respects the trial thereof.<sup>105</sup> The Contempt Act adds the qualification that it shall not be necessary for the judge or judges in whose presence the offence is alleged to have been committed to appear as a witness, and that statement placed before the Chief justice under the application procedure shall be treated as evidence in the case.<sup>106</sup> For charges of criminal contempt relating to acts outside of the court, such charges must be heard by a bench of not less than two judges.<sup>107</sup>

Several observations can be made about these procedural safeguards.

First, the procedure under the Contempt Act allowing a contemnor to apply for a change of judges is not particularly helpful. The court in whose presence the alleged contemptuous act took place has a broad discretion to refuse such an application. Even if the court accedes to the application, the word of the court is not capable of being challenged, as it is taken as evidence before the Chief Justice.

Second, in relation to allegedly contemptuous acts outside the court, the requirement that charges be heard by a bench of at least two judges may also not provide much assistance to the defendant. For example, if a judge has been personally criticized, there is nothing to prevent him from sitting on this bench. If the criticism has been of the bench as a whole, then it is doubtful whether a truly neutral judge could be found.

Third, as discussed previously, the courts are not compelled to follow the procedures under the Contempt Act. Thus there remains a theoretical possibility that a judge could pass judgment on his own cause, regardless of any limitations under the Contempt Act.

## 4.8 Punishment for contempt

Punishment for the offence of scandalising the court may be either simple imprisonment for a term no longer than six months, and/or a fine of up to 2000 rupees.<sup>108</sup> The court may waive such punishment if it receives a sincere apology, even in cases where the apology is not in writing.<sup>109</sup>

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<sup>105</sup> Contempt Act, section 14(2).

<sup>106</sup> Contempt Act, section 14(3).

<sup>107</sup> Contempt Act, section 18.

<sup>108</sup> Contempt Act, section 12.

<sup>109</sup> Contempt Act, section 12; *Dinabandhu Sahu v. State of Orissa*, (1972) 4 SCC 761.

## 4.9 Appeals

For cases involving allegedly contemptuous acts in the face of the court, a judgment of a single judge of a High Court may be appealed to a bench of at least two judges of the same Court.<sup>110</sup> A judgment of a bench of a High Court may be appealed to the Supreme Court.<sup>111</sup>

For cases involving acts outside of the court, a judgment of a bench of the High Court may be appealed to the Supreme Court.<sup>112</sup>

Obviously, as the apex court, no appeal lies from decisions of the Supreme Court.

## 4.10 Summary

- While courts regularly follow the procedure set out in the Contempt Act, they are not bound to do so. Courts have a constitutional power to set procedure for contempt cases as they see fit.
- When an allegedly contemptuous act occurs in the face of the court, the court may try the matter summarily, dispensing with certain procedural safeguards that exist in normal criminal cases.
- For allegedly contemptuous acts occurring outside of the court, the court may only take cognizance of the charge in limited circumstances (including on its own motion).
- Principles of natural justice, for the most part, apply to contempt trials. However, there is considerable scope for judges to act in their own cause ie to be the victim, prosecutor and arbiter at the same time.
- Punishment for contempt may include imprisonment (maximum 6 months) and/or a fine (maximum Rupees 2000). Appeals are available in most cases.

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<sup>110</sup> Contempt Act, section 19(1)(a).

<sup>111</sup> Contempt Act, section 19(1)(b).

<sup>112</sup> Contempt Act, section 19(1)(b).

## 5. ABUSE OF THE SCANDALISING OFFENCE

### 5.1 The scope for abuse of the scandalising offence as the law currently stands

Having reviewed the current substantive and procedural law of scandalising the court, it is fair to conclude that the scandalising offence has the potential to be abused, for several reasons. First, the definition of the offence is both wide and vague – any act that undermines public confidence in the administration of justice is potentially punishable. Empirically, the wide variety of conduct that has resulted in convictions in India and elsewhere underlies this point. Second, the defences that are available, and the conduct protected by such defences, are profoundly uncertain. Third, judges are relatively free to try contempt cases as they see fit, even potentially in circumstances where the judge has a personal interest in the case.

### 5.2 International examples of abuse of the scandalising offence

Given this potential scope for abuse, it is hardly surprising that in some instances, the offence appears to have actually been abused. Several international observer organizations, including the Asian Human Rights Commission, Article 19,<sup>113</sup> and the International Bar Association, have documented such abuses of the scandalising offence. The abuses recorded by these organizations are sobering. Examples of such abuse from two countries will now be considered.

#### a) Sri Lanka

Sri Lanka provides a number of dubious examples of convictions for scandalising the court.

In *Hewamanne v. de Silva*,<sup>114</sup> the editor and publisher of a newspaper and others were found liable for contempt of court. They had published a notice of a motion relating to the Judiciary found on the order paper of Parliament the next day. The news item was a verbatim reproduction of the said notice except for the two headlines.

Such a conviction seems to suppress the ability of the press to report - not to mention comment upon - the interaction between the legislative and judicial branches of government. In a vibrant democracy, the ability to report on such events is of the greatest importance.

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<sup>113</sup> Article 19 is a charity registered in the UK, whose mission is to promote freedom of expression. Their name is derived from Article 19 of the Universal Declaration of Human Rights, which guarantees the right to the freedom of opinion and expression.

<sup>114</sup> [1983] 1 SLR 1.

A more recent abuse occurred in *Michael Anthony Fernando case*.<sup>115</sup> Mr. Fernando, a human rights activist, filed an appeal before the Supreme Court of Sri Lanka against the joining of two previous fundamental rights petitions. The appeal was heard by, among others, Chief Justice Sarath N. Silva, one of those who had decided to join the earlier petitions. Upon realising this, Mr. Fernando protested. The Court asked him to stop and, when he refused, he was summarily tried the same day, again before the Chief Justice, for contempt of court and sentenced to one year's imprisonment.

As Article 19 notes, the *Fernando case* is troublesome on a variety of counts, irrespective of the merits of Mr Fernando's appeal.<sup>116</sup> First, there was a failure on the part of the Supreme Court to observe a fundamental tenet of justice, namely that one cannot sit in judgement in one's own case, both in relation to the appeal and in relation to the contempt hearing. Second, Mr Fernando's imprisonment seems grossly disproportionate to the harm done. It is clear that a far less oppressive sanction in this case, such as removal from the Court or even a fine, would have been sufficient. Third, Mr Fernando was not given an opportunity to obtain legal advice or to prepare his defence, as the case was heard summarily. All in all, the decision has been subject to much criticism, and done little to uphold public confidence in the administration of justice.

## **b) Malaysia**

Malaysia also provides a disturbing legacy of abuse of the scandalising offence.

In *Attorney General and Others v. Lee*,<sup>117</sup> a lawyer had written letters criticizing a previous decision of the Malaysian Supreme Court. The lawyer was convicted of scandalising the court, because the Supreme Court felt that his criticism, despite being written in temperate language, imputed that the decision was "unjust and biased" and contained an 'implicit threat' that unless the decision were to be reviewed, there would be no justice. The court explained:<sup>118</sup>

For the present, except possibly—and we say this with great reservation—for the limited purpose of proving it in actual court proceedings, any allegation of injustice or bias, however couched in respectful words and even if expressed in temperate language, cannot be tolerated, particularly when such allegation is made for the purpose of influencing or exerting pressure upon the court in the exercise of its judicial functions.

Regardless of the merits of the case, this line of reasoning was clearly dangerous. In contrast to the later comments of the Privy Council in *Ahnee*, discussed above, it suggested that *any* allegation of injustice or bias, however temperate or justified, would scandalise the court. Furthermore, it held that 'implicit threats' could be read into critical discussion of judgments. Not surprisingly perhaps, later cases seized upon this expansive

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<sup>115</sup> S.C. (F/F) No. 55/2003 or 6 February 2003.

<sup>116</sup> Article 19, *Submission on Contempt of Court in Sri Lanka: Recommendations for Codification*, London, August 2003, 8.

<sup>117</sup> [1987] LRC (Crim) 580 Mal SC.

<sup>118</sup> *Ibid* 584.

reasoning to justify convictions in dubious circumstances, particularly in cases involving covert political elements.

*Attorney-General, Malaysia v Manjeet Singh Dhillon*<sup>119</sup> arose out of the 1988 constitutional crisis. Put briefly, in 1986-1987 tensions flared between the Malaysian Judiciary and the Prime Minister, Dr Mahathir Mohammad, over a number of Supreme Court judgments against the Government. In 1988, tensions peaked when the Supreme Court was due to hear a challenge against the legality of the Prime Minister's political party. Rather than letting the court hear this challenge, the Prime Minister dismissed the acting Lord President<sup>120</sup> of the Supreme Court and several other Supreme Court judges. The Prime Minister replaced them with judges that were commonly perceived to be political puppets. (Interestingly, the appeal against the legality of the Prime Minister's was heard one day after the removal of the original judges, and it was dismissed). Protesting these developments, the Secretary of the Bar Council of Malaysia, in his official capacity, affirmed an affidavit contending that the new Lord-President had abused his position. The Secretary was quickly charged, and found guilty of, scandalising the court.

It is worth pausing a moment to consider this use of contempt powers. At the time of the case, a most fundamental shift was occurring in the Malaysian legal landscape: the separation of powers was being whittled away, if not totally abolished. At no moment was public debate so important. Yet contempt powers were used to muzzle this public debate, and the Prime Minister was able to bring about reforms with little difficulty.

This sowed the seeds for further abuse of contempt powers for political purposes, as the trial of former Deputy Prime Minister Anwar Ibrahim shows. Anwar Ibrahim was a popular Deputy to Prime Minister Mahathir, and they appeared to have a falling out. Soon after, Anwar Ibrahim was charged with sedition (these charges were later amended). A number of contempt cases arose in his trial.

The *Zainur Zakaria case* involved one of the lawyers defending Anwar Ibrahim, Mr Zakaria. Mr Zakaria lodged an application on behalf of Mr. Anwar to have two of the prosecutors excluded from the case on the ground that they had attempted to fabricate evidence against Mr Anwar. In support of the allegation, Mr. Anwar had lodged an affidavit alleging that they had tried to persuade a colleague of his to fabricate evidence against him. The affidavit itself was based on a letter written by the colleague's lawyer, in which he protested that his client was being pressured by the prosecutors to give information about Mr. Anwar in exchange for dropping a capital charge against the colleague. Declining to consider this application on its merits, the trial judge not only ruled that the application was misconceived, but went further and said that it was in contempt of court. The judge announced that he intended to cite Mr. Zakaria for contempt, unless Mr Zakaria tendered an unconditional apology to the court, the Attorney General and the two prosecutors. The judge refused to adjourn the matter for the preparation of any defence for more than half an hour. Moreover, the judge refused to

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<sup>119</sup> [1991] 1 M.L.J 167.

<sup>120</sup> Now known as the Chief Justice.

allow the lawyer who had written the letter to be called as a witness and he refused to allow the President of the Bar Council a watching brief. During the half-hour recess, Mr. Zakaria consulted other members of Mr. Anwar's defence team. He came to the conclusion that to apologize to the court and admit that the application was without foundation would be contrary to the interests of his client. On the following day, the judge sentenced Mr. Zakaria to three months' imprisonment for contempt. Thankfully, although some time later, the finding of contempt was reversed on appeal.<sup>121</sup>

Aside from this incident, the trial of Anwar Ibrahim was full of irregularities, as noted by the International Bar Association.<sup>122</sup> For example, the judge disallowed large amounts of evidence tendered by the defence, including any evidence relating to political conspiracy. When the defence protested these irregularities, they were threatened with being in contempt of court. Even where the defence's protestations were proven correct, they were still potentially in contempt of court. In relation to one such incident involving a frustrated defence lawyer, the judge remarked: "If the way of speaking is like an animal, we can't tolerate it. We should shoot him. He has to change."

What has emerged in Malaysia is a disturbing trend to use the contempt power to threaten lawyers criticizing the operation of the court. Often, it is the mere threat of conviction that is used to quell dissent, even if the threat has no basis. A recent example of this was the *Raja Segaran No. 2 case*.<sup>123</sup> The case involved an application for an injunction to prevent a Bar Council meeting to discuss allegations of judicial corruption. The respondents, the Bar Council, sought to have the judge disqualified from hearing the case, on the basis that his son was a member of the Bar and therefore had a vested interest. The Bar Council cited a recent UK authority suggesting that disqualification was necessary in such circumstances. For citing this case, the Chief Executive Officer of the Bar Council was threatened with the charge of contempt! No conviction was ever recorded, but the mere fact that a person could be threatened for citing legal authority is disquieting.<sup>124</sup>

### 5.3 Learning from the international examples

It would be comforting to think that the examples from Sri Lanka and Malaysia are isolated, and could never happen in India. However, it is vital to bear in mind that the tests employed by the Sri Lankan and Malaysian courts, and the procedure adopted by them, are essentially the same in character as that in India. That is the nature of the scandalising offence: as it currently stands, it is so broad and vague that it can readily be abused.

We may hasten to add that in most cases, the scandalising offence has not been abused in India. But even in India, there have been reports of questionable use of the power. S.P. Sathe cites one case where a newspaper was required to apologize for reporting that a

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<sup>121</sup> [2001] 3 AMR 3149

<sup>122</sup> Report of the International Bar Association, *Justice in Jeopardy: Malaysia 2000*, pages 40-49.

<sup>123</sup> *Raja Segaran a/l Krishnan v. Bar Malaysia & 11 Ors* [2000] 4 AMR 4971.

<sup>124</sup> See Chew Swee Yoke, *Contempt of Court: Freedom of Expression and Rights of the Accused*, paper presented at the 11th Malaysian Law Conference, 8-10 November 2001, Kuala Lumpur, Malaysia.

beneficiary of an illegal allotment of largesse was the son of a judge, despite the fact that the Court itself had noted this allotment in another decision.<sup>125</sup> Another example involved an Allahabad High Court judge who, unable to secure a reserved berth on a train at New Delhi railway station, held up the entire train, constituted an open court on the platform and charged the terrified station master with contempt.<sup>126</sup>

Ultimately, whether or not these abuses are an isolated phenomenon in India is a moot question. The point is that such abuses, even if rare, are *possible* under the current state of the law. In this sense, even if the offence has not been abused in India to this point, it is still possible to prevent any foreseeable problems – to nip them in the bud, as it were.

There would appear to be two ways of preventing foreseeable abuse. One way would be to simply abolish the scandalising offence outright. Alternatively, the scandalising offence could be maintained, but in a more limited or well-defined form.

It may also be possible to argue that despite its ambiguity and scope for abuse, the current law of scandalising is still desirable. Perhaps abolition or limitation of the offence would introduce an even more insidious host of problems. To assess the merits of this argument, we need to reconsider the rationales of a broad and vague scandalising offence. Are they convincing today? And if they are not convincing, does this suggest that the scandalising offence should be abolished, or merely limited? In the next section, these questions will be explored.

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<sup>125</sup> S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2002, Oxford University Press, New Delhi, citing *In re Harijui Singh; In re Vijay Kumar* (1996) 6 SCC 466 in contrast with *Common Cause, A Registered Society v India* (1996) 6 SCC 530.

<sup>126</sup> Coomi Kapoor, 'The contempt test: how broad are the court's shoulders?', *Indian Express*, 31/05/2001; Madhav Godbole, *Public Accountability and Transparency: The Imperatives of Good Governance*, 2003, Orient Longman, Hyderabad, page 327.

## 6. RE-ASSESSING THE RATIONALE FOR THE CURRENT SUBSTANTIVE LAW OF SCANDALISING THE COURT

### 6.1 Substantive vs procedural law

From the outset, it is necessary to distinguish between the rationale for maintaining the current substantive law of scandalising, and the current procedural laws for hearing scandalising cases. For the moment, we will ignore procedural issues, and return to them in section 8. The focus of this section will be on whether the current substantive law of scandalising is justified.

### 6.2 The traditional rationales for the substantive law of scandalising

There are various, overlapping rationales that have traditionally been suggested in support of a broad substantive test for scandalising the court. Each of these rationales, together with possible rebuttals to these rationales, will now be listed. These arguments will then be critically assessed.

This section builds upon the discussion of various commentators and review bodies, particularly the Australian Law Reform Commission and Irish Law Reform Commission.

### 6.3 Protection of the rule of law

#### a) **The rationale**

As we have already seen, the most fundamental rationale for the scandalising offence is that an effective Judiciary is necessary for a proper rule of law. If the public loses confidence in the Judiciary, it is said, then orders of the courts will neither be enforced nor obeyed, and the rule of law will quickly unravel.

#### b) **Rebuttals**

##### *(i) No empirical basis for the fear that the rule of law would be undermined*

The Australian Law Reform Commission notes that in relation to the supposed threat to the rule of law, “a great deal of the argument in the area is pure speculation.”<sup>127</sup> There is no evidence to comprehensively demonstrate that subjecting the Judiciary to greater criticism would lead to complete disregard for the administration of justice. If further criticism were to reveal that the Judiciary, as a human institution, is imperfect, then:<sup>128</sup>

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<sup>127</sup> Australian Law Reform Commission, Report No 35, Contempt (1987), 246.

<sup>128</sup> Ibid.

It is short-sighted, indeed paranoiac, to argue that, because the community, on being confronted with the realities, might 'rise up' and destroy the system, it should be kept in some sort of state of innocent delusion.

Indeed, credible evidence suggests that if anything, subjecting the Judiciary to greater public criticism does *not* lead to a disregard for the rule of law. In England, for example, convictions for scandalising the court have become exceedingly rare. The last conviction was more than seventy years ago,<sup>129</sup> with only one subsequent prosecution attempted, unsuccessfully.<sup>130</sup> Some commentators and judges go so far as to suggest that the offence has become "virtually obsolescent."<sup>131</sup> Despite this, there has been no revolutionary assault on the English Judiciary. Similarly, in the US, there have been very few charges brought for scandalising the court, mainly because of an extremely high threshold for proving that an act presented a "clear and present danger" to the judicial system.<sup>132</sup> Nevertheless, the US Judiciary has not been bombarded with criticism, and nor has the rule of law disintegrated.

Some respond to this rebuttal with the notion of cultural relativism. This concept, it may be recalled, suggests that while the Judiciary may not need the protection of a broad scandalising offence in 'mature democracies', it still requires such protection in fledgling democracies where the rule of law is not so firmly established. It was recently affirmed by the Privy Council in *Ahnee & ors v DPP*.<sup>133</sup>

**(ii) A broad scandalising test may be counter-productive**

If the aim of the scandalising offence is to safeguard public confidence in the administration of justice, then it is quite plausible to argue that a broad scandalising test may be counter-productive. Barend van Niekerk argues that the offence may be counterproductive in two senses.<sup>134</sup> First, the publicity devoted to a critic's conviction may be far greater than the publicity generated by the initial scandalising act. Put another way, convicting someone may make them into a kind of martyr, providing publicity and legitimacy to the contemnor's cause. Second, and more importantly, it is strongly arguable that suppressing reasonable criticism of the court will actually undermine public confidence in the court more than uphold it.

**c) Discussion**

It is fair to conclude that while protection of the Rule of Law may justify a scandalising offence of *some sort*, it does not necessarily justify the current broad and vague substantive law.

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<sup>129</sup> *R v Gray* (1900) 2 QB 36

<sup>130</sup> *R. v. Metropolitan Police Commr, ex p Blackburn (No. 2)*, (1968) 2 QB 150.

<sup>131</sup> *Secretary of State for Defence v. Guardian Newspapers Ltd.*, (1984) 3 All ER 601 at 605 (Viscount Diplock).

<sup>132</sup> *Bridges v California* 314 US 252.

<sup>133</sup> (1999) AC 294.

<sup>134</sup> Barend van Niekerk, *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (1987), Chapter 1, 1-45.

Let us begin by considering the effect of total abolition of the offence on the Rule of Law. It is difficult to predict with any certainty what effect such abolition might have. Certainly, in England and the US, the scandalising offence is very rarely resorted to. Nevertheless, the scandalising offence is probably not obsolete - it remains a potential, albeit unlikely, threat to extreme attacks on the court. We cannot therefore conclude that on the basis of the English and US experience, it would be safe to abolish the offence.

What about the effect of retaining the scandalising offence in a more limited form? Here, it is possible to rely on the English and US experience, because informally, the offence now only exists in these countries in a very limited form, a last resort for only the most extreme attacks on the court. It is at this point that we must assess whether the Indian Judiciary, like its English and US counterparts, could survive under a more limited scandalising offence. In other words, we must re-consider the notion of cultural relativism. Cultural relativism seems to underlie the comments of the Indian Supreme Court:<sup>135</sup>

After more than half a century of independence, the Judiciary in the country is under a constant threat and being endangered from within and without. The need of the time is of restoring confidence amongst the people for the independence of Judiciary.

With respect, it is submitted that this notion of cultural relativism is ill-founded. It relies on an almost colonial belief that the public in new democracies are less sophisticated, or more prone to heated action, than their counterparts in mature Western democracies. It is patronizing in the extreme. Furthermore, at least in the case of India, it cannot be said that the democracy is fledgling. The Indian democracy has survived more than fifty years of existence, with the importance of an independent and effective judiciary well understood. Today, if the Indian people were to lose confidence in the Judiciary, it is doubtful that this would be due to gullibility or mis-appreciation of the Judiciary's role. Rather than the courts adopting some kind of siege mentality lingering from the colonial period, it is surely more sensible to be mindful of the prescient words of Lord Denning:<sup>136</sup>

[The scandalising offence] is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. This must rest on surer foundations.

In fact, a siege mentality may do more to harm the reputation of the Judiciary than to uphold it. Consider, for example, the outcry generated by the conviction in *In re: Arundhati Roy*.<sup>137</sup> Regardless of the legitimacy or otherwise of Roy's actions, it is fair to conclude that the conviction probably did 'back-fire'. Had the Court refrained from convicting Roy, the affair might have passed with Roy's actions having far less influence on the public's confidence in the courts.

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<sup>135</sup> *In re: Arundhati Roy* 2002 SOL Case No. 138.

<sup>136</sup> *R v Police Commissioner of the Metropolis, Ex parte Blackburn (No 2)* (1968) 2 QB 150, 154.

<sup>137</sup> 2002 SOL Case No. 138.

Ultimately, it may be taking too great a risk to completely abolish the scandalising offence. But equally, the current broad and vague test is not justified. Once false notions of cultural relativism are cast aside, it becomes clear that a more limited offence is likely to uphold confidence in the Indian Judiciary to a greater extent than a broad offence that is prone to backfiring.

## 6.4 The special vulnerability of judges

### a) The rationale

This rationale is related, although distinct, from the rule of law rationale. It suggests that judges are especially vulnerable to criticism, and thus the scandalising offence is necessary to ensure that such criticism does not get out of hand and undermine the rule of law. There are two basic arguments relating to the special vulnerability of judges.

First, judges have refrained from making public comment, in order to maintain an image of impartiality. This is reflected in the code of ethics adopted by the Indian Judiciary, which states that a judge “shall not speak to the media. The judgements speak for themselves.”<sup>138</sup> Because of this, judges require scandalising powers to protect themselves if necessary.

Second, alternative legal actions available to judges may not be sufficient to protect judges from illegitimate criticism, as several law reform bodies have concluded.<sup>139</sup> For example, defamation law has developed in response to attacks on ordinary citizens. Defamation law may therefore be inadequate for dealing with attacks on judges, given the unusual vulnerability of judges to respond to criticism, and the special role that judges play in society.

### b) Rebuttals

It has been argued that today, judges are well-equipped with modern PR techniques to deal with criticism, and are thus no longer in need of special protection.<sup>140</sup> Judges regularly give public speeches, for examples, and modern courts now have administrative support, often by employing media specialists, to deal with media issues.

### c) Discussion

Once again, this rationale justifies some sort of scandalising offence, but does not necessarily justify the broad offence under current law.

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<sup>138</sup> As reported in Murali Krishnan, “Milord, Judge Yourself” *Outlook* 20/12/1999, 22.

<sup>139</sup> Australian Law Reform Commission, Report No 35, Contempt (1987), 242-243, The Law Reform Commission of Ireland, Consultation Paper On Contempt Of Court (1991), 271.

<sup>140</sup> Australian Law Reform Commission, Report No 35, Contempt (1987), 262.

While it may be true that the Judiciary is becoming more media-savvy, it is still an overstatement to suggest that judges are completely free to defend themselves in the public domain from criticism. In recent incidents in Australia<sup>141</sup> and New Zealand<sup>142</sup>, for example, judges seemed unable to respond to sustained, intense and misguided criticism. So judges probably are more vulnerable to criticism than ordinary citizens. Several points need to be borne in mind when assessing the implications of this vulnerability.

First, it must be remembered that the scandalising offence is concerned with harm to the public confidence in the administration of justice, not harm to the judges personally. Constitutional safeguards protect the judge from the ultimate harm - arbitrary removal from office. Under the Indian Constitution, a judge may only be forcibly removed for “misbehaviour or incapacity”, and only by way of an order of the President supported by a majority of total membership of the house present and voting within a single session of Parliament.<sup>143</sup> One former Chief Justice of India bemoaned the process, noting that “impeachment is a cumbersome process and which, as a recent instance showed, may not achieve the desired result for reasons that are political.”<sup>144</sup> So if anything, the vulnerability of judges to criticism may actually *improve* public confidence in the administration of justice, because it provides some means of judicial accountability in the absence of any other viable mechanisms.

Second, while upholding appearances of impartiality may prevent judges from responding publicly to criticism, this appearance also contributes to a kind of public reverence for the Judiciary. Justice J.S Krishna Iyer aptly described this effect as “the cult of the robe.”<sup>145</sup> The high integrity assumed of the Judiciary in the public eye, and the consequent immunity of the Judiciary’s reputation from much criticism, should not be underestimated. For example, when an Australian Senator made false allegations against a judge of the High Court of Australia, the reputation of the Senator suffered greatly, while many sprung to the defence of the High Court judge.<sup>146</sup>

On balance, it is fair to say that the vulnerability of judges to criticism may require them to have some special protection from extreme attacks which are significant enough to undermine the public confidence in the courts. It does not follow, however, that judges should be able to punish all criticism, or even most criticism. We must keep in mind that the public are not fools, and that quite apart from the threat of legal action, the potential damage to a critic’s or publication’s reputation is a significant disincentive from making unwarranted criticism of the courts.

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<sup>141</sup> A Justice of the High Court, Justice Michael Kirby, was attacked under parliamentary privilege – see footnote 146 and accompanying text below.

<sup>142</sup> See Noel Cox, “Criticism of Judges by Politicians: Reflections from New Zealand” (2004) 13(3) *The Commonwealth Lawyer* 28.

<sup>143</sup> Indian Constitution, Articles 124(2) and 217(1).

<sup>144</sup> Former Chief Justice S.P. Bharucha, quoted in Rajindar Sachar, Whither the Judiciary, *Hindu*, 15 May 2002, page 10.

<sup>145</sup> Justice V.R. Krishna Iyer, in *Quae Curia*, *Frontline*, 19 June 1998.

<sup>146</sup> For a summary of these events, see the story transcript of the ‘Sunday’ show report, *The Plot to Destroy Michael Kirby*, first televised on July 14, 2002. The transcript is available online at [http://sunday.ninemsn.com.au/sunday/cover\\_stories/transcript\\_1103.asp](http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_1103.asp).

## 6.5 The embarrassment that a defence of truth may cause to the Judiciary

### a) **The rationale**

It has been argued that truth should not be a defence to a charge of scandalising the court, because it would be unseemly for judges' personal affairs to be put under the scrutiny of a trial. Some fear that this would lead unscrupulous critics to make baseless claims to discredit the Judiciary, knowing that the judges maligned would be unlikely to bring forward proceedings dealing with their private lives. It would be better for individuals to bring their allegations forward through a non-public mechanism such as an in-house mechanism.

### b) **Rebuttals**

#### *(i) In-house mechanisms are ineffective*

An in-house mechanism exists for dealing with allegations of corruption against Indian judges. The in-house mechanism is seemingly informal, and findings are kept confidential. Judges themselves have noted that the internal mechanism was only effective if the judge against whom allegations were leveled voluntarily consented to the investigation.<sup>147</sup> Furthermore, the internal mechanism cannot force a judge to resign. This has led one academic to comment:<sup>148</sup>

One thing is clear. The in-house mechanism leads nowhere. It is not legal. It does not conduct a proper fact-finding exercise. It is confidential. It does not even result in a public denial or affirmation of the allegations made against the judges concerned. Plainly, it is not intended to infuse confidence in the public or to clear doubts about errant judges.

#### *(ii) The onus is on the accused*

A further point that must be kept in mind is that even with a defence of truth, baseless or reckless allegations will lead to conviction. The onus would be on the accused to prove the defence. Critics would still need to carefully consider the implications of their actions before attacking the court.

#### *(iii) The need to expose corruption is paramount*

It is argued that a defence of truth is necessary to ensure that instances of corruption or misconduct can be exposed. Without it, critics will be too fearful to bring forward incidents of judicial corruption.

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<sup>147</sup> Former Justice J.S Verma, quoted in Madhav Godbole, *Public Accountability and Transparency*, (2003) Orient Longman, Hyderabad, page 329.

<sup>148</sup> Vinod A. Bobde, "Scandalising the Court", (2003) 8 SCC (Jour) 32.

### c) Discussion

The rebuttals provide strong reasons for rejecting the ‘embarrassment to judges’ rationale.

Given the inefficacy of internal mechanisms for monitoring judges, and the foregoing discussion about the difficulty of removing judges from office, it would seem that informed criticism of the Judiciary through the media is a vital mechanism for ensuring judicial accountability. The Judiciary, like everyone else in society, must be accountable for its actions.

Similarly, it is important to keep the nature of a truth defence in perspective. The Irish Law Reform Commission dealt with this issue in great detail, and persuasively reached the following conclusions:<sup>149</sup>

We are not impressed by many of those arguing against the universal availability of the defence of truth. The suggestion that the defence should not be available (save when in conjunction with public benefit) because some defendants might seek to use the contempt proceedings as a public platform or to have a case reheard seems to us to involve far too overbroad an exclusion to deal with a small minority of cases. The logic of such an argument would be that all appeals in civil and criminal litigation should be abolished because some appellants use the process to gain publicity or to rehearse old grievances. ..

Nor do we think that the defence of truth would herald an age of “judicial guerilla warfare by political ideologues. An allegation of justification which has no basis of fact will be rejected: the fate of the contemnor – imprisonment or a substantial fine – is a sufficient disincentive to engage in scandalising conduct. It is conceivable that an occasional such person might be sufficiently inspired by the desire for his or her day in court, with consequent publicity, that he or she would make a scandalising statement; but we seriously doubt whether the existence of a specific defence of truth would have any distinctive influence one way or the other. What is far more likely is that persons such as this are motivated to make public remarks which may fall foul of the contempt law, not because they hope to get away 'with it' or to gain cheap publicity but because they have a deep conviction that the system of justice in capitalist societies, while formally incorporating objective norms of justice, in fact operates so as to protect the interests of the dominant elements in society at the expense of those of the media.

Finally, the idea that judicial corruption must be exposed at all costs is very persuasive. Frankly, if there is cause for a judge to be embarrassed, then it should be exposed. It is a far greater ill for judicial misconduct to go unnoticed than for judges to undergo the embarrassment and burden of defending themselves from unwarranted criticism. And as has already been mentioned, if criticism is absolutely baseless, it would still be punishable irrespective of a defence of truth.

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<sup>149</sup> The Law Reform Commission of Ireland, Consultation Paper On Contempt Of Court (1991), 284-285.

## 6.6 The impracticability of narrowing the offence

### a) The rationale

This argument acknowledges that narrowing the scandalising offence may be desirable in theory, but in practice, will lead to an inadequately drafted offence. As the Australian Law Reform Commission commented, it may be impossible to comprehensively define all potential acts scandalising the court.<sup>150</sup> It has been argued that a broad offence is necessary because a wide variety of acts could potentially undermine public confidence in the administration of justice, and thus it is inadvisable to limit the definition of the offence. Any limitation would merely lead to the creation of loopholes to be exploited by unscrupulous critics.

### b) The rebuttals

#### (i) *Imprecision of the offence is against the interests of justice*

It is sometimes suggested that the scandalising offence is “arbitrary, irrational, vague in its nature and constitutes a violation of the principle of legality.”<sup>151</sup> On the other hand, it has been pointed out that various criminal offences, such as the crime of obscenity, are also defined in broad and vague terms.<sup>152</sup> It is clearly arguable (although perhaps unlikely) that whether the offence is too vague to be legally valid. But whatever the case may be, it seems reasonable to define the scope of the offence as precisely as possible to avoid confusion. A total *carte blanche* should only exist as a last resort.

#### (ii) *It is possible to more narrowly define the offence*

A variety of law reform bodies have noted that there is no need for an unlimited scandalising offence. Several law reform bodies have suggested that the scandalising offence should be limited to indefensible allegations of judicial corruption,<sup>153</sup> misconduct,<sup>154</sup> improper conduct,<sup>155</sup> and perhaps misrepresentations of judicial decisions.<sup>156</sup> It is widely accepted that scurrilous abuse does not warrant prosecution, and should be removed from the definition of the offence. Similarly, it is possible to limit the offence in terms of the requisite *mens rea*, the requisite mode of publication, and so on.

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<sup>150</sup> Australian Law Reform Commission, Report No 35, *Contempt* (1987), 250.

<sup>151</sup> Milton, *South African Criminal Law and Procedure* (1996) 187-188 as cited in *S v Mamabolo* (2001) 3 SA 409 [67] (Sachs J).

<sup>152</sup> Australian Law Reform Commission, Report No 35, *Contempt* (1987) 250, The Law Reform Commission of Ireland, Consultation Paper On Contempt Of Court (1991) 265.

<sup>153</sup> Eg English Law Commission Report, *Criminal Law: Offences Relating to Interference with the Course of Justice*, (1979) Law Com. No. 96.

<sup>154</sup> Eg the Australian Law Reform Commission.

<sup>155</sup> Eg the Phillimore Committee.

<sup>156</sup> Eg the Law Reform Commission of Ireland.

**c) Discussion**

Quite simply, there seems to be no practical impediment to narrowing the scope of the offence, and given the theoretical desirability of doing so, a more limited offence seems sensible.

**6.7 Conclusions on the theoretical justifications for the current state of the law**

Ultimately, an appropriate scandalising offence requires a kind of balancing act.

On the one hand, some sort of scandalising offence seems necessary to protect the rule of law, or more precisely, the key role of the Judiciary in the rule of law. Total abolition of the scandalising offence seems too risky, but by the same token, it seems clear that a draconian scandalising offence is hardly necessary.

On the other hand, there are many good reasons for limiting the scope of the scandalising offence as much as is reasonably possible. Limiting the scope would prevent abuse of the offence, even if such abuse has not occurred as of yet in India. It would allow valid allegations of corruption and misconduct to be brought forward. It would provide a means of judicial accountability in the absence of any other effective mechanisms.

Therefore, this report concludes that the current expansive and vague scandalising offence is not justified, and a more limited – and crucially, more clearly defined - form needs to be introduced. The precise nature of the reforms needed will be considered in the next section.

## 7. RECOMMENDATIONS FOR REFORMS OF THE SUBSTANTIVE LAW OF SCANDALISING THE COURT

### 7.1 The issues to be resolved

Reforms of the substantive law of scandalising the court must explore the following questions:

- What types of conduct should constitute scandalising the court?
- By what mode must the scandalising act be communicated to the public?
- To what degree must the act potentially harm public confidence in the administration of justice for the act to scandalise the court?
- What is the required *mens rea* for the offence?
- Should publishers, editors, distributors etc be liable for scandalising the court, and in what circumstances?
- What defences, if any, should be available for the accused?

### 7.2 What types of conduct should constitute scandalising the court?

#### a) Current law

It may be recalled from previous discussion that a variety of acts may constitute scandalising the court, including:

- Scurrilous abuse of the court
- Imputations:
  - of judicial corruption;
  - of having bowed to external pressures;
  - of personal bias (although probably not institutional-wide bias);
  - of misuse of court processes; and
  - of judicial negligence
- Intimidation of the court
- Misrepresentations of judicial decisions
- Critical comparative reviews of judicial performance

**b) Types of conduct that should continue to potentially constitute scandalising the court**

**(i) *Imputations of corruption, bowing to external pressures, bias or misuse of judicial processes***

Subject to the recommendations made below, it is suggested that imputations of judicial corruption, bowing to external pressures, bias or misuse of judicial processes should continue to constitute scandalising the court. These strike at the very heart of the administration of justice, suggesting that a judicial decision or process is motivated by factors other than the merits of the case at hand.

**(ii) *Misrepresentation of judicial decisions***

This report tentatively concludes that in extreme cases, misrepresentation of judicial decisions should constitute scandalising the court. The damage that could be done a court's reputation is potentially grave, and just as importantly, there would appear to be no other legal recourse for the court in the absence of the scandalising offence.

That said, a conviction for misrepresenting a judicial decision should only occur in the most extreme of circumstances. Opinions can often validly differ over what a judgment means, or the reasoning of the judgment. If judges themselves differ over the meaning of a precedent, then there can be no justification for punishing others for merely representing a decision in a different light to that intended by the judges delivering the judgment. Therefore, this report recommends that a misrepresentation of a judicial decision can only potentially constitute the court when no reasonable person could make such a representation. The mere fact that a representation omitted some detail from the judgment shall not establish that the misrepresentation scandalised the court.

**c) Types of conduct that shouldn't constitute scandalising the court**

This report recommends that many types of conduct that may currently constitute scandalising the court should no longer do so, for the following reasons.

**(i) *Imputations of judicial negligence and critical comparative reviews of judges***

At first glance, it may seem that an imputations of negligence of a particular judge, whether arising in its own right or as part of unflattering comparisons with other judges, may potentially undermine public confidence in the administration of justice. However, there is an important distinction between an imputation of negligence on the one hand, and imputations of corruption, bowing to external pressures or bias on the other hand. The distinction arises in two ways.

First, and most importantly, the decisions of the judge are on the public record, available for scrutiny. The judgments speak for themselves, and consequently provide an immediate implicit defence to any claims of negligence. If a judge has not been negligent, then this will be obvious from the judgments. Negligence is not some vague, difficult-to-defend attack delving into the judge's personal affairs. The only allegations of negligence that are likely to have any effect on the public are those supported by clear evidence from published decisions. Such allegations are likely to be true, and as will be discussed soon, should be protected from conviction.

Second, imputations of negligence generally involve technical legal points, such as whether the judge has misapplied a precedent, or misunderstood a statute. Most of the public lack the legal knowledge to fully appreciate most of these technical details. As such, it is doubtful that most of the public would be able to muster such outrage on technical matters of negligence as to seriously harm the administration of justice.

In relation to critical comparisons of the judicial performance, there should be no reason why these comparisons *per se* should scandalise the court. Such comparisons may be uncomfortable for judges, perhaps a little unseemly, but they can hardly justify potential criminal conviction. If anything, some might argue that they provide a means of establishing judicial accountability, sending a useful signal to the Judiciary about its performance. Of course, if such comparisons contained imputations of corruption, bowing to external pressures or bias, then such imputations may separately scandalise the court.

### **(ii) *Scurrilous abuse***

Several law reform bodies have recommended that scurrilous abuse no longer constitute scandalising the court.<sup>157</sup> This report is of the same view, given that scurrilous abuse is unlikely to hold much sway over the public at large. It is worth repeating a statement quoted earlier, from the Australian case of *Anissa Pty Ltd v Parsons*, where the Court dismissed a solicitor's vulgar insult against a judge with the following comment: "the words spoken by the defendant do not undermine public confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them."<sup>158</sup> Scurrilous abuse

### **(iii) *Comments on the merits of judicial decisions***

At the moment, it may be recalled that section 5 of the Contempt 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.*

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<sup>157</sup> Eg the Law Reform Commission of Ireland, Law Reform Commission of Hong Kong, Australian Law Reform Commission, the Phillimore Committee.

<sup>158</sup> *Anissa Pty Ltd v Parsons (on the application of the Prothonotary of the Supreme Court of Victoria)* [1999] VSC 430, paragraph [22].

As discussed previously, this defence is problematic in several ways. First, it is not always clear when a comment relates to the merits of a judicial decision, as opposed to the judges delivering the decision. Second, it is also uncertain what ‘fair’ means. Third, section Five seems to imply that ‘unfair’ criticism of the merits of judgments is punishable, whereas in most other common law jurisdictions, criticism of the merits of the judgment, no matter how intemperate, cannot scandalise the court.

The best solution is to amend Section Five so that *no* comments on the merits of a case which has been heard and finally decided can scandalise the court. We must remember, in this context, that judicial decisions are constantly debated and criticized in academic circles, legal journals, indeed whenever an appeal is lodged. The legal system has shown itself to be more than capable of handling such criticism of decisions. There seems to be no great pressing need to protect the courts from intemperate criticism of its decisions in this context – certainly not by means of the criminal law.

Finally, to help clarify when a comment is about the judgment rather than the judge, it should be made clear that the mere fact that a comment suggests that a decision is unjust does not imply that the judge delivering the decision has engaged in misconduct.

#### **(iv) Intimidation of the court**

This should not exist as a form of scandalising, if indeed it can truly be said to be a form of scandalising now. Often intimidation of the court should be viewed as an interference with the administration of justice, a separate form of contempt, and dealt with accordingly.

Earlier, the question was raised whether the mere sustained *repetition* of an otherwise legitimate criticism could be construed as scandalising the court. Whatever answer the current law provides, it is clear that such repetition should not constitute scandalising the court. Certainly, if the criticism itself is unjustified, then there may be grounds for laying a charge. But if the criticism has merit, then the fact that it is repeated should be of no legal significance.

### **7.3 The necessary mode of communication**

#### **a) Current law**

The current law in India suggests that publication is not necessary for a scandalising conviction. In any case, ‘publication’ is defined broadly to include not only public acts such as newspaper reports, articles, or televised speeches, but also acts such as writing private letters to judges. Many cases have arisen from statements made in official court documents such as affidavits.

**b) The need for publication to the public at large**

This report recommends that an act should only be capable of scandalising the court if it is publicized to the public at large. This was the recommendation of the English Law Commission in its 1979 report.<sup>159</sup> The reasoning behind this is compelling: if the act has not been publicized to the public at large, then it is highly unlikely that public confidence in the administration of justice will be seriously eroded.

There are several rebuttals to this recommendation which need to be considered. The first rebuttal is that public confidence in the administration of justice could be undermined, even if the act were only publicized to a small group of the public. For example, a letter written to several influential politicians or fellow judges might be thought of as doing so. However, this argument surely cannot hold much weight. For if a small group of important people are privy to an attack on the court, the vast majority of the public remain oblivious to this attack. It is only when the small group of important people *act* on this attack, and themselves make the public at large aware, that the rule of law can be said to be endangered.

There is a second potential rebuttal to the proposal that a scandalising act must be published to the public at large. The rebuttal is that judges should be able to preemptively strike down such attacks before they can be published to the public at large. This argument is not convincing either. We must remember that the possibility of being charged with contempt of court is a sufficient disincentive to acting rashly. It makes people think twice before attacking the courts publicly. A power to preemptively strike down attacks which *might* be published allows a judicial discretion, and hence a level of uncertainty, that is not justified.

**c) Formal complaints of bias, or any other complaints made to the proper authorities, should not form the basis of a scandalising conviction**

There is an unusual tendency in India for statements in official court documents, such as affidavits, to lead to convictions for scandalising the court. This means that whenever a litigant questions the actions of a court by the proper legal mechanisms, they may still be slapped with a charge of scandalising the court. A disquieting example of this was the Indian case of *Chetak Construction Ltd v Om Prakash*.<sup>160</sup> The case had involved a property dispute, which was due for an appeal. Before the appeal was heard, the appellants discovered that the judge set to hear the appeal had actually purchased the property in dispute. Understandably, the appellants politely applied for the judge to relieve himself of hearing the dispute. The judge acquiesced to this request, but added:<sup>161</sup>

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<sup>159</sup> English Law Commission Report, *Criminal Law: Offences Relating to Interference with the Course of Justice*, (1979) Law Com. No. 96, Appendix A, clause 32.

<sup>160</sup> 1998 SOL Case No. 321.

<sup>161</sup> At Paragraph 14 and 15 of his order, cited in *Chetak Construction Ltd v Om Prakash*, *ibid*.

I felt that time has come that the courts put a very heavy foot on those who are indulging in the dirty tricks by trying to manipulate the proceedings, choosing or avoiding the forums, through the lawyers, who cannot argue, but for their active interest indulge in such activities... I feel that this is the fittest case to refer to the Supreme Court for taking appropriate actions including contempt of court proceedings and demarcate the lines for conduct by the lawyers and the litigants in the Courts.

On appeal of this order, the Supreme Court reprimanded the judge for his comments. Nevertheless, the case revealed the possibility of judges abusing the scandalising offence to brow-beat litigants. It is reminiscent of the ‘chilling’ effect created by the threat of contempt laws in Malaysia. Clearly, it is sensible to prevent this abuse from occurring in the future by establishing that statements made in relation to a formal complaint of bias against a judge should not give rise to a scandalising offence.

One concern that might be raised about exempting formal complaints of bias is that it will create a loophole for critics to unscrupulously attack the court. This argument is hard to sustain, for several reasons. First, even without the possibility of getting charged with contempt of court, there are still significant disincentives from making baseless attacks in applications to the court. Adverse cost orders may be awarded, and in extremely vexatious cases, abuse of process orders may also be made. Second, if the litigant chooses to go public, then their public statements (as opposed to statements in the court documents) will not be exempted. Of course, the media may in their own right report the statements made in official court documents on the public record, but the impact of such reports should not be overestimated. Such a report would in essence state, as a matter of fact, that a litigant has made an allegation against the Judiciary, and that such an allegation is being considered via the proper legal mechanisms.<sup>162</sup> This is hardly a precursor to public abandonment of the rule of law.

The same logic applies to statements made to proper authorities as to statements made in official court documents. A person should be allowed to bring a complaint via the proper legal mechanisms without fear of being charged with contempt. Once again, there is a small possibility that this exemption will create a loophole, but it must be kept in mind that most complaints to independent bodies are dealt with on a confidential basis, and it is only after verification that the complaints are made public. Therefore, the danger posed by any potential loophole is minor.

#### 7.4 To what degree must the act harm public confidence in the administration of justice?

##### a) Current law

Section 13 of the Contempt Act provides that an act must “substantially interfere”, or tend to substantially interfere, with the due course of justice.

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<sup>162</sup> Bearing in mind that the *sub judice* rule would prevent comments of a more damaging nature.

**b) Act should seriously harm public confidence in the administration of justice**

This Report recommends that an act can only scandalise the court if it ‘seriously’ harms public confidence in the administration of justice. Several points can be made about this recommendation.

First, the word ‘seriously’ has been chosen in preference to ‘substantially’, to import a higher threshold of threat to the administration of justice. This is because only sufficiently serious threats to the administration of justice should warrant criminal conviction.

Second, the phrase ‘with the due course of justice’ has been amended to specifically refer to ‘public confidence in the administration of justice.’ This clarifies any ambiguity over the application of the section, although it may be necessary to retain the phrase ‘with the due course of justice’ in relation to other forms of contempt of court.

Third, a ‘clear and present danger’ test, as adopted in the United States, is deliberately avoided. In the United States at least, the ‘clear and present danger’ test has been interpreted as requiring such a high threshold as to make the scandalising offence virtually obsolete. For the reasons discussed in section 6.3, a total abolition of the scandalising offence is not yet warranted in India.

Fourth, the recommended phrase does not refer to a ‘tendency’ to harm public confidence in the administration of justice. This reflects the previous recommendation, made in Section 7.3, that the attack on the courts must first have been published to the public at large before it can lead to a conviction.

**7.5 What should the requisite *mens rea* be for the scandalising offence?**

**a) Current Law**

The current law is vague and somewhat uncertain here. In India and most Common Law jurisdictions, it is probable that there is no *mens rea* requirement for the scandalising offence.

**b) The requisite *mens rea***

This report recommends that the requisite *mens rea* be based on intention. It must be shown, on the balance of probabilities, that the defendant intended to seriously undermine public confidence in the administration of justice. This is similar to the test proposed by the Phillimore Committee in England in 1974.<sup>163</sup> Where the act was committed in circumstances in which the defendant could not have reasonably expected the act to be published, then the *mens rea* would not be established.

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<sup>163</sup> *Phillimore Report*, para [174].

One criticism of this test is it might be hard to prove the intent of the person involved. There are several responses to this. First, the standard of proof required is on the balance of probabilities, rather than the more onerous standard of beyond reasonable doubt. Second, there are many criminal offences based on intent, which have been prosecuted successfully on a regular basis. Of course, the defendant may baldly assert that his intention was not harm the administration of justice, but if the objective facts lead to a different conclusions, bald assertions will not hold much evidential weight. Third, it must be kept in mind that scandalising can potentially lead to imprisonment – an alternative negligence-based test with loose standards such as reasonable foreseeability is not justified in this criminal context.<sup>164</sup>

A second criticism of this test is that it might be hard to show an intention to undermine public confidence in the administration of justice *in general*, which could mean that certain allegations against judges in a particular locality, or a court dedicated to a particular area of law, could not be prosecuted for scandalising the court.<sup>165</sup> With respect, this argument is fallacious for several reasons. First, by the same logic, an attack against an individual judge could be said to be limited, and not against the administration of justice in general. Yet as has been shown time and time again, courts consider an attack on an individual judge to be capable of undermining public confidence in the administration of justice in general. So why should an attack of judges in a particular locality, or a tribunal devoted to a particular area of law, be treated any differently? Second, even if it could be said that certain attacks on court could not be construed as intending to undermine public confidence in the administration of justice, then it seems only fair that such attacks should not result in scandalising convictions. The fundamental rationale of the scandalising offence is to protect the rule of law. If the rule of law is not threatened, then no scandalising offence should arise.

## 7.6 Should publishers, editors, distributors etc be liable for scandalising the court, and in what circumstances?

### a) Current Law

People who assist the dissemination of another person's scandalising act may themselves be charged with scandalising. Although there is little case law or commentary specifically discussing this point, it would appear that the test is one of strict liability: once it is shown that the original source has scandalising the court, anyone else assisting the publication of this scandalising act is also liable.

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<sup>164</sup> Cf Law Reform Commission of Ireland, *Consultation Paper On Contempt Of Court* (1991), 280.

<sup>165</sup> Eg English Law Commission Report, *Criminal Law: Offences Relating to Interference with the Course of Justice*, (1979) Law Com. No. 96, para 3.66.

**b) Same test should apply to disseminators of scandalising act**

This report recommends that the same standard should apply to individuals who initially scandalise the court and individuals who later assist the publication of the scandalising act. This test will still require publishers etc to carefully consider the validity of the scandalising act before publishing them. However, it will remove the possibility of injustice arising out of a strict liability test.

**7.7 Defences**

**a) Current Law**

As discussed above in Section 3.5, the defences to a charge of scandalising are extremely uncertain. Greater clarity is needed.

**b) Recommended defences to a scandalising charge**

**(i) *Acts made under parliamentary privilege***

This report recommends that any reporting of acts made under parliamentary privilege should be immune from prosecution for scandalising the court. It is vital that the media is able to report on the relationship between the Legislature and Judiciary. As such, if a politician can claim privilege for a statement, then a person reporting this statement should also be able to claim privilege.

**(ii) *Comments made on the merits of judicial decisions***

As discussed above in Section 7.2, no comment on the merits of a judicial decision, however intemperate, should be capable of scandalising the court.

**(iii) *Statements in certain official court documents, or any other complaints made to the proper authorities,***

As discussed above in Section 7.2, these statements should not attract the scandalising offence.

**(iv) *Truth***

Few would debate that a true allegation of judicial misconduct should not ordinarily be punished. In section 6.6 above, it was concluded that some kind of defence of truth is justified. The contentious aspects of a truth defence are whether a truth defence should be qualified with notions such as ‘the public interest’, and whether an honest belief in the truth of a false assertion should provide a defence.

The *Contempt of Courts (Amendment) Bill 2004* proposes that the following defence be adopted:

*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 the public interest and the request for invoking the said defence is bona fide.*

This proposal is based on the recommendations of the NCRWC.<sup>166</sup> Several observations can be made about this proposal, each of which warrants careful discussion.

First, the language used in the section is permissive rather than mandatory – courts *may* allow the defence, but are not compelled to do so. There seems to be no justification for such permissive language. If a defence is to have any value, a defendant must be absolutely confident in the availability of a defence when the necessary conditions for the defence are satisfied. This report recommends that the language used should be mandatory.

Second, the defence of truth is qualified, in the sense that it also must be in the public interest, and that it is pleaded as a defence bona fide. In this respect, the proposal is similar to the defence recommended by the Phillimore Committee, that truth in conjunction with public benefit constitute a defence.<sup>167</sup> However, qualifying the truth defence is problematic. One problem, as several law reform commissions have pointed out, is that the notion of ‘public interest’ is vague. We have already seen that the current law of scandalising is beset by uncertainty. To replace the old vague law with a new vague law would achieve nothing. An even greater problem with qualifying the truth defence is that it suggests that some true allegations of judicial misconduct should still be punished, and by corollary, deterred from being brought forward. This qualification seems to derive from a concern that an unqualified truth defence would herald a new age of “judicial guerilla warfare.” However, as was discussed at Section 6.6, little weight can be given to this fear. It must be borne in mind that even with an unqualified truth defence, baseless claims would not be protected, and that the onus would be on the defendant to discharge the defence. More importantly, regardless of the motives behind a true allegation of judicial misconduct, it is vital that such misconduct be exposed. Public confidence in the administration of justice is likely to suffer far more as a result of judicial misconduct going unchecked than due to reckless claims being made against the Judiciary.

A third observation on the Bill’s proposal is that it does not include a defence for an honest belief in the truth of an allegation. In contrast, a number of law reform bodies have recommended that a defence of honest belief in the truth of the allegation, provided that there were reasonable grounds for this belief and the defendant was not reckless as to the truth or falsity of the allegation.<sup>168</sup> There are sound reasons for allowing such a defence. In defamation law, a similar defence has served a useful purpose in cases where, due to technical legal and evidential issues, the truth of a claim has been impossible to prove one

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<sup>166</sup> NCRWC Report, para 3.8.2.

<sup>167</sup> Phillimore Report, para 165.

<sup>168</sup> Eg the Law Reform Commission of Australia, the Law Reform Commission of Hong Kong.

way or the other. Allowing such a defence would strike an appropriate balance between encouraging people to come forward with honest allegations of judicial misconduct, whilst ensuring that such people must make adequate investigations before making the allegation. In the case of people merely disseminating another person's allegation, the disseminator should also have a defence of honest belief in the truth of the other person's claim, based on sufficient personal investigation of the other person's claim.

(v) ***Fair Comment***

(Civil) defamation law in India and elsewhere recognizes a defence of fair comment, which protects statements of opinions made in relation to a matter of public interest, based on facts in which the defendant honestly believed. Extensive jurisprudence has been devoted to this area of the law, and word constraints do not permit a thorough discussion of this defence in this report. Ultimately, what matters is that a defence of fair comment is clearly justified in the context of scandalising the court. This report therefore recommends that a defence of fair comment be introduced for scandalising cases, following concepts developed under defamation law.

## 7.8 Summary of recommendations

- The following conduct may constitute scandalising the court:
  - Imputations of:
    - Judicial corruption;
    - Judges having bowed to external pressures;
    - Personal bias; or
    - Judicial misuse of court powers
  - Misrepresentation of a judicial decision, when no reasonable person could make such a representation. The mere fact that a representation omitted some detail from the judgment shall not establish that the misrepresentation scandalised the court.
- An act can only scandalise the court if it is publicized to the public at large.
- An act can only scandalise the court if it seriously undermines public confidence in the administration of justice.
- For a conviction to arise, it must be proven, on the balance of probabilities, that the defendant intended to seriously undermine public confidence in the administration of justice.
- The following shall not constitute scandalising the court:
  - Commenting in any way upon the merits of a judicial decision, or reporting such comments.
  - Reporting an act made under parliamentary privilege.
  - Commenting in any way in a formal complaint of bias against the court, or any other complaint to the proper authorities.
- The following considerations should be irrelevant to the question of scandalising:
  - The mere fact that allegedly contemptuous act was repeated.

- The mere fact that the allegedly contemptuous act alleged that a judicial act was unjust.
- The following shall be defences to a charge of scandalising:
  - That the allegedly scandalising conduct was a statement of truth;
  - The statement was a statement which the defendant honestly believed to be true, provided that there were reasonable grounds for this belief and the defendant was not reckless as to the truth or falsity of the allegation; or
  - The statement was fair comment.

## 8. RECOMMENDATIONS FOR REFORMS OF THE PROCEDURAL LAW OF SCANDALISING THE COURT

### 8.1 The issues to be resolved

Reforms of the procedural laws relating to scandalising the court need to explore the following issues:

- Who may initiate proceedings against the accused?
- Which courts should have jurisdiction to hear scandalising matters?
- In relation to which courts should scandalising matters be capable of arising?
- What procedural safeguards can be put in place to protect the accused?
- Which judges should be able to hear scandalising cases?
- What forms of punishment are justified for scandalising convictions?

### 8.2 Who may initiate proceedings against the accused?

This report recommends that the current provisions in the Contempt Act for initiating proceedings be maintained. The current provisions provide that a court may bring charges for contempt in the face of the court, and that for other cases, the court may take cognizance of the charge either on its own motion, or on the motion of the Attorney-General or any individual with the written consent of the Attorney-General. It was earlier noted in Section 4.3 that the courts have laid charges in circumstances which perhaps were not intended when the Act was originally passed. However, it seems too extreme a measure to deny courts the power to take cognizance of scandalising acts in their own right. Otherwise, the court would be too vulnerable to the whims of the Attorney-General, a member of the Executive.

### 8.3 Which courts should have jurisdiction to hear scandalising matters?

Under the Constitution, only the Supreme Court and High Courts have inherent jurisdiction to hear matters relating to contempt of court. However, by virtue of Acts of Parliament, several other courts and tribunals have been vested with powers to punish for contempt of court.

This report recommends, as was recommended by the NCRWC,<sup>169</sup> that the power to punish for contempt of court be limited to the Supreme Court and High Courts. A scandalising hearing involves a most delicate balancing of the protection of the court with the freedom of expression. It is a job best left to the experience of the higher courts. Thus, the Constitution should be amended to remove the possibility of other courts and tribunals having powers to hear contempt proceedings.

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<sup>169</sup> At 7.4.7 of the NCRWC Report.

#### 8.4 In relation to which courts should the scandalising offence be capable of arising?

Under current law, the Supreme Court and High Courts are able to hear contempt cases in relation to themselves or any subordinate courts or judicial officers. This report tentatively concludes that the current law is justified.

It might be argued that the only attacks on the courts which warrant criminal prosecution are attacks on the higher courts. However, this does not necessarily make sense. If people were to continually attack lower courts, which deal with far more matters on a yearly basis than the higher courts, the rule of law could be potentially threatened. If anything, the lower courts have a more direct link with the general population, and as such, attacks on the lower courts may have a more direct influence on the general population.

#### 8.5 Principles of natural justice to be applied

Under current law, discussed above at Section 4.6, the Contempt Act sets out several procedural safeguards under section 14, 17 & 18 for contempt cases in the face of the court, and outside the court, respectively. Under their inherent jurisdiction, courts have also summarily heard cases.

This report recommends two amendments in this area.

First, the power of courts to summarily try scandalising cases should be abolished. Whatever the justification that there once was for summary hearings – if there ever was such a justification – today there is no need for courts to deal with scandalising cases summarily. There are good reasons for a less expedited approach to be adopted. In the heat of the moment, judges may proceed in a manner which they later regret. Given the potential for imprisonment, the same procedural safeguards should apply to scandalising cases as other criminal cases.

Second, section 14 should be amended to ensure that a person charged with contempt is guaranteed legal representation if they so wish.

#### 8.6 Which judges are entitled to hear the case?

This report subscribes to the basic principle that a judge who has been personally attacked should not pass judgment on the individual attacking him. On this basis, several amendments are necessary to the Contempt Act.

Section 14 of the Contempt Act allows a litigant, in contempt of the court *in facie*, to apply for another judge to hear the case. At the moment, the court may refuse to do so if it considers it impractical or not in the interests of the administration of justice. This is

unsatisfactory. An individual should have the right to have their case heard by another judge, by applying to the Chief Justice for a change of judge. Such an application must be granted. However, this report recommends that maintenance of the current provision that the offended judge need not appear as a witness, and that the word of the judge forms evidence.

Section 18 should be amended so that it provides that no judge who has been personally attacked by the allegedly contemptuous act is able to hear the contempt case.

## 8.7 Punishment

This report considers that the current punishments for contempt set out in the Contempt Act are appropriate.

## 8.8 Summary of recommendations

- The procedures under the Contempt Act for initiating scandalising proceedings should be maintained.
- The Constitution should be amended so that only the Supreme Court and High Court have jurisdiction to hear scandalising cases.
- The ability of the Supreme Court and High Courts to hear scandalising cases relating to themselves or lower courts or judicial officers should be maintained.
- The power of courts to summarily try scandalising cases should be abolished.
- Procedural safeguards should ensure that a person charged with contempt in the face of the court is entitled to legal representation.
- A judge should not be able to hear a case arising out of a personal attack on him. Therefore, section 14 of the Contempt Act should be amended to give a right for a person to apply to the Chief Justice for a change of judge, and this application must be granted. Section 18 of the Contempt Act should provide that a judge who has been personally attacked by the alleged contemnor cannot hear the case against the alleged contemnor.
- The current provisions for punishment for contempt of court should be maintained.

## 9. CONSTITUTIONAL ASPECTS OF THE CHANGES

### 9.1 The issue to be resolved

As has been pointed already, the relationship between the Constitution and the Contempt Act is uncertain. In most cases the Court follows the Contempt Act without question. However, Courts have suggested that the Contempt Act need not be followed. In a passage already quoted, in *Pritam Pal v High Court Of Madhya Pradesh, Jabalpur*, the Supreme Court noted that:<sup>170</sup>

[T]he constitutionally vested right cannot be either abridged by any legislation or abrogated or cut down. Nor can they be controlled or limited by any statute or by any provision of the Code of Criminal Procedure or any Rules

This line of reasoning is suspect. After all, the Constitution not only provides for contempt powers of the Supreme Court and High Courts. It also provides, in Article 19(2), that the Legislature may make laws in relation to contempt of court, so long as the laws are a reasonable restriction on the right to freedom of speech and expression. Clearly, the Constitution envisages the Legislature enacting laws which govern the substantive and procedural aspects of contempt of court.<sup>171</sup> If courts could simply ignore legislation in relation to contempt of court, then the Constitution would be in disharmony. It is therefore more accurate to suggest that Acts of Parliament govern the conduct and substantive content of content matters, provided that the legislation does not severely impinge or abolish the contempt powers of a court

Unless this situation is resolved in the Constitution itself, the present uncertainty may continue. If courts are not bound by the Contempt Act, then it follows that merely amending the Contempt Act may not ensure that courts will put the amendments into effect. On this basis, the NCRWC recommended that any amendments to contempt laws need to be enshrined directly in the Constitution.

### 9.2 The jurisdiction issue

Another, more minor, issue that to be addressed in Constitutional reforms is limiting the jurisdiction of subordinate courts and judicial bodies to initiate contempt proceedings. This reports recommends that the changes to the constitution in relation to this issue, as proposed by the NCRWC, be implemented.

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<sup>170</sup> *Pritam Pal V. High Court Of Madhya Pradesh, Jabalpur Through Registrar*, 1993 SCC-0529 (SC), para 41.

<sup>171</sup> For a recounting of the debate preceding the adoption of Article 19(2) of the Constitution, see Granville Austin, *Working a Democratic Constitution: The Indian Experience* (2001), Oxford University Press, Chapter 2.

### 9.3 The appropriate constitutional amendments

It is clearly not feasible to amend the Constitution to incorporate all of the recommendations of this report. What is needed is a statement making clear that while the fundamental contempt powers of the court cannot be abolished, the substantive and procedural aspects of contempt laws can be governed by an Act of Parliament.

Given this, the report recommends that a qualification be added to Articles 129 and 215 of the Constitution, such that the Articles would read as follows (with changes indicated in bold):

#### ARTICLE 129

*(1) The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.*

***(2) Subject to Article 19(2), the State may enact laws with respect to scandalising the Court, which the Supreme Court is bound to follow, unless such laws effectively abolish the power of the Supreme Court to punish for scandalising the court.***

***(3) The power to punish for contempt of itself is inherent only in the Supreme Court and every High Court, and no other court, tribunal or authority may punish for contempt of itself.***

#### ARTICLE 215

*(1) Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.*

***(2) Subject to Article 19(2), the State may enact laws with respect to scandalising the Court, which every High Court is bound to follow, unless such laws effectively abolish the power of the High Court to punish for scandalising the court.***

Several aspects of these recommended changes should be noted.

First, the changes only relate to scandalising the court, and not other areas of contempt law. Other areas of contempt law involve different considerations, and it is outside the scope of this report to make any recommendations in relation to these areas of contempt law.

Second, the changes explicitly clarify that the Court will be bound to follow legislation with respect to contempt of courts matters, so long as the legislation does not effectively abolish the power of the Supreme Court to punish for scandalising the court. A law may validly restrict or limit the scandalising offence - even substantially limit the offence - so long as it does not effectively abolish the offence.

Third, the use of the term ‘effectively’ ensures that a law cannot formally retain the scandalising offence, but in substance make it impossible to acquire a conviction.

## 10. CONCLUSION

This report has suggested that current substantive and procedural laws relating to the scandalising offence are unsatisfactory. While the Judiciary should not be totally vulnerable to all attacks, neither should the Judiciary be too sheltered from public criticism. An appropriate balance needs to be struck between judicial protection and judicial accountability. The current law, which is vague and subject to abuse, does not achieve this balance. The *Contempt of Court (Amendment) Bill 2005* does not adequately address problems with the current law. A more extensive set of reforms, such those recommended in this report, is required to rectify flaws in the current law.

In 1936, Lord Atkin stated that “justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.”<sup>172</sup> These words ring true today. Respect for the Judiciary is a vital part of an effective rule of law. But respect cannot be enforced; it can only be earned. Until necessary reforms are undertaken, the law of scandalising will not reflect this reality.

## 11. APPENDICES

APPENDIX A: Recommended draft *Contempt of Court (Scandalising) Bill*

APPENDIX B: Recommended changes to the Constitution of India.

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<sup>172</sup> *Ambard v Attorney-General of Trinidad and Tobago* [1936] AC 322, 335.