FREE PRESS AND INDEPENDENT JUDICIARY: THEIR JUXTAPOSITION IN THE LAW OF CONTEMPT OF COURTS*

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FOR RULE of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected.[1]

I

It is indeed a trite statement that free press and independent judiciary are institutions that are *sine qua non* for the maintenance of the rule of law. Nay, these are the very foundation of a democratic society. Both of these, therefore, need to be jealously preserved and protected. The judiciary, undoubtedly, is the arbiter of the rule of law, because it is the courts that are constitutionally entrusted to decide disputes between opposing parties, and thereby maintain the supremacy of law. The press, on the other hand, is a harbinger of public interest, and through its critical eye the affairs of public are carried on objectively as per the proclaimed principles, and not arbitrarily for meeting the vested interests. Although the operational areas of both are quite distinct and apart to a large extent, and yet at times, these run into each other on the issue of contempt giving rise to a situation of conflict and confusion. In the present paper, for avoiding mismatch between the two, an attempt is being made to locate in the arena of law regulating contempt of courts the juxtaposition of free press on the one hand and the independence of judiciary on the other. The requisite stimulus for this exercise has been provided by a recently delivered judgment of the Supreme Court in

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1. *Rajendra Sail* v. *M.P. High Court Bar Association and Others*, AIR 2005 SC 2473 *per* Y.K. Sabharwal J (for himself and on behalf of Tarun Chatterjee J) at 2482.

Rajendra Sail v. *Madhya Pradesh High Court Bar Association and Others*.[2]

In *Rajendra Sail*, the editor, printer and publisher, and a reporter of a newspaper, along with the petitioner who was a labour union activist, were summarily punished and sent to suffer a six-month imprisonment by the high court. Their fault was that on the basis of a report filed by a trainee correspondent, they published disparaging remarks against the judges of a high court made by a union activist at a rally of workers. The remarks were to the effect that the decision given by the high court was 'rubbish' and 'fit to be thrown into a dustbin'. Although the publication of the news item was a factually correct version of the speech delivered by the union activist, nevertheless the editor, printer and publisher, and the reporter were held liable for contempt of the high court. Accordingly, all of them were convicted and sentenced to six months imprisonment. On appeal, the Supreme Court upheld the contempt against them, but drastically modified and reduced the sentence. The apex court accepted the unconditional apology tendered by the editor, printer and publisher, and the reporter, and thereby discharged them of the contempt of court; whereas the sentence of imprisonment awarded to the union activist was reduced only to one week.

The interesting feature of the case is that though the Supreme Court rendered the decision in the light of the already "well settled" principles relating to the law of contempt[3] — the principles that were already in the know of the high court, nevertheless, the eventual decision of the Supreme Court in terms of the punishment given is drastically different from the one given by the high court. Does it mean that the well settled principles governing contempt of courts are not yet so settled? Or, is this an arena of absolute discretion, implying that the variation in eventual decision-making is the inherent weakness of the common law tradition where the living law emanates as a result of court decision? In an analysis of quite a few related judicial decisions it has been found that the various principles expounding the contempt law are found scattered in numerous judicial decisions with varying emphasis. And, a coherent text-book approach, giving a rounded-view of the subject of contempt law with a thematic unity, is conspicuous by its absence. Such a state of affair has recently prompted an editor of a national newspaper to echo the popular perception and say: "While the present system of dealing with complaints of misconduct against judges is shrouded in secrecy, the contempt laws hangs like the sword of Damocles."[4] The concern in

2. *Ibid.*

3. *Id*. at 2477 (para 10).

4. See, the Editorial in *The Tribune*, "The High Court act: Errant judges must be shown the door" August 22, 2005.

this article, therefore, is to make an attempt to analyze and abridge the gap in understanding the true import of the well settled principles of the contempt law. In this respect, the paper would like to answer the critical question whether it is possible to decipher a clear resonance of objectivity so that the free press may not unduly see 'the sword of Damocles' hanging over their head and feel discouraged to venture into the relatively new field of 'investigative journalism'.

II

It is both legal and logical to state that the freedom of press is as wide as the freedom of individual citizens. As a matter of fact, the press is a manifestation of collectivity: it reflects people's hopes and aspirations, and also their agonies and afflictions. However, in a civil society no right to freedom, howsoever invaluable it might be, can be always considered absolute, unlimited, or unqualified in all circumstances. The sweep of all rights or freedoms is, therefore, always controlled and regulated so that the like rights or freedoms of others are not jeopardized. Realizing the truth of this fact of social life - the Constitution of India - envisages the regulation of fundamental right to freedom of speech and expression of all citizens, including the press, under article 19(1)(a) by imposing reasonable restrictions under clause (2) of the same article. *Vis-à-vis* judiciary, the restrictive clause specifically states that such freedom is subject to the law made by the state "in relation to contempt of court."[5]

The contempt law enacted by the Parliament is contained in the Contempt of Courts Act, 1971.[6] A perusal of the provisions of this Act reveals that the contempt is an offence, which may be civil or criminal in nature,[7] and the person committing contempt, called the contemnor, is liable to fine or imprisonment, or both. This paper, however, is concerned with criminal contempt.

By definition, 'criminal contempt' means[8] the publication (whether by words, spoken or written, or by signs, or by visible representation, or

5. A similar provision is found in art. 19 of the International Covenant on Civil and Political Rights, 1966, to which India is a signatory and had ratified the same. It provides that everyone shall have the right to freedom of expression, to receive and impart information and ideas of all kinds. However, clause (3) of the same article makes these rights subject to certain restrictions, which shall only be such as are provided by law and are necessary for the respect of life and reputation of others for the protection of national security or public order or of public health and morality.

6. This Act repeals the Contempt of Courts Act, 1952.

7. See, s. 2(a) of the Act of 1971.

8. See, s. 2(c) of the Act of 1971.

otherwise) of any matter or the doing of any other act whatsoever, which –

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

A mere glance at this statutory exposition instantly shows that the contempt law is a very powerful instrument in the hands of judiciary. Its singular purpose (as distinguished from civil contempt)[9] is to protect and preserve the majesty of law and the dignity and independence of judiciary, which is otherwise so expressly guaranteed by the Constitution itself. The founding fathers of the Constitution engrafted articles 121 and 211 and thereby prohibited the Parliament and the legislatures to discuss on the floor of the house the conduct of any judge of the Supreme Court or the high court in the discharge of his duties. Any discussion on the aberration of conduct of a judge can be held *only* upon a motion for presenting an address to the President praying for removal of the judge under article 124(4) of the Constitution in accordance with the procedure prescribed under the Judges (Inquiry) Act, 1968 and the rules made thereunder.[10] By implication, no one else has the power to accuse a judge of his misbehaviour, partiality, or incapacity.[11] Obviously, the purpose of such a protection is to ensure independence of judiciary so that the judges could decide cases without fear or favour. If any person dares to discuss the conduct of a judge in a manner that brings the administration of justice into disrepute, he would be liable for contempt of court under the law.

Otherwise also, quite independently of the express limitation laid down in article 19(2) on the right to freedom of speech and expression under article 19(1)(a), the Constitution directly under articles 129 and 215 empowers the Supreme Court as well as high courts, as courts of record, to punish people for any contempt of court. The underlying principle here is that contempt is essentially a wrong or an injury, not to

9. The principal distinction between a civil contempt and criminal contempt is that, whereas the function of taking action against a contemnor in a civil contempt is to enforce compliance and not so much as to punish him; the function of proceedings in a criminal contempt is to punish the contemnor unless he sincerely repents and offers apology which is acceptable to the court as a genuine one.

10. See, *Re: S. Mulgaokar,* AIR 1978 SC 727.

11. See, *Re Dr. D.C. Saxena,* and *Dr. D.C. Saxena* v. *Hon'ble the Chief Justice of India,* AIR 1996 SC 2481 at 2501 (para 58). Hereinafter, simply *Dr D.C. Saxena*.

the person who sits as a judge and against whom disparaging remarks are made but, to the court as a public institution, which is created constitutionally for the dispensation of justice. Injury to the court, therefore, is an injury to the public, because such a disparaging statement tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge, or tends to deter actual and prospective litigants from placing reliance upon the administration of justice by the courts, or it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.[12] For the protection of this public interest, the courts are entrusted with extraordinary powers of punishing those who indulge in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalizing it. "*When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual Judge who is personally attacked or scandalized, but to uphold the majesty of the law and of the administration of justice.*"[13]

The ambit of the contempt power is indeed very wide. Its wide amplitude, as deciphered from the various judicial decisions, could be comprehended and crystallized as follows:

The first and foremost is the principle that permits a court to be a judge in its own cause. Seemingly, such a position is in contradiction with the fundamental principle of natural justice that denies the complainant to adjudicate on the merits of his or her own case. Nevertheless, in contempt proceedings, the matter is strictly between the court and the contemnor. No third party can intervene.[14] This position follows directly from the provisions of articles 129 and 215 of the Constitution. Under the provisions of these articles, the courts may, as courts of record, take notice of the contempt *suo motu* or at the behest of the litigant or a lawyer.[15] In *Dr. D.C. Saxena*,[16] for instance, the Supreme Court took *suo motu* cognizance of the contempt committed by Dr. Saxena under article 129 of the Constitution.[17]

This position is further accentuated by a couple of established or even entrenched features of the contempt proceedings that, unwittingly perhaps, widen the contempt power of the court. The first one is that a

12. See, *Brahma Prakash Sharma and Others* v. *The State of U.P.*, AIR 1954 SC 10. In this case it was held that if the publication and the disparaging statement were calculated to interfere with the due course of justice or proper administration of law by the court, then it is a contempt which is considered a wrong done to the public and this is punishable summarily.

13. *Supra* note 1 at 2477 (para 11). Emphasis added.

14. See, 1991 Cri LJ (NOC) 8 (DB) (Cal).

15. See, *P.N. Dube* v. *P. Shanker*, AIR 1988 SC 1208.

16. *Supra* note 11.

17. *Id.* at 2491 (para 28).

positive finding of the actual interference is not an essential pre-requisite; *i.e.*, a person may be held-up for contempt even without a positive proof that there has been an actual interference with the administration of justice by reason of his, say, defamatory statement: "it is enough if it is likely or tends in any way to interfere with the proper administration of law."[18]

The second accentuating feature that widens the contempt power of the court is its de-emphasis on the requirement of the element of *mens rea* in the offence of contempt. This element of guilty mind or criminal intent is undoubtedly an essential element of an indictable offence, because a person can be imprisoned or fined for contempt. It needs to be proved or established affirmatively as such beyond a reasonable doubt by the prosecution for convicting an offender.[19] However, by expounding the legislative intent in *Dr. D.C. Saxena*, the Supreme Court has held that the provisions of section 2(c) of the Contempt of Courts Act "excludes the proof of mens rea."[20] In other words, in contempt proceedings, "the proof of mens rea is *absolutely unnecessary*."[21] What is relevant is the effect or the tendency of the offending act, conduct, written or spoken, or by signs or by visible representation or otherwise."[22] By the exclusion of mental element, the implication is that all pleas, such as the contemnor had no personal gains to seek in the *lis*; that he had been fired by public duty, or that he had professed the highest respect for the court, have no meaning in the action for contempt. All such pleas, said the Supreme Court, "are neither relevant nor a defence for the offence of contempt."[23] "What is material is the effect of the offending act and not the act per se."[24] Thus, in contempt

18. *Id.* at 2477 (para 14), citing *Brahma Prakash Sharma*, *supra* note 12, and *Re. Ajay Kumar Pandey*, AIR 1997 SC 260.

19. See, *Chhotu Ram* v. *Urvashi Gulati and Another*, AIR 2001 SC 3468; *Anil Ratan Sarkar* v. *Hirak Ghosh*, AIR 2002 SC 1405; *Radha Mohan Lal* v. *Rajasthan High Court (Jaipur Bench*), 2003 SC 1467, and *Bijay Kumar Mahanty* v. *Jadu Alias Chandra Sahoo*, AIR 2003 SC 657.

20. *Dr. D.C. Saxena*, *supra* note 11at 2496 (para 41). Under section 2(c) of the Act, which defines 'criminal contempt', "any enumerated or any other act apart, to create disaffection, disbelief in the efficacy of judicial dispensation or tendency to obstruct administration of justice or tendency to lower the authority or majesty of law by any act of the parties, constitutes criminal contempt. Thereby, it excludes the proof of mens rea. What is relevant is that the offending or affront act produces interference with or tendency to interfere with the course of justice."

21. *Id*. at 2502 (para 61). Emphasis added.

22. *Ibid*.

23. *Ibid.*

24. *Ibid*. See also, *E.M.S. Namboodripad* v. *T. Narayanan Nambiar*, AIR 1970 SC 2015, in which a three-judge bench of the Supreme Court held that the contempt law punishes not only acts which had in fact interfered with the courts and

proceedings, it is not essentially required to establish "*actual intention* on the part of the contemnor to interfere with the administration of justice."[25]

The third accentuating feature that has enormous potential to widen the court's contempt power to punish is the judicial holding that the statutory definition of contempt is not exhaustive. This means that the courts are relatively free to decide in their discretion whether or not a given act constitutes contempt.[26] In this respect, they have gone to the extent of observing that though the expression 'contempt of court' is not vague or indefinite, and yet there is nothing unconstitutional in judicial determination by the courts as to the meaning of that expression.[27] Besides, the statutory definition of 'criminal contempt' under section 2(c) of the Act of 1971 is of "wider articulation."[28] It empowers the court to bring within the ambit of offence of contempt "any publication" (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of "any matter" or "the doing of any other act whatsoever," which scandalizes or tends to scandalize, or lowers or tends to lower the authority of any court.[29] This makes the amplitude of the court's contempt power very wide both in matter and mode or substance and form.

The fourth feature that makes the court's power of contempt instantly efficacious is the quick mode of punishment through summary proceedings. Two cogent reasons are adduced for the summary-mode of punishment. One is that contempt being an offence to the court (and not just to the person sitting as judge against whom disparaging statement is directed), and if the insult or injury is not punished instantly it will create suspicion in public mind about the dignity, solemnity and efficacy of the justice delivery system. Instant punishment, therefore, is highly desiderated for inspiring confidence in public as to the institution of justice. Without such a protection the courts would go down in public esteem and thereby respect for the rule of law and maintenance of law and order will become the first casualty. Summary punishment deters not only the contemnor before the court not to repeat such contempt,

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administration of justice, but also those which have a tendency; that is to say, are likely to produce a particular result of lowering the prestige of the judges and the courts in the eyes of the people. The same view was reiterated by the Supreme Court in *Sambu Nath Jha* v. *Kedar Prasad Singh*, AIR 1972 SC 1515 at 1518.

25. *Dr.D.C. Saxena, supra* note 11 at 2496 (para 41).

26. *Ahmed Ali* v. *The Superintendent, District Jail, Tezpur and others*, 1987 Cri LJ 1845 *per* K.N. Saikia, Actg. CJ and TC Das J.

27. See, *Brig. E.T.(Retd.)* v. *Edatata Narayanan and Others*, 1969 Cri LJ 884 *per* I.D. Dua CJ, S.K. Kapur and Jagjit Singh, JJ.

28. See *Dr. D.C. Saxena, supra* note 11.

29. *Ibid*.

but also all other potential offenders.[30] The second relevant reason is that "the court does not sit to try the conduct of the judge to whom the imputations are made."[31] Accordingly, the contemnor is not permitted to adduce evidence to show how fairly imputation was justified against the judge who is not there before the court: contempt issue being strictly between the contemnor and the court, and not between the contemnor and the judge before the court.[32] A statement of principle emanating from judicial decisions on this count is that truth cannot be pleaded, examined or established as a defence to the charge of contempt of court.[33] Nor the power to punish for contempt of court can be invalidated on the ground that law which does not allow plea of truth as a defence is in contradiction of article 19(1)(a) of the Constitution.[34]

The conferment of wide power to punish for contempt on courts is to protect judges from being imputed with "improper motives, bias, corruption or partiality," so that people do not lose faith in them.[35] "The Judge requires a degree of detachment and objectivity, which cannot be obtained if judges constantly are required to look over their shoulders for fear of harassment and abuse and irresponsible demands for prosecution or resignation."[36] "The whole administration of justice would suffer due to its rippling effect."[37] This is the reason that has prompted our Parliament to confer wide powers on judges to punish the contempt of court summarily and with fine or imprisonment, or both.

III

On a plain reading of the constitutional design, it is obvious that the contempt law constitutes a clear exception to the right to freedom of speech and expression, including that of the press. And, the ambit of this exception, as seen in the preceding section, is very wide. But does this mean that the courts are completely immune from criticism?

The Parliament, while enacting the Contempt of Courts Act of 1971, has clearly carved out certain exceptions to the exercise of the power of contempt. Section 3 of the Act takes a person out of the purview of contempt law if he has published any matter which interferes or tends to interfere the course of justice in connection with any civil or criminal

30. See, *Re. Roshan Lal Ahuja*, 1993 Supp. (4) SCC 446 (A three-judge bench decision.).
31. See, *Dr.D.C. Saxena*, *supra* note 11 at 2496 (para 42).
32. *Ibid*.
33. See, *V.M. Kande* v. *Madhav Gadkari and Others*, 1990 Cri LJ 190 (DB).
34. *Ibid*.
35. *Dr. D.C. Saxena*, *supra* note 11at 2495 (para 39).
36. *Ibid.*
37. *Ibid.*

proceedings provided at the time of publication he had no reasonable grounds for believing that proceedings are pending. In other words, want of knowledge of criminal proceeding whether pending or imminent would be complete defence to a person accused of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connection with such proceedings. Under section 4, fair and accurate reporting of judicial proceedings is not contempt. Similarly, by virtue of section 5, even fair criticism of judicial act is not to be considered contempt.

Carving out exceptions to contempt law shows the clear legislative intent: the prime purpose of enactment is to limit the scope and sweep of the contempt law rather than enlarging it. In fact, the principal objective of the Parliament in enacting the Act of 1971 is to "define and limit the power of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto."[38] The apex court has captured this objective spirit of the enactment, when Sabharwal J (as he then was) issued a call to the judges:[39]

> A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. The court has to act [therefore] with a great circumspection. It is only when a clear case of contemptuous conduct not explainable otherwise arises that the contemnor must be punished.

The analysis of the decisions of the apex court reveals that the rigor of contempt law has been remarkably reduced by developing certain juristic principles and practices. In this respect, there are at least *three sets of principles and practices* that are in consonance with the legislative intent.

The first set of juristic principles and practices revolves around the holding of the apex court to the effect that the jurisdiction of the court for initiating contempt proceedings in terms of the provisions of the Contempt of Courts Act is *quasi-criminal*.[40] As such the standard of proof required is that of a criminal proceedings and the breach shall have to be established 'beyond reasonable doubt'. In this respect, the Supreme Court in *Mrityunjoy Das*[41] cited the observation of Lord Denning in *Re Bramblevale Ltd*.[42] while expounding the expression 'beyond reasonable doubt':

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38. The Act of 1971 replaces and repeals the Contempt of Courts Act, 1952.

39. *Rajendra Sail*, *supra* note 1at 2480 (para 25).

40. See, *Mrityunjoy Das and Another* v. *Sayed Hasibur Rahman and Others*, AIR 2001 SC 1293.

41. *Ibid.*

42. (1969) 3 All ER 1062 (CA).

> It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence… Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.

To the same effect are the holdings of the Supreme Court in *S. Abdul Karim*[43] (a three-judge bench decision) and *M.R. Prashar*.[44] Thus, the standard of proof required for establishing a charge of criminal contempt is the same as in any other criminal proceedings.

As a follow up of this holding, namely, that the proceedings under the Act of 1971 are quasi-criminal, one is able to decipher at least three analogous judicial strategies on ground of standard of proof, or simply the nature and quality of 'proof', that tend to limit the arena of contempt law. These strategies have been invoked by the Supreme Court in *Rajendra Sail* in deciding whether the press (the editor, printer and publisher, and the reporter) was liable for contempt by publishing certain disparaging remarks against the judge of a high court.

The first judicial strategy is to distinguish 'contempt' from 'libel'. 'Contempt' is a *public wrong*, having "an adverse effect on the due administration of justice" by "undermining the confidence of the public in judiciary;"[45] whereas, 'libel', which is an illegal act of writing things about someone that are not true, is a *personal injury*. The test, if an act of criticism is simply 'libel' or constitutes 'contempt' is, "whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court."[46] "It is only the latter case that will be punishable as contempt."[47] In other words, that is "alternatively," "the test will be whether the wrong is done to the Judge personally or it is done to the public."[48] In case of 'libel', one has to bring a suit and prove the charge, whereas in the case of contempt, it is the public institution, namely the court, that initiates proceedings and the contemnor is punished summarily even without proof of the actual injury, if the

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43. *S. Abdul Karim* v. *M.K. Prakash and Others*, AIR 1976 SC 859.

44. *M.R. Prasharand Others* v. *Dr. Farooq Abdullah and Others*, AIR 1984 SC 615.

45. *Rajendra Sail*, *supra* note 1 at 2748 (para 16) citing *Shri CK. Daphtary and Others* v. *Shri O.P. Gupta and Others*, AIR 1971 SC 1132.

46. *Id*. at 2478 (para 9) citing *Perspective Publications Pvt. Ltd. and Another* v. *The State of Maharashtra*, AIR 1971 SC 2211.

47. *Ibid.*

48. *Ibid.*

disparaging remarks are likely to interfere with the due administration of law. Since in *Rajendra Sail*, the published remark on the very face of it undermines the majesty of courts by lowering their prestige in public esteem, it was construed as contempt by the high court, and the apex court agreed with that holding.

The second judicial strategy for restricting court from holding people for its contempt is by differentiating the judge from his judgment. The judgments, and not the judges, are subject to public criticism. This is mainly for two reasons. One, that a judgment, once delivered, becomes a public document. It is always open to public scrutiny and criticism. Sabharwal J (as he then was) unequivocally states:[49]

> Undoubtedly, the judgments are open to criticism. No criticism of a judgment, however rigorous, can amount to contempt of court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts.

Another reason is that a judgment – a decision given by the judge in the course of administering justice – is always directed to do justice and, therefore, it is supposed to inhere justice. But, to quote the classical statement of Lord Atkin,[50] which has been cited by the Supreme Court with utmost approval,[51] "justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The underlying purport or the sense and signification of this classical statement, in the author's view, lies in the observation of K. Ramaswamy J in *Re. Dr. D.C. Saxena*:[52]

> [F]air criticism of judicial proceedings outside the pleadings of the Court is a democratic feature so as to enable the Court to look inward into the correctness of the proceedings and the legality of the orders of the Court by the Court itself for introspection.

This, indeed, is a very profound statement. It widens the ambit of the freedom of speech and expression as a basic democratic right on the one hand, and impels the courts, rather than compelling them, to bear the criticism with utmost rectitude, reflection and introspection.

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49. *Rajendra Sail*, *supra* note 1 at 2484 (para 43).
50. *Ambard* v. *Attorney-General for Trindad & Tobago*, 1936 AC 322, at 335.
51. See, for instance, in *Perspective Publications Pvt. Ltd.*, *supra* note 46.
52. *Re. Dr. D,C, Saxena*, *supra* note 11at 2500 (para 53).

The functional objective of differentiating 'judgments' from the judges who delivered them is that the former are, as has been shown above, open to criticism, but not the latter.[53] For this exposition, the reason is not too far to seek. Criticism of the judge, apart from his judgment; *i.e.*, independently of the reasons reflected in his judgment, say, by imputing motives to him, is to go beyond his judgment, and this amounts to clear contempt of court,[54] because it patently interferes with the due course of justice by lowering the authority of the court,[55] and affects the independence of judiciary, which is otherwise constitutionally guaranteed.

The third judicial strategy to reduce the rigor of the contempt proceedings is by holding that the criticism made in 'good faith' and 'public good', that is without malice or ill-will does not amount to contempt of court. For this proposition, Sabharwal J (as he then was) cites the authority of a three-judge bench of the Supreme Court in *Re. Roshan Lal Ahuja*[56], which holds that fair comments, even if outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court.[57] The ambit of the contempt law is further limited by the observation of the apex court *In re. Arundhati Roy*[58] to the effect that the criticism of the conduct of a judge, the institution of judiciary, and its functioning may not amount to contempt if it is made in 'good faith' and in 'public interest'. However, for deciphering the presence of these two doctrines, the apex court has suggested that the courts dealing with the issue of contempt should consider "all the surrounding circumstances," including (a) the person responsible for comments; (b) his knowledge in the field regarding which the comments are made; and (c) the intended purpose sought to be achieved. This implies that all the persons "cannot be permitted to comment upon the conduct of the courts in the name of fair criticism…" holds the Supreme Court assertively.[59] The reason for this assertion is: "If criticism is permitted to everybody in the name of fair criticism, it would destroy the institution [of courts] itself."[60] This reality is instanced by the Supreme Court: Litigants losing in the court would be the first to impute motives to the judges and the institution in the name of fair

53. *Id.* at 2506 (para 75).

54. See, *P.N. Dadu* v. *P. Shiv Shankar and Others*, AIR 1988 SC 1208.

55. *Re. Dr. D,C, Saxena, supra* note 11at 2506 (para 75) citing *R.* v. *Grey*, (1900) 2 QB 36.

56. *Supra* note 30.

57. *Rajendra Sail, supra* note 1 at 2479 (para 20).

58. AIR 2002 SC 1375.

59. *Ibid.*

60. *Ibid.*

criticism, which cannot be allowed for preserving the public faith in an important pillar of democratic set up, that is judiciary.[61]

The second set of juristic principles and practices that has the effect of cutting down the contempt proceedings relates, not to the construction of 'contempt' but, to the consequences of contempt in terms of punishment. On this count, section 12 of the Act of 1971 specifically provides that "a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both." To this provision is engrafted a proviso, which entitles the contempt court either to discharge the accused by cancelling the court's order for initiating/ initiated contempt proceedings, or "the punishment awarded may be remitted on apology being made to the satisfaction of the Court." On the basis of simple construction of this proviso, it is evident that the court's decision in holding a person guilty of contempt may be reviewed in the light of the justification offered by the accused. If the court is satisfied, it may instantly cancel its order, discharging the accused. Herein, one sees the incorporation of the test of 'objectivity' into the realm of 'subjectivity', which provides a sort of legislative safeguard. Besides, there is merger of this incorporated element of 'objectivity' into the second limb of the proviso through the engrafting of an explanation.

The second limb of the proviso provides that "the punishment awarded may be remitted on apology being made to the satisfaction of the court." This is immediately followed by an explanation: "An apology shall not be rejected on the ground that it is qualified or conditional if the accused makes it bona fide." On a conjoint consideration, the underlying spirit of the provision is that the courts should not be hesitant or rather they should be magnanimous in accepting apology, which is true and sincere. By stressing the element of 'sincerity', the legislature has attempted to convert court's 'subjectivity' into 'objectivity' to a certain realistic extent.

In relation to legislative exceptions, two more sub-sections of section 12 need attention:

> *Sub-section (2):* Notwithstanding anything contained in any law for the time being in force, no Court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a Court subordinate to it.
>
> *Sub-section (3*): Notwithstanding anything contained in this section, where a person is found guilty of a *civil contempt*, the Court, if it considers that a fine will not meet the ends of justice

61. *Ibid.*

> and that a sentence of imprisonment is necessary, shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit. (Emphasis added)

A couple of brief comments on these provisions are in order here. One, in view of sub-section (2), it is suffice to state that power to punish for contempt is not unlimited. Two, sub-section (3) stipulates that under normal circumstances, a sentence of fine alone should be imposed, and the power to pass a sentence of imprisonment should be invoked only if the ends of justice so require. In terms of the language of the provision, this rule applies specifically to *civil contempt*. However, the apex court has intended to extend the normal rule even to cases of criminal contempt. For instance, *In Re. Dr. D.C. Saxena*, the conduct of the contemnor was held "an outrageous criminal contempt."[62] The court felt that keeping in view "the gravity of contumacious statements, the recklessness with which they are made, the intemperateness of their language, the mode of their publication in a writ petition in this court and the alleged contemnor's influential position in society," "punishment only in the nature of fine would not be adequate." "A contemnor, such as the present must undergo imprisonment."[63] Accordingly, the court convicted the contemnor and sentenced him to undergo simple imprisonment for a period of three months with a fine of Rs. 2000 payable in a period of three months, and in case of default, to undergo further imprisonment for a period of one month.[64]

Moreover, on the count of punishment the apex court has consistently shown its disposition not only to reduce the awarded punishment, but also grant of pardon by locating some "explainable" basis justifying leniency. For instance, in *Re Harijai Singh and Another*,[65] the editor,

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62. *In Re. Dr. D.C. Saxena*, *supra* note 11 at 2499 (para 50). For instance, dismissal of his first writ petition, in which his grouse against P.V. Narsimha Rao was not redressed by the Supreme Court in the exercise of power under article 32 of the Constitution, was described by him as "totally unjust, unfair, arbitrary and unlawful, flagrant violation of the mandate of article 14," "violation of the sacred oath of office," and a fit case to "declare Justice A.M. Ahmadi [presiding officer of the Court that heard his writ petition] unfit to hold the office as Chief Justice of India." When these imputations were pointed out to the petitioner Dr. D. C. Saxena by the three-judge bench while dismissing his second writ petition, to be scandalous and reckless, he had stated that he "stood by" those allegations.

63. *Id.* at 2508 (para 85).

64. *Id*. at 2502-2503 (para 62). In view of the conviction and sentence, the court marshall of the court was directed to take the contemnor into custody and confine him to Tihar Jail for his undergoing the sentence imposed in the case, *id*. at 2508 (para 87).

65. AIR 1997 SC 73 *per* Faizan Uddin J (for himself and Kuldip Singh J).

printer and publisher, and reporter of *The Tribune* were held guilty of publishing a false report against senior judges of the Supreme Court; including the Chief Justice of India.[66] In the opinion of the court, such a publication could not be regarded as a public service; it was rather a disservice to the public by misguiding them with false news. However, the Supreme Court accepted their unconditional apology on the basis of differential circumstances. It is indeed interesting to note the 'explainable' basis discovered by the apex court by differentiating the statement and circumstances of each of the contemnors for granting pardon.

The editor, printer and the publisher of *The Tribune* explained at length and pleaded that the news item was published by them on the basis of information supplied to them by a very senior journalist of long standing. Such an explanation, in court's view, was "far from satisfactory" and that could not be accepted as "a valid excuse." Absence of intention to cause embarrassment to the court or absence of knowledge about the correctness of the contents of the matter published "will be of no avail for the Editors and Publishers for contempt of court, but for determining the quantum of punishment which may be awarded."[67] Acting on this principle, the Supreme Court concluded that the editor and publisher "cannot escape the responsibility for being careless in publishing it without caring to verify the correctness."[68] However, due to their "expressed repentance" on the incident and "sincere written unconditional apology," the court accepted their apology albeit "with the warning that they should be very careful in future," and that they would publish on the front page of their news paper "within a box"

66. *The Sunday Tribune* (March 10, 1996) published a news item in a box with a caption, "Pumps for all" – conveying that then Petroleum Minister, Government of India, allotted out of the discretionary quota petrol pumps to the persons related to high-ups, including two sons of a senior judge of the Supreme Court and two sons of the Chief Justice of India. A similar news item was also published in *Punjab Kesari* – a Hindi news paper. By its order of March 13, 1996, the Supreme Court issued notice to the Secretary, Ministry of Petroleum and Natural Gas, Government of India, to file an affidavit offering his comments and responses to the facts stated in the said news papers. In the affidavit so filed, it was categorically stated that there was no allotment in favour of son/sons of any Supreme Court judge. After verification of records, the court found that the news item was patently false. This led the Supreme Court to the initiation of contempt proceedings against the editors, publisher and printers, and reporters, for they did not take the necessary care in evaluating the correctness and credibility of the information published by them in respect of the allegation of a "very serious nature, having great repercussion causing an embarrassment to this Court." Obviously, the publication of such a patently false news "cannot be regarded as something done in good faith" or in "public interest," *id*. at 78, 79 (para 11).

67. *Id*. at 79 (para 12).

68. *Ibid.*

their apology, specifically mentioning that the said news item published on such and such date was "absolutely incorrect and false" within a stipulated period of two weeks.[69]

In the case of the "very senior journalist of long standing" who filed the information with the editor, the court found that "he acted in gross carelessness."[70] "Being a very experienced journalist of long standing, it was his duty, while publishing the news item relating to the members of the Apex Court, to have taken extra care to verify the correctness and if he had done so, we are sure there would not have been any difficulty in coming to know that the information supplied to him had absolutely no legs to stand and was patently false and the publication would have been avoided."[71] Having said all this, the court accepted his apology as well, because, in their view, "he has realized his mistake and expressed sincere repentance and has tendered unconditional apology for the same."[72] The court construed "sincere repentance", not only from the words of mouth and the written version, but the same was apparent from his personal presence in the court, and that he "virtually looked to be gloomy and felt repentant of what he had done."[73] "We think this sufferance itself is sufficient punishment for him." "He being a senior journalist and an aged person and, therefore, taking lenient view of the matter, we accept his apology also."[74]

In *Rajendra Sail*, the High Court of Madhya Pradesh refused to accept the apology tendered by the contemnors, and held all of them guilty of contempt of court, and sentenced each one of them to undergo simple imprisonment for six months.[75] However, the Supreme Court, in appeal, accepted the unqualified apology of the editor, printer and publisher of the newspaper, and freed them from the punishment of imprisonment. However, in the case of the appellant Rajendra Sail, the appellate court reduced the sentence to one week by bearing in mind "his background and the organization to which he belongs, which, it is claimed, brought before various courts, including this Court many public interest litigations for general public good."[76] In his case, the Supreme Court felt that "ends of justice would be met if sentence of six months is reduced to sentence of one week simple imprisonment."[77]

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69. *Ibid*.
70. *Ibid.*
71. *Ibid.*
72. *Ibid.*
73. *Ibid.*
74. *Ibid*.
75. *Rajendra Sail*, *supra* note 1 at 2476 (para 9).
76. *Id.* at 2485 (para 49).
77. *Ibid*.

The third set of juristic principles that emerges from the various pronouncements of the apex court relates to a fundamental or an intrinsic question: how should the court respond to the issue of contempt of courts? Undoubtedly, the prime purpose for the creation of contempt law is to preserve the sanctity of the institution of courts for maintaining the rule of law. But the real protective strength of the judiciary comes from within, and not from without, say, from the coercive instrument of the law of contempt. In this respect, the seminal statement made by K. Ramaswamy J in *Re Dr. D.C. Saxena*[78] needs reiteration:

> The best way to sustain the dignity and respect for the office of judge is to deserve respect from the public at large by fearlessness and objectivity of the approach to the issues arising for decision, quality of judgment, restraint, dignity and decorum a judge observes in judicial conduct off and on the bench and rectitude.

To the same effect is the emphasis of the seven judges bench decision of the Supreme Court in special reference no. 1 of 1964,[79] wherein it was observed that the power to punish for contempt alleged must always be exercised cautiously, wisely and with circumspection. In their deep reflection, the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, fearlessness and objectivity of their approach and by the restraint, dignity and decorum which they deserve in the judicial conduct.

Likewise, the judges should show "magnanimity in accepting the apology on being satisfied that the error made in the publication was without any malice or without any intention of disrespect towards the courts or towards any member of the judiciary."[80]

The conclusion that emerges is that the judges should never be 'over-sensitive to public criticism', and that punishment under the contempt law should be invoked only when there is "danger of grave mischief" being done in the matter of administration of justice.[81]

IV

Apart from narrowing the ambit of contempt law through judicial construction, the apex court has also broadened the sweep of the right to freedom of press by following the glorious tradition of common law. Following this tradition, it is axiomatic to say that the statutes like the

78. *Re Dr. D.C. Saxena*, *supra* note 11 at 2493 (para 33).

79. This case is popularly known as *UP Legislature's Warrant of Arrest of the Judges of the Allahabad High Court and Keshav Singh Reference.*

80. *Re Harijai Singh and Another*, *supra* note 65 at 79 (para 12).

81. *Rajendra Sail*, *supra* note 1 at 2477 (para 13) citing *Aswani Kumar Ghose and Another* v. *Arbinda Bose and Another*, AIR 1953 SC 75.

Contempt of Courts Act are not codifying and consolidating statues, and create no new powers but merely recognize the powers which already exist and seek to define and limit them.[82] In other words, such initiatives as taken by the courts while administering justice are to be considered quite independently of, though not in derogation to, the statutory law. In this regard, one may particularly refer to a few seminal statements that are considered critical to the freedom of press and have assumed a classic character in dispensation of justice.

The first and foremost is that 'justice is not a cloistered virtue'. This seminal statement was made by Lord Atkin in the case of *Andre Paul Terence Ambard*,[83] which has been often cited by the Supreme Court with fullest approval in amplifying the scope and sweep of the right to freedom of speech and expression.[84] According to Lord Atkin, "Justice is not a cloistered virtue: it must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The singular reason adduced by him for this freedom is that "the public act done in the seat of justice should always remain open to public scrutiny." "The path of criticism is a public way: the wrongheaded 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 expressing a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune."

Following the lead of Lord Atkin, Sabharwal J (as he then was) holds in *Rajendra Sail*: "The judgments of the courts are public documents and can be commented upon, analyzed, and criticized, but it has to be done within certain limits; that is, it has to be done in a dignified manner without attributing motives."[85] Similarly, the apex court has held in *R.C. Cooper*[86]: "In a democracy Judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat that criticism as a contempt of court." K. Ramaswamy J cited this observation with utmost approval in *Re Dr. D.C. Saxena*,[87] and then illustrated its application by the Supreme Court in the case of

82. See, *Mohammad Yusuf* v. *Imtiaz Ahmad*, AIR 1939 Oudh 131, at 136, 137.

83. *Andre Paul Terence Ambard* v. *Attorney-General*, AIR 1936 PC 141.

84. See, for instance, *Rajendra Sail*, *supra* note 1 at 2477 (para 12), *Aswani Kumar Ghose and Another*, *supra* note 81; and *Re Dr. D.C. Saxena*, *supra* note 11.

85. *Rajendra Sail*, *supra* note 1at 2482 (para 33).

86. *R.C. Cooper* v.*Union of India*, AIR 1970 SC 1318 (para 6) cited by Sabharwal J (as he then was) in *Rajendra Sail*, *supra* note 1 at 2478 (para 17).

87. *Re Dr. D.C. Saxena*, *supra* note 11at 2493-94 (para 34).

P.N. Dube,[88] in which the speech of the law minister in a seminar organized by the bar council was challenged as committing the contempt of Supreme Court, but the offending portion therein were held not contemptuous and, therefore, not punishable under the Contempt of Courts Act. Most recently, an advocate filed a petition in the apex court registry, seeking notice to law minister as to why contempt proceedings should not be initiated against him, because in his speech at a seminar on "Social Responsibility of legal fraternity", he is reported to have said that "the very Supreme Court has destroyed" the jurisprudence, while earlier judges of the apex court, like Justice Krishna Iyer and Justice P.N. Bhagwati, were the champions of the civil liberties. The petitioner alleged that by making such remarks, the law minister "ex-facie" had committed contempt of the Supreme Court, and would affect the dignity of the court in the minds of the public. When a motion was made before a bench of Y.K. Sabharwal CJI, C.K. Thakker and P.K. Balasubrananyan JJ for early hearing of the matter, the Supreme Court declined to issue any order.[89]

The underlying principle of granting immunity to the press for fair criticism of any public institution, including courts, is that they (the courts) are not the repository of "all truth", nor the judges think themselves to be so.[90] They do not think or hold that "whenever others differ from them, it is so far error."[91] Agreeing with the observations made by the apex court in *R.C. Cooper*, Sabharwal J (as he then was) reiterates in *Rajendra Sail* that "while fair and temperate criticism of this Court or any other court, even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or courts into hatred and contempt, or obstructing directly or indirectly with the functioning of courts is serious contempt of which notice must and will be taken."[92]

The other seminal statements in the form of judicial precepts enunciated by the apex court in the common law tradition that emphasize the value of freedom of press *vis-à-vis* the law of contempt of courts are:[93]

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88. *P.N. Dube*, *supra* note 15.

89. See, *The Tribune*, November 17, 2005, under the caption, "SC declines to issue order on plea against Bhardwaj."

90. *R.C. Cooper*, *supra* note 86.

91. *Ibid*.

92. *Rajendra Sail*, *supra* note 1at 2478 (para 17), citing *R.C. Cooper*, *supra* note 86.

93. See *Re Harijai Singh and Another*, *supra* note 65 at 77 (paras 8 and 9); *Indian Express Newspaper* v. *Union of India*, AIR 1986 SC 515 and *Express Newspaper Pvt. Ltd.* v. *Union of India*, AIR 1986 SC 872.

(a) The freedom of press is an essential pre-requisite 'of a democratic form of government; it is "indispensable to the functioning of a true democracy."

(b) Free press is a necessity for "the full development of the personality of the individual" and "for the mental health and the well-being of the society."

(c) Being an integral part of the freedom of speech and expression as envisaged under article 19(1)(a) of the Constitution, the freedom of press is also a fundamental right.

(d) Without freedom of press "truth cannot be attained."

(e) "The freedom of Press is regarded as 'the mother of all other liberties' in a democratic society.

(f) The right to freedom of press is "a pillar of individual liberty which has been unfailingly guarded by the Courts."

All these judicial precepts are not hypothetical, but primarily pragmatic: these are born out of the societal needs – the entrenched needs of the society. The elucidation of the Supreme Court on this score[94] is that the functioning of a true democracy is based on the active and intelligent participation of the people in all spheres and affairs of their community as well as the state. For active and intelligent participation, the people have the right to be informed about the important issues of the day, so that they are able to form an informed opinion about them. To achieve this objective, the people need a clear, objective and truthful account of events, and this is the role, which is played by the free press. In fact, through its comprehensive critical coverage of issues of public concern, free press educates the people, moulds public opinion, and prepares masses for meaningful social change. It even stirs the Supreme Court into action![95] As if to prop up the propositions relating to the critical role of the press, the apex court even cited Mahatma Gandhi, who, in his autobiography mentioned three objective roles of the newspaper:[96] to understand the proper feeling of the people and give expression to it; to arouse among the people certain desirable

94. See, *Harijai Singh, id.* at 78 (para 9).

95. On November 18, 2005, a bench of the Supreme Court, comprising Y.K. Sabharwal CJ and C.K. Thakker J pulled up the central government – the Government of India - for its failure to appoint judges to the Madras High Court despite the 17 names being cleared by the collegium, consisting of five senior most judges of the apex court. The immediate cause for provocation was the report in the newspaper that the Madras High Court was functioning with less than half the sanctioned strength of 49 judges. See, *The Tribune*, November 19, 2005, under the heading, "SC pulls up Centre: Appointment of judges."

96. *Re Harijai Singh and Another*, *supra* note 65 at 78 (para 9).

sentiments; and to fearlessly express popular defects. The inevitable conclusion drawn by the apex court is: "It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication."[97]

V

In conclusion, it may be submitted that the law relating to contempt of courts has been designed to protect the functional independence of the courts, so that they are able to maintain the rule of law, which is the very basis of the democratic system of government.[98] However, this does not make the judges and their courts absolute, arbitrary, or completely immune from criticism. Their doings and their decisions are admittedly open to public scrutiny through the powerful medium of press.[99] Though, both the press and the judiciary are independent and have their respective functional autonomy, and yet both are required to fulfil the same constitutional objective; namely, to secure to all its citizens "Justice" in its full comprehensive sense, including social, economic, and political.

Seemingly, criticism of the conduct of judges counteracts the contribution of the courts. Nevertheless, such a conflict is sought to be resolved by emphasizing that so long as the criticism is constructive; *i.e.*, directed to protect and promote the public interest, the same criticism, however vigorous it may be, should not be construed as contempt of courts, or destructive of the institution of judiciary. But, then, here is a question that still remains to be answered: How to determine and decide, 'what is 'just' or 'public good'?'

Obviously, the answer to this question cannot be given in absolute terms, because, the notion of 'just' or 'public good' is not static, it is relative – relative to *desh* and *kal* – relative to 'space' and 'time'. One must, therefore, keep on exploring 'justice' and its nuances by using the functional strategy of 'thesis, anti-thesis, and synthesis.'

In the academic world, where it is both the right and the responsibility of academic lawyers to keep on reviewing the judicial decisions critically, where one is taught and trained to create a potential judge *within* ourselves – the judge whose judgment is the subject of criticism, the judge who is unable to defend his judgment publicly. This instantly

97. *Ibid.*

98. *Rajendra Sail*, *supra* note 1 at 2482 (para 37): "A free press is one of the very important pillars on which the foundation of the Rule of Law and democracy rests."

99. "The power and reach of the media, both print as well as electronic is tremendous," *ibid.*

creates a constructive constraint in the thought process, enabling the critic to have a multi-dimensional view of the issue in hand. Such a strategy reduces the possibility of ignoring the viewpoint of the judge on the one hand, and increases the chances to have a more dispassionate and balanced view of the problem in your critical appraisal on the other. Rest is only a matter of *form*, observing the norms of a civil society.[100] In the free market place of ideas, for avoiding the sad spectacle of conflict, confusion and controversy, giving rise to the issue of contempt of courts, one needs to follow the traditional *mantra* – the *mantra* of *satyam, shivam, sundaram*. That is, so long as the criticism remains truly objective, directed to secure 'public good', and marked by the rules of decency, one need not tread with the fear of contempt.

100. Such rules, *inter alia*, require that the media should "refrain from casting scurrilous aspersions on, or imputing improper motives or personal bias to, the Judge," nor should they make "personal allegations of lack of ability or integrity against a Judge," *id*. at 2483 (para 38).