

## CONTEMPT OF COURT: FINDING THE LIMIT

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*The propensity of the judiciary in recent times to frequently exercise its contempt jurisdiction has led to a burning debate on the justifiability of such powers of the court. In this context, we have made a humble attempt to examine the genesis of this power of the court, which has been subject to many an academic debate. This paper also throws light on the contentious issues concerning the recent cases where the authority and integrity of the Apex Court of the country have been questioned, and the way in which such questions have been answered. We have made an objective effort to examine the justifications put forth by the judiciary in its defence, especially in light of the rapidly changing image and role of the judiciary in a modern democratic setup.*

### I. INTRODUCTION

“We are not final because we are infallible, but we are infallible only because we are final.”

This was a famous quote by Justice Jackson in *Brown v. Allen*,<sup>1</sup> making what appears to be a realistic self assessment of the position of the Supreme Court in the constitutional scheme. However, the question that arises is whether a layman, who is not a privileged member of the Bench can ever make such a comment, which effectively questions the infallibility of any court, leave alone the highest court of the land. As things stand today, any person attempting such an adventure may be hauled up for contempt of court, potentially facing a few ignominious days behind bars. This problematic situation is evident when one looks at the ambiguous expressions defining the ambit of contempt law. At a deeper level it becomes clear that this law itself is based on foundations ill-fitting to present day context, and it is these very foundations that one will attempt to question through the course of this paper.

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<sup>1</sup> 344 U.S. 443 (1953).

Contempt of court is a matter concerning the fair administration of justice, and aims to punish any act hurting the dignity and authority of judicial tribunals. Although it is difficult to accurately assess the origins of contempt law, there is little doubt that it stems from the common law ideal of supremacy and independence of the judiciary. The champions of this law proclaim that it is the good faith of the judges which forms the bedrock on which any system of administration securely rests. Hence, any attempt to shake the people's confidence in the courts, amounts to striking at the very root of the system of democracy, and deserves to be condemned.<sup>2</sup> Contempt law has ancient origins and has evolved over time through various phases of the monarchical legal system. Digging further, one can in fact find the genesis of the concept in the pre-historic divine origin theory,<sup>3</sup> and also the more recent theory of the Social Contract.<sup>4</sup> As the primary function of the early Monarch was protection of his subjects and consequently administration of justice, it was of utmost importance that his position should be beyond question. In its origin, all legal contempt will be found to consist in an offence more or less against the sovereign himself as the fountainhead of law and justice, or against his Palace, where justice is administered.<sup>5</sup> As society evolved, the authority of the king came to be vested in the office of the Judge who performed the functions as per the delegated mandate.<sup>6</sup> If the authority of the king is beyond question, so should be the authority of the Judge who is a direct representative of the king himself. Hence, it is clear that the law of contempt of court has ancient roots and has evolved through the ages: a journey which we shall track in the course of this paper.

The ambit of contempt law is so manifold in its aspects that it is difficult to lay down any exact definition of the offence. According to a respected authority, it is defined or prescribed to be disobedience to the court, an act of deposing or despising the authority, justice, or dignity thereof. It commonly consists in the party's doing otherwise, than what he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court.<sup>7</sup> The origin of the theory of common law can be traced to the opinion of Justice Wilmott in *R. v. Almon*,<sup>8</sup> and this decision will be analyzed in the course of this paper.

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<sup>2</sup> SURINDER PURI, *IYER'S LAW ON CONTEMPT OF COURTS* 25 (2004).

<sup>3</sup> The theory of Divine Origin of the state is the oldest theory concerning the primary origin of state, according to which, the state is established by a Supreme Being, i.e., God, who rules the state directly or indirectly through someone regarded as an agent. This theory provided the foundation for most ancient and medieval monarchies.

<sup>4</sup> Social Contract describes a broad class of legal and political theories, whose subjects are implied agreements by which people agree to maintain a certain social order. Such social contract implies that the people give up some rights to a government and other authority in order to receive or jointly preserve social order. Its main proponents are Thomas Hobbes, John Locke and Jean-Jacques Rousseau. Later day thinkers like John Rawls are also regarded by some scholars as being amongst the social contractualists.

<sup>5</sup> J. F. OSWALD, *CONTEMPT OF COURTS* I (1911).

<sup>6</sup> *Supra* note 1, 22.

<sup>7</sup> *Miller v. Knox* (1878) Bing N.C 574, 589. (Per Williams, J.)

<sup>8</sup> (1765) Wilm.243, 254.

## II. WHERE DOES THE LAW OF CONTEMPT DERIVE ITS LEGITIMACY FROM?

‘Modern law’ symbolizes a break, away from mythology and superstition into an enlightened age of rationality, and consequently equitable justice.<sup>9</sup> The legal system as we know today has been the culmination of a long journey from the divinely ordained dictums to natural law, and further to positive law.<sup>10</sup> In this long journey, it is evident that the changes which evolved were in no way absolute, and the influence of divine law in the creation of many present day legal procedures and principles is all too clear.

‘Order is Heavens’ first law<sup>11</sup> – the belief that divine law passes down to earth and becomes ‘the first law of nature’ dominated early English jurisprudence. God and His characteristics were the primary incontestable sources of law. Gradually, divine and natural law gave way to positive laws that is a system of law determined by the political sovereign, and with this transition, the supreme power vested in God came to be delegated to the human sovereign.<sup>12</sup> The question that arises here is whether this was a manifestation or a replacement in the source of legal authority. After being processed by Kant, law and legal system established itself as an independent entity, having inherent force and legitimacy from its nature itself.<sup>13</sup> However, modern legal philosophers like Peter Fitzpatrick suggest that despite forming this independent identity for itself, the law still bears a divine character and like God, it *creates its own world*.<sup>14</sup>

The creation of ‘its own world’ - it is this very feature of the modern day judiciary that ‘creates’ a higher platform for itself, one which is subject to different standards and status from any other institution engaged in the administration of justice. Contempt, in its legal conception means disrespect to that which is entitled to legal regard,<sup>15</sup> and the power to punish is the last fortification of the court’s sanctity. An analysis of this law provides a window of understanding to the self-exalted world of the court, the privileges it appropriates and the sources of its legitimacy. The premise for contempt of court being a crime stems from the accountability of the court. It is said to have its origins in the medieval transfer of royal powers to the courts from a monarch who was believed to be appointed by God, and would be accountable only to Him. Clearly, this law was a product of the context in which it was born: the English medieval ages where the judicial system was an imperial tool in the hands of the monarch. In those times, judges and even

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<sup>9</sup> PETER FITZPATRICK, MYTHOLOGY OF MODERN LAW 51 (1991).

<sup>10</sup> DENNIS HERON, AN INTRODUCTION TO THE HISTORY OF JURISPRUDENCE 56 (2001).

<sup>11</sup> (Pope 1950:132—Epistle IV, line 49) PETER FITZPATRICK, MYTHOLOGY OF MODERN LAW 50 (1991).

<sup>12</sup> *Supra* note 11.

<sup>13</sup> *Supra* note 10, 54.

<sup>14</sup> *Id.*, 57.

<sup>15</sup> *Supra* note 3, 95.

legislators were representatives of the Royalty, and hence played a crucial role in legitimizing the functioning of these allegedly divinely ordained monarchies. The king was believed to be the fountainhead of justice who delegated it to judges, and so to disrespect or question the court became a challenge to the wisdom and the superiority of the King himself.<sup>16</sup> Hence, we see that although structurally the source of law in society had transformed, the unquestionable superiority that it enjoyed was calculatedly upheld by the monarchy.

The historical aspect of the law of contempt in India has been dealt with in the Sanyal Committee Report, which is responsible for starting the process of amending the law.<sup>17</sup> Although essentially the law of contempt has its origin in English law, it is not entirely an imported concept. The age old systems to protect courts or assemblies (*sabhas*) point to an indigenous development of contempt law.<sup>18</sup> In his epoch making manual on governance, *Arthashastra*, Kautilya wrote, “Any person who insults the King, betrays the King’s council, makes evil attempts against the King... shall have his tongue cut off.”<sup>19</sup> Further, he said, “When a judge threatens, browbeats, sends out or unjustly silences any one of the disputants in his court, he shall first of all be punished with the first amendment.”<sup>20</sup> Interestingly, the scheme aimed to protect, against the violation of the administration of the King’s Justice not only by those for whose benefit it is administered, but also by those administering it. Although there is no direct evidence of the existence of a system similar to the modern contempt of court, it is clear that there was a conscious effort at protecting the sanctity of the images of justice.

The power of contempt clearly protects the court, but what has always, and even more so today, remained ambiguous is what exactly it aims to protect. The juristic question regarding the object of contempt law has been variously interpreted, and this shall be the crux of the paper. An early common law judgment, believed to be the *locus classicus* on the subject of contempt by attacks on judges is one prepared by Sir Eardley Wilmot in the case against J. Almon in 1765. Almon had published a pamphlet allegedly libeling the Kings Bench. The judgment, which has been largely accepted as correctly stating the law said:

“Arraignment of the justice of judges is arraignment the king’s justice, it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them. To be impartial, and to

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<sup>16</sup> THOMAS MCINTYRE COOLEY, BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 168 (2003).

<sup>17</sup> With the purpose of consolidating and amending the law relating to contempt of court, the Ministry of Law had set up a Committee in July, 1961 under the chairmanship of Shri H.N. Sanyal, the then Additional Solicitor General of India. This committee submitted its report on February 28, 1963.

<sup>18</sup> *Id.*, Chapter II.

<sup>19</sup> V.G RAMACHANDRAN, CONTEMPT OF COURT 19 (1976).

<sup>20</sup> *Id.*

be universally thought so are both absolutely necessary for justice and which so eminently distinguishes and exalts it above all nations on earth”

This judgment brought to light, several important yet questionable aspects of the judiciary. Firstly, that any attack on, or questioning of the judiciary is a direct challenge to the authority that has put it in place, in other words, the king. In fact, this judgment reveals that what was evidently being protected was the honour of the king, who could do no wrong, and this extended to his choice of judges. Then interestingly, the preservation of order appears to be another justification as is evident from the observation, “excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them”. This sentiment emanates from the belief that acts contemptuous of the court would in some way stir rebellion. Clearly, the judiciary was thought of as a force capable of ensuring adherence to the King’s mandate, and consequently order in society.<sup>21</sup>

This judgment also recognized that impartiality was the feature of the judiciary which distinguished it from all other similarly situated institutions. Therefore, any doubt cast upon its impartiality was capable of shaking its very foundation. We see that even after the development of modern Common Law, the superiority of the court is established, and its universally recognized impartiality is said to be the source of the same. This is evident from the observation “which exalts it above all nations on earth.” This hints towards an importation of principles of Divine law into modern common law. In other words, the reason that the judiciary enjoys the status and subsequent immunity is due to the absolute impartiality it exercises through its agents, being judges. The problem with this is that it ignores the possibility that the judges do in fact, at times compromise this impartiality. The question that needs to be addressed here is, whether this immunity is justified even if the judges compromise on impartiality, which is the most basic quality he is expected to follow. If the courts themselves have in people’s opinion compromised justice, do they still deserve absolute privilege against criticism? The view, that justice is not a cloistered virtue and therefore, must be allowed to suffer the scrutiny and respectful, even if outspoken comments of ordinary people, has been accepted.<sup>22</sup>

We do not intend to be judgmental on the fairness of the judicial process, but seek to find out whether the reputation of its institutions can be preserved by proceedings that essentially contravene the principles of fairness. In contempt cases, the judges have the power to decide in their own case. The court can *suo motu* start the proceedings, and sometimes the court expects the public prosecutor to lay the information. The judge in effect is the prosecutor, the witness and the Judge. Even as regards contempt, the decision as to whether an act or word substantially interfered with justice, or whether they qualify as free criticism, whether

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<sup>21</sup> *Id.*, 1.

<sup>22</sup> *In Re Bholu Nath*, AIR 1961 Pat 1, 8.

in fact truth can be a defence, is ultimately at the discretion of the judges themselves. Although this practice militates against the basic principles of natural justice, it has never really been questioned.<sup>23</sup>

These questions acquire urgent answers especially in the context of today's political environment. Medieval monarchies have given way to a modern democratic order and with that, dissolution of the concept of the 'king's justice'. In India specifically, contempt law today is divided into three main general areas: (i) violation of an order of a court, (ii) interference in the judicial process and (iii) criticism of a judge, his or her judgment, or the institution of the judiciary.<sup>24</sup> It is the third category, known as criminal contempt that is the focus of this paper as it remains the most ambiguous and questionable aspect of contempt law. The Contempt of Courts Act of 1952 contained no definition of contempt, with the power being presupposed as inherent in the court. This lack of precision has been subsequently compounded in the Act of 1971, which brought in its wordings a host of new uncertainties. A distinction between civil and criminal contempt was brought out, and the latter was defined; but the meaning of inherently ambiguous terms such as 'scandalizing the court', what 'prejudices any judicial proceeding' and 'interferes with the administration of justice' were left unexplained.<sup>25</sup>

### III. IMAGES OF JUSTICE

From the Preamble to the Act of 1971, it is clear that it is not the dignity of individual judges that the Act seeks to protect, but the administration of justice and judicial proceedings.<sup>26</sup> In this attempt to protect the dignity of courts, and thereby, of justice, it is imperative to ask: in what forms is the court represented? What are the images of justice that the court wishes to protect?

Long before any law of contempt of court had been thought of, a 14<sup>th</sup> Century case *William de Thorp v. Mackerel and Another*<sup>27</sup> provides some insight into these aforesaid queries. William Thorp, 'the king's sworn clerk', was walking from the Inns of Court to the Court at Westminster in the company of other 'men of

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<sup>23</sup> There are two basic principles of natural justice:

(i) *Audi alteram partem*: No one shall be condemned unheard,

(ii) *Nemo in propria causa judex, esse debet*: No one shall be a judge in his own case

See, I.P. MASSEY, ADMINISTRATIVE LAW 201 (2008). When deciding on contempt cases, the court itself decides on a matter in which it believes that it has been wronged, and is thus an aggrieved party. It is our understanding that the court when judging a contempt petition, it amounts to violation of the second principle of natural justice being '*Nemo in propria causa judex, esse debet*'.

<sup>24</sup> § 2, Contempt of Courts Act, 1971.

<sup>25</sup> *Id.*

<sup>26</sup> *Brahma Prakash Sharma v. State of Uttar Pradesh*, AIR 1954 SC 10, 13.

<sup>27</sup> 74 Selden Society (1318), quoted vide PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 79 (1996).

law'. While proceeding along Fleet Street which is in close proximity to the court, William was attacked by some men. While he was on the ground, the accused Mackerel urinated on him, and kicked and trampled him. The writ petition later moved by the plaintiff (a writ of *venire facias*) stated that the defendant was in contempt of the king and his court (*in contemptum domini regis et curiae*) and further that this contempt was committed in the presence of the court (*in presencia curie*). The judgment in the case accepted the writ as stated and agreed that the contempt, while being committed some mile and a half from the Court at Westminster, was committed in its presence. In this case, it was the geographical proximity to the court that resulted in the offence of 'scandalising the court.' Interestingly, William De Thorpe was viewed as a 'man of law' above any other identity he had. Any disrespect to him, was therefore seen as disrespect to the court and this emerges as the most controversial aspect of this entire episode. Even today, on the pretext of preserving the dignity of the administration of justice, contempt law in practice has been at times reduced to exactly this: preserving nothing more than the reputation and dignity of individual judges.

In today's democratic era, judges are no longer acting on behalf of the king, and the higher authority sought to be protected by contempt law is not clearly described. Indirectly, the judges in fact get their authority from the people, and so it follows that at some level, they must remain answerable to them. This transformation in the political and social structure has given the judiciary an indispensable role: to remain completely independent and unbiased in the administration of justice for all. Thus, it appears strange and illogical that the basis of contempt law lies in the fact that it must protect the authority of the courts in the eyes of people. It needs to be understood that in a democracy, the courts derive their ultimate authority from the people, and a law muzzling dissent and criticism from the people defies all logic. An Indian case highlighted that the purpose of contempt law is to uphold the majesty and dignity of the law courts and the image of such majesty in the eyes of the public cannot be allowed to be distorted.<sup>28</sup> It is clear from this statement that the judiciary has created in its own eyes, a self-satisfied image, and wishes to retain its 'majesty' in the eyes of the people. However, this seems to be delusionary when one looks at society today – in this age of information it is no longer necessary to try and create, or recreate the 'majestic image of the court.'<sup>29</sup> Authority cannot come from alienating an institution from the people, but must be secured by instilling faith through its actions.

As mentioned earlier, the Contempt of Courts Act, 1971 is characterized by ambiguity in expression and uncertainty in purpose, which has made many view it as a necessary evil. It is widely believed that certainty in law can only come at the expense of flexibility, and with a law regarding criminal contempt, the value of flexibility is paramount.<sup>30</sup> However, the question that needs to be asked here is:

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<sup>28</sup> Mohd. Iqbal Khandey v. Abdul Majid Rather, 1994 (2) SCJ 358, 362.

<sup>29</sup> *Id.*

<sup>30</sup> 'Report on Review of Law of Contempt', The Law Reform Commission of Australia, June 2003.

“what is the extent of this flexibility?” Contempt power is seen as inherent in judicial power, and the Contempt of Courts Act, 1952 did not even provide a definition of contempt. The lack of clarity in definition and barely limited scope of the Act is justified with the acceptance that contempt power lies at the core of the judiciary. It is said that no definition can curtail what is contempt in the view of the court in a specific circumstance.<sup>31</sup> However, this argument turns out to be acutely problematic. It ignores the greater evil: that judges having the power to decide their own case also involves granting them a limitless flexibility in interpretation of key terms, and this essentially goes against the principle of fairness. Even if there was a definition of what constitutes ‘scandalizing the court’, or what ‘prejudices or interferes with the course of justice’, the understanding of these concepts is continually changing. This aspect of contempt law seems to be more and more obsolete as we enquire into the reasons why this power is justified and the sources from where this power is abused. The system itself is inherently flawed because of the fact that both the media and the judiciary are incapable of objective and unbiased involvement since they are both direct players in the process. It is for these reasons that this aspect of contempt (‘scandalising the court’) has become obsolete in many common law jurisdictions. Distinguished lawyer David Pannick commented on this aspect in 1987, by saying that in the absence of an allegation of bias or other improper motive, the offence of scandalizing the judiciary is obsolete in England.<sup>32</sup> In the mid 1980s itself, Justice Diplock observed in *Defence Secretary v Guardian Newspapers*,<sup>33</sup> that the species of contempt which consists of scandalizing the judges is virtually obsolescent in England and may be ignored.

Hence, we see that the law regarding this aspect of contempt is continuously evolving and in most common law jurisdictions, is heading towards abolishment or at least, a less objectionable and justifiable model. In 1992, Chief Justice Mason said in the Australian High Court that as long as the defendant is genuinely exercising a right of criticism and not acting in malice, he or she is immune.<sup>34</sup> This builds upon the 1911 case of *King v. Nicholls*,<sup>35</sup> where it was opined that if there is a just cause for challenging the integrity of a judge, it is not to be contempt of court. Clearly, the unchallengeable justification for the courts’ immunity is no longer upheld and it is being realized that the judiciary must also be receptive to criticism if it is to retain the respect of people.

#### IV. CONTEMPT POWERS : JUDICIAL AUTHORITY IN TROUBLE?

The power of the Courts to punish contempt would appear to be empty rhetoric as far as the source of this power and the various attempts at its

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<sup>31</sup> *Supra* note 22, 182.

<sup>32</sup> A.G. Noorani, *Contempt of Court and Free Speech*, ECONOMIC AND POLITICAL WEEKLY, May 19, 2001, at 1693-1694.

<sup>33</sup> (1985) 1 A.C 339, 347.

<sup>34</sup> *Supra* note 33.

<sup>35</sup> 12 C LR 280.



rationalization are concerned. It is not our intention to say that there is no justification for such powers of the court which it claims to protect its dignity and authority. However, as has been observed earlier, the advocates of this power of the court have presupposed the existence of the inherent powers of the court to punish contemptuous acts, and have advanced numerous theories and justifications to support their views. An often cited ground for upholding the enormous power of contempt is that of the necessity to ensure 'Rule of Law'.<sup>36</sup> This is something the courts have been repeatedly relying on to justify their acts of punishing alleged contempt of their powers. In this light, the *Arundhati Roy* case<sup>37</sup> is worth special mention since in that judgment, the Supreme Court of India made a determined effort to elucidate the need to empower the Courts with the power to punish contempt of its authority. However, it seems that the *raison d'être* behind the existence of such a power is the lack of confidence of the Courts in their own capacity to earn respect from the people. In fact, the need of any such power would be irrelevant if the Court realizes that it can have greater authority by winning the confidence and respect of the people rather than enforcing its authority with penalties.

#### A. THE ARUNDHATI ROY CASE

The *Arundhati Roy* case has been the focal point of any discussion on the contempt powers of the Court in recent times. Though it has been repeated time and again, still the background of this case needs to be mentioned for the present paper. It is noteworthy that writer Arundhati Roy has faced contempt charges three times including the one already mentioned. The first one was when she wrote an article entitled 'The Greater Common Good' which was published in the Outlook magazine.<sup>38</sup> The author had ridiculed the 'tender concern' that the Supreme Court judges had expressed in regard to the availability of children's park for the children of the tribal inhabitants who would be displaced when the height of the Sardar Sarovar dam was increased. The author had pointed out the ground reality of the plight of the hitherto happy, simple minded tribals who had been living among nature's beautiful creations for ages and who had now, not even been allotted any land for rehabilitation. However, such thoughts of the author did not go down well with the supreme judicial authority of the country. Two judges of the Supreme Court felt that these comments made by her were *prima facie* a misrepresentation of the proceedings of the Court and constituted contempt of

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<sup>36</sup> The Court says, "Rule of Law is the basic rule of governance of any civilised democratic policy. Our Constitutional scheme is based upon the concept of Rule of Law which we have adopted and given to ourselves. Everyone, whether individually or collectively is unquestionably under the supremacy of law.... It is only through the courts that the rule of law unfolds its contents and establishes its concept" in its judgment in: *In re Arundhati Roy*, AIR 2002 SC 1375.

<sup>37</sup> *In re Arundhati Roy*, AIR 2002 SC 1375.

<sup>38</sup> Published on May 24, 1999, also available at <http://www.narmada.org/gcg/gcg.html> (Last visited on November 1, 2008).

Court.<sup>39</sup> It is observed that the Court has time and again referred to *freedom of speech and expression* as being used as a cover by offenders guilty of contempt of court. In the subsequent contempt case against Arundhati Roy, the Court again gave the impression of *freedom of speech and expression* being some kind of a garb being misused by miscreants to attack the courts' authority and dignity. This is a very unfortunate trend as far as the *right to freedom of speech and expression*, which the Supreme Court has itself termed as the 'life blood of democracy', is concerned and the attempt of the Court to justify itself from this particular angle needs an assessment.

Subsequently after the final judgment on the Narmada dam was passed, the *Narmada Bachao Andolan* (NBA) staged a *dharna* in front the Supreme Court. A group of lawyers filed a FIR against Medha Patkar, Arundhati Roy and Prashant Bhushan alleging that they had shouted slogans against the Supreme Court and had hence committed contempt of court. The court issued a notice asking why they should not be punished. All three respondents denied that they had committed any contempt and asserted that they had a right to criticize the judiciary and its decisions in exercise of their freedom of speech guaranteed by the Constitution. When that matter was heard, it was revealed that the petitions were frivolous, they suffered from various procedural flaws, and none of the charges made against any of the three respondents could be established. The court had to concede that had its registry carefully scrutinized the petition, perhaps even a notice might not have been issued, and hence, the three persons were acquitted. But the court took *suo motu* notice of the contemptuous statements contained in Arundhati Roy's affidavit and issued a fresh notice of contempt. The particular affidavit in question is the crucial point of the third and the most significant contempt proceeding in terms of the Court's objectivity in such proceedings. However even before proceeding to that, it can be seen from the haste of the Court in issuing notices that the Court itself created grounds for critics to question the integrity of the Court.

The natural question that arises in this regard is: what was there in the affidavit of Arundhati Roy that infuriated the Court so much? Several things might not be considered as contempt by a reasonable person; there were however some which could have been interpreted otherwise, as was done by the Supreme Court. Arundhati Roy pointed out in her affidavit that there seemed to be an inconsistency in the approach of the Court to the urgency of the contempt proceedings in comparison to other serious issues.<sup>40</sup> As a case in point, she mentioned the Tehelka

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<sup>39</sup> Civil Original Jurisdiction I.A. No. 14 of 1999; also available at <http://www.narmada.org/sc.contempt/SC.order.151099.html>, (Last visited on November 2, 2008).

<sup>40</sup> In her affidavit, Ms. Roy said, "On the grounds that judges of the Supreme Court were too busy, the Chief Justice of India refused to allow a sitting judge to head the judicial inquiry into the Tehelka scandal, even 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 criticised a recent judgement of the Supreme Court, the Court displays a disturbing willingness to issue notice."

scandal, where some political leaders were caught red-handed on the camera taking bribes from spurious arms dealers during a sting operation conducted by the news agency, Tehelka. Though that was an exceedingly grave issue concerning national security, the then Chief Justice of India refused to allow a sitting judge to head the judicial enquiry into that scandal on the ground that there were no judges available in the Supreme Court at that time. Arundhati Roy scathingly termed this reasoning as very ironical and cynical in comparison to the alacrity of the same Court when the issue of contempt arose against these three individuals. It was more so because the notices were issued based on 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 writer went further to say that such a response of the Court indicated a 'disquieting inclination on the part of the Court to silence criticism and muzzle dissent; to harass and intimidate those who disagree with it'. There is certainly a certain amount of impertinence in the language used, but there is nothing to suggest that the writer imputed any *mala fides* to the Court. It was a mere suggestion, which on a sympathetic reading would appear completely inoffensive.

However, the Court chose to react otherwise, and although it acted with no evil intention, it certainly did more harm to its repute and credibility by acting thus. Another fact that calls for concern was that the Court accused Arundhati Roy of imputing motives to the Court by terming some of its actions as hasty. The Court had made such an interpretation from the language of the affidavit which stated that, "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." She further added, "... whoever they are, and whatever their motives, for the petitioners to attempt to misuse the Contempt of Court Act and the good offices of the Supreme Court to stifle criticism and stamp out dissent, strikes at the very roots of the notion of democracy." It is clear to any reasonable mind, from the words used in the affidavit that the allegation was not that the Court was motivated, but that the court allowed itself to be used as an agent to stifle criticism and dissent, by external elements who are motivated. It is clear from the context that Arundhati Roy had not tried to impute motives to the court, and any harm to its reputation if any, was unintentional.<sup>41</sup> Admission of the contempt proceeding and subsequent conviction of Ms. Roy on these grounds brought the contempt powers of the court under severe scrutiny.

The approach of the highest court of the country in dealing with this particular instance of contempt proceeding was criticized on all fronts. As can be seen from the above paragraphs, the flawed approach of the Court was itself

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<sup>41</sup> S.P. Sathe, *Accountability of the Supreme Court*, ECONOMIC AND POLITICAL WEEKLY, April 13, 2002, at 1383.

responsible for such criticism. The Court failed to realize the fundamental relation between the authority of any institution, and the respect and trust of the people that such institution commands. The trust in the honesty and integrity of the judges is inspired by their work. If such a fundamental rule is respected and is actually practised, then certainly the Courts can do without exercise of powers of contempt of court. However, it seems that it is not obsolete in India despite the fact that Article 19(2) of the Constitution permits, *inter alia*, on the ground of contempt of court only 'reasonable restrictions' on the fundamental right to freedom of speech and expression, guaranteed by Article 19(1) (a). So it is disheartening to note that although our law is based on English law, our courts follow English precedents discarded as outdated in the very land of its origin, namely, UK.<sup>42</sup>

### *B. JUDICIAL INTERPRETATION OF CONTEMPT LAW IN OTHER INDIAN CASES*

In light of the *Arundhati Roy* case, we can have a better understanding of such travesties of justice when two earlier instances of contempt proceedings are compared. One being the *Shivshankar's* case<sup>43</sup> wherein harsh criticism of the judiciary was held not to be contemptuous; and the other is the *Namboodripad's* case.<sup>44</sup> In the latter case, Namboodripad had been convicted for contempt for a speech which was a pure theoretical statement on the role of the judiciary from a Marxist perspective. While criticizing the lack of a standard code for execution of contempt proceedings, the critics have pointed out that the fact that Shivshankar was a former judge of a High Court and later a minister in the central government was the difference between him and Namboodripad.<sup>45</sup> Although this might have been nothing more than sheer coincidence, that was still enough for some sections of scholars to raise the issue of disparity in the attitude of the Court as far as freedom of speech vis-à-vis contempt was concerned. This is very significant in light of the present approach of the Supreme Court while dealing with the contempt proceeding against Arundhati Roy. In light of these cases, it has been rightly observed that a more tolerant and sensitive, but not sentimental court, would doubtless earn greater public admiration.<sup>46</sup>

The concept of public admiration is also one that needs to be examined, especially in the context of public response to media articles or television programmes. The recent *Wah India* case<sup>47</sup> brings to light how the gullibility of the readers is often overestimated, making the media vulnerable to the offence of 'scandalizing the court.' The basis for initiating contempt proceedings against the

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<sup>42</sup> *Id.*

<sup>43</sup> P.N. Dua vs. P. Shiv Shanker and Ors., AIR 1988 SC 1208.

<sup>44</sup> E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, AIR 1970 SC 2015.

<sup>45</sup> S.P. Sathe, *Accountability of the Supreme Court*, ECONOMIC AND POLITICAL WEEKLY, April 13, 2002, at 1384.

<sup>46</sup> *Id.*

<sup>47</sup> Shri Surya Prakash Khatri & Anr. v. Smt. Madhu Trehan and Others, 2001Cri.L.J. 3476.

editor, Madhu Trehan, was that the magazine report had ‘scandalised the court’ by making an imputation that some Judges of the Delhi High Court were not perceived in the most honest light by some senior advocates whose ratings the magazine had collated. Essentially, the question boiled down to whether the ratings that senior advocates had assigned to judges based on parameters like integrity, understanding of law, and courtroom behaviour was challenging the credibility of the judiciary on the whole. Incidentally the overall ratings were not especially dramatic, as almost all judges secured more than 30 out of 60, and very few less than 40, out of the total of the 31 sitting judges who had been ranked. By accusing the magazine of questioning the credibility of the judiciary, it is clear the court perceived that the readers would be swayed by the results of this survey so much so that they would doubt its credibility far more than they would have earlier. This in itself is incredulous; all this survey did was to show a mirror to the inner workings of the judiciary and revealed discrepancies that are in fact present in all institutions. Rather than making a self introspection into its flaws, the court took exception to the survey. Its reaction was noteworthy: the Bench asked the Deputy Commissioner (Crime), Delhi Police to seize and confiscate copies of the issue of the magazine from shops, news-stands or any other place where they were being sold. It also asked the respondents to withdraw from circulation copies of the issue. It further directed that no one shall publish an article similar to it, or any article, news, letter or any material that tended to lower the authority, dignity and prestige of the members of the judiciary. The Bench also put a bar on reporting the proceedings of the case in the media, including contents of the article, in any manner. Issuing the notices, the Bench asked the respondents to show why they should not be punished for contempt of court. There was a huge uproar in response to these orders and many leading media personalities sought to express solidarity with the accused, and clamoured for more complete media rights.<sup>48</sup> This had the desired effect and the court finally did allow media coverage of the proceedings.

Ultimately, Madhu Trehan tendered an “unconditional and unqualified apology and expressed deep regret for the article published” and the court reserved its judgment in the case. However, what needs to be noted is that by overestimating the naivety of the public, or at least projecting itself as doing so, the court in fact did more harm than good to its reputation. The ‘scandalous’ aspect of the entire episode was the unforgiving and uncalled for response of the court more than the survey that had been conducted. The Chief Justice of the Delhi High Court, Justice Arijit Pasayat, reportedly observed during the hearing on May 2, 2001, “We are not defending ourselves. Judges may be wrong, but you cannot question the credibility of the judiciary.”<sup>49</sup> However, we need to question whether the courts themselves are blurring these lines between defending themselves individually or defending the institution of the judiciary. Once again, the problem arises regarding who represents the judiciary, and in what forms. Evidently, in the absence of any

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<sup>48</sup> V.Venkateswaran, *What constitutes scandalizing the court?* available at <http://www.flonnet.com/fl1810/18101000.htm> (Last visited on October 2, 2008).

<sup>49</sup> *Id.*

clear understanding, under this aspect of ‘scandalising the court’ under criminal contempt, it is open to misuse.

The purpose of discussing the above instances of contempt proceedings is certainly not to repeat or further the old debate circling around the justness of the conviction of Arundhati Roy in the contempt proceedings against her. But such a discussion has given us an understanding regarding the distrust and doubts created by the exercise of the power of contempt of court in a manner that is unbecoming of a revered institution like the Supreme Court. However the root of the problem seems to be the absence of a certain amount of consistency and uniformity in the exercise of such a power. Another issue associated with it is the question of the accountability of the Court in the public eye. It is an often cited aphorism of Lord Hewart that: “. . . it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>50</sup> Nevertheless, in comparison to the other organs of the government, the reputation and credibility of the Indian judiciary is certainly high in the eyes of the people. But then the people should have the access and opportunity to examine the functioning of the judiciary so that their faith remains intact. This is a very sensitive issue that is not yet given a positive thought by the judiciary. The courts must realize that the best way for the court to protect its image is not by unleashing the contempt whip, but by a thorough and gradual process of self introspection. This understanding has been succinctly surmised by Lord Denning in *R v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)*,<sup>51</sup>

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. . . .”

#### IV. TRUTH AS A DEFENCE

As has been observed earlier in this paper, the Courts have been emphasizing on the need to exercise the contempt powers in order to uphold the rule of law which according to it, might be degraded in case a commoner is allowed to criticize or comment upon the working of the Court. As such it has been unfortunate that the powers to proceed against contempt as provided under the Contempt of Court Act, 1971 have been very widely exercised in a significantly asymmetrical manner. On many occasions, we can observe an overzealous attitude on the part of the Court to protect the self proclaimed immunity from any examination of their decisions. However an unlikely victim of such an attitude has been ‘truth’.

<sup>50</sup> *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259.

<sup>51</sup> (1968) 2 QB 150.

The courts have time and again denied the defence of truthfulness or factual correctness in the law of contempt. However, such justification is a complete defence to an action for libel. The English Courts are closely followed by the Indian courts in this regard irrespective of the fact that the English have seldom taken resort to contempt proceedings in a long time.<sup>52</sup>

This kind of an attitude of the Indian courts has its roots in the pre-independence days when even the decisions of the Courts were largely guided by colonial interests. In one such significant case, the defendant in a contempt proceeding who was an editor of an Indian newspaper had attempted to call evidence to prove his allegations and was refused.<sup>53</sup> While completely rejecting the possibility of entertaining any justification of contempt of court, the Court said that even if the writer of a manifesto believed that all he stated therein to be true, if anything in the manifesto amounted to contempt of court, the writer would not be permitted to lead evidence to establish the truth of his allegations. Such attitude continued even after independence as can be observed in the case of *Advocate General v. Seshagiri Rao*.<sup>54</sup> In this case, the Court clearly said that it was not permissible for a defendant to establish the truth of his allegations since the damage is already done. In other words the Court observed that allegations against the Court “excites in the minds of the people a general dissatisfaction with all judicial determinations and indisposes their mind to obey them” which in turn was considered by the Court as a very dangerous obstruction to the course of justice. This expression has been borrowed in verbatim from the *Almon* case decided much earlier by an English court.

The inherent flaw in such an approach of the judiciary was realized, and the National Commission to Review the Working of the Constitution gave definite direction towards a solution to the same.<sup>55</sup> In course of its report, the Commission recommended that in matters of contempt the Court should have the option of permitting or denying a justification by truth. It was further recommended that the power to punish for contempt should be limited to the Supreme Court and High Court by inserting a proviso to Article 129 of the Constitution and including it as part of the privilege of Parliament and State Legislatures. As a matter of fact, the Supreme Court derives its contempt powers from Article 129 of the Constitution which states that, “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 its contempt”. The Commission had submitted its report to the Government of India on 31<sup>st</sup> March 2002. A subsequent development was the Contempt of Courts (Amendment) Bill, 2003 which never reached the legislature. Nevertheless after a long period of anticipation, the Amendment Act of 2006 made a significant change in the Act

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<sup>52</sup> *Supra* note 33.

<sup>53</sup> In Re: Tushar Kanti Ghosh. Editor, Amrit Bazar Patrika, and Anr., AIR 1935 CAL 419 (FB).

<sup>54</sup> AIR 1966 AP 167.

<sup>55</sup> Para 7.4, National Commission to Review the Working of the Constitution; available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch7.htm>, (Last visited on October 5, 2008).

itself by providing in Section 13 of the Act that justification by truth can be a valid defence if the Court is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.<sup>56</sup> Thus in a way, this was a great leap forward in ensuring that the power of punishing for contempt is not boundless and can be limited to certain boundaries.

However the progress made was cut short by the *Mid-Day Newspaper* case,<sup>57</sup> which is again a very controversial issue in itself. For the purposes of the present discussion, we shall examine the decision of the court in the light of the amendment of 2006 which had led to the acceptance of truth as a defence. This case created a stir in the conscious sections of the public and once again brought to limelight the question of inapt interpretation of the statutory provisions by the Court. Going into the facts of the case, on May 18<sup>th</sup> 2007, the Mid-Day daily reported that retired Justice Y.K. Sabharwal, in the capacity of the Chief Justice of India, passed judgments on the sealing of commercial property in the residential areas thereby benefiting his sons who were partners in a commercial enterprise involved in the construction business. On the next day, the newspaper carried a cartoon by Mr. Md. Irfaan Khan, depicting the former Chief Justice in his robes holding a bag with currency flowing out. It also depicted a man sitting on the side walk saying "Help! The mall is in your court." This was thought by the Court as being aimed at lowering the image of the judiciary. Consequently, the court started contempt proceedings *suo motu*, and held that an accusation against the former Chief Justice amounts to the contempt of court as it hurts the image of judiciary as a whole.

The contemnors had in their affidavit claimed that the sons of the former Chief Justice of India had benefited by orders made by the Supreme Court and that they were operating their businesses from the official residence of Justice Y.K. Sabharwal. They claimed that whatever has been stated in the publications was the truth which, according to them, was a permissible defence. In fact, as we have discussed earlier, the amendment to Section 13(b) of the Act seeks to provide justification by truth as a valid defence. However as can be seen from the language of the statute, the Court is left with the discretion to decide whether the truth stated is in public interest or not and also if the request for invoking the same benefit is *bona fide*. As such, there was a gap left so that the Courts could take timely and appropriate measures in the event of severe threats to its dignity at the hands of the people with vested interests. This discretionary power of the Court was utilised in the Mid-Day newspaper case and the contemnors were denied the defence of truth. This was despite the fact that it was inappropriate on the part of the then Chief Justice to preside upon a Bench taking a decision which had a direct bearing upon the business fortunes of his sons; which may clearly seem to be a case of nepotism in the eyes of the public even if it was not so in reality. Thus, the fact remains that the Court turned down a *bona fide* request for availing the said defence irrespective of the fact that it was a newspaper report in public interest,

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<sup>56</sup> Section 13(b) Contempt of Courts Act, 1971.

<sup>57</sup> Court on its Own Motion v. M.K. Tayal and Ors., MANU/DE/8520/2007.



and despite the point that at the time of the report Justice Sabharwal was no longer in the Court. However, the action taken against the newspaper once again raised doubts in the minds of the common man regarding the propriety of the contempt jurisdiction of the court. It is more so since the decision came at a time when a lot was expected from the amendment that recognised truth as a defence.

The Court has, as a matter of fact, carefully avoided the question of truth being a justified defence and has proceeded to take a very inequitable attitude to the whole issue. It is so because the Court continued its old tradition of interpreting the alleged contempt in a very subjective light. The Court found the manner in which the entire incident had been projected as appearing that the Supreme Court permitted itself to be led into fulfilling an ulterior motive of one of its members. According to the Court, the nature of the revelations and the context in which they appeared, though purporting to single out a former Chief Justice of India, tarnished the image of the Supreme Court as a whole. As such the Court once again termed the same as an act tending to erode the confidence of the general public in the institution of the Supreme Court. So, according to it, by imputing motive to the presiding member of its Bench, the contemnors automatically sent a signal that the other members were dummies or were party to the ulterior design of the former Chief Justice. The Court found the same very disturbing and as such, the accused were awarded four months of imprisonment. Later, they were released on personal bails of Rs.10, 000 each. This whole episode was a very disturbing one in the light of the issue of judicial accountability.

The right of the contemnor to have truth as a defence in the contempt proceedings is closely related to the question of the duties of the judiciary towards the people and its accessibility by the public. It is true that the duties of the judiciary are not owed to the electorate, but to the law which is there for the peace, order and good governance of all in the community; as had been rightly pointed out by Chief Justice Brennan of Australia.<sup>58</sup> On the same note, the learned Justice acknowledged that judges should give account for exercise of the judicial power, especially when pronouncing judgments of significance.<sup>59</sup> The real question is not just about giving account for the exercise of the judicial powers, but the criticism and appreciation of such exercise of powers which is the case in most occasions. It is a fact that unwarranted and irresponsible criticism subverts judicial independence; but on the other hand, the judiciary must be also mature enough to take in healthy criticism of its decisions. A very important aspect related to this is the independence of the judiciary and for sustaining the same, it is essential that the judiciary is free from any unhealthy criticism by pressure groups. In such a situation the power of the Court to punish any contempt against it will be deemed to be an appropriate option.

However in order to have an objective and honourable tradition of the judiciary making proper use of this significant power, it is crucial that there is a

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<sup>58</sup> LAW AND JUSTICE: AN ANTHOLOGY 259 (Soli J. Sorabjee ed., 2004)

<sup>59</sup> *Id.*

clearly defined process of interpreting the incidence of contempt. As has been rightly observed by Justice Markandey Katju, there is a lack of uniformity in contempt cases because even after 'contempt' was defined in the Contempt of Courts Act, 1971: there was no definition offered regarding 'what constitutes scandalizing the Court', or 'what prejudices, or interferes with, the course of justice'. Thus there is still a huge scope left for the Court to intentionally or unintentionally utilize the power of contempt proceedings in an attempt to reassure itself of its authority and dignity. This is certainly not a welcome development at a time when there have been a number of instances of members of the judiciary being brought under the scanner for alleged nepotism and even corruption. The recent instance of Transparency International<sup>60</sup> alleging corruption and nepotism amongst certain members of the judiciary and the ongoing Supreme Court lawsuit resulting from the same is a clear indication of the severity of the problem.<sup>61</sup> Although most of these charges have not been proved, and are hopefully incorrect, there is undeniably a lot of pressure on the court to come out in the open and present a clean image.

As there is a risk that contempt power may be used at the wrong time and for the wrong reason if the Court has boundless authority to interpret the statutory provisions for subjective comfort, it is important that there be in place, a well defined system of checks. Thus, it is imperative that in the light of the uncertainties concerning the cases of contempt and the growing concern regarding the accountability of the judiciary, the powers of contempt are done away with. This certainly will be a great leap forward towards the establishment of rule of law in the truest sense of the term. Repeated use of the contempt jurisdiction exposes the underlying insecurity of the court, and restraint will go a long way in refurbishing its image.

## V. CONCLUSION

Modern law, is a culmination of a long journey from divine law to natural law and further positive law, and has retained some of the principles and beliefs enshrined in early legal thought. Although modern law is thought to be rational and free from superstition and myth, we see that it often clings on to archaic conceptions of the court, often misplaced in today's context. The law of contempt is an excellent example of this dichotomy between rationality and mythology surrounding the judiciary. The concept originated in English medieval monarchies as a way to preserve the unchallengeable authority of the king, who was believed to be the fountainhead of justice. The authority of God as the last

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<sup>60</sup> An international NGO headquartered at Berlin, Germany which works incessantly against corruption world over.

<sup>61</sup> In this case 36 judges including one sitting Supreme Court judge, 11 High Court judges and 24 district and sessions' judges of Ghaziabad are facing allegations of being beneficiaries of Rs 70,000,000 General Provident Fund (GPF) scam. See [http://timesofindia.indiatimes.com/CJI\\_to\\_sack\\_HC\\_judge\\_in\\_Ghaziabad\\_PF\\_scam/rssarticleshow/3692981.cms](http://timesofindia.indiatimes.com/CJI_to_sack_HC_judge_in_Ghaziabad_PF_scam/rssarticleshow/3692981.cms) (Last visited on October 10, 2008)

word was believed to be manifested in him, the human sovereign. Therefore, in this new, 'democratic' era, this protection of the judiciary against criticism as well as the procedure for its trial appears problematic.

Two questions emerged, during the course of this paper: the first being what the court aims to protect by this law, and second, what are the images of justice that it seeks to preserve. Now, the Contempt of Courts Act, 1971 defines criminal contempt as that which 'scandalizes the court' or 'prejudices judicial proceedings' without providing any explanation of these key terms. The concept of scandalizing the court remains the most controversial aspect and the paper has so far, attempted to unravel the mystery behind its purpose. However it becomes clear that the vagueness of this term is not accidental, and coupled with the fact that judges are deciding their own case, this clause has led to many legal atrocities that have in fact lowered the reputation of the judiciary. The uncertainty of the law is justified by the need for flexibility; however the greater evil that comes with this, cannot be ignored. Although, it is the administration of justice that this law aims to protect, it often ends up being used to protect individual judges. Furthermore, whether the dignity of the judiciary can be preserved by procedures that essentially contravene principles of fairness emerges as another dilemma.

The paper has also delved into the controversial decisions of the Indian Supreme Court, which have time and again exposed the insecure attitude of the judiciary when it comes to the respect and prestige it seeks to command. The Court has more than once failed to realize that the authority of the court which is imposed by penalties under contempt powers can procure submission, but not respect. It would be a better option to earn the respect through benevolent handling of the instances of contempt of court. The several cases already discussed show a disturbing trend of subjective approach of the court and lack of uniformity in such decisions resulting in an unhealthy uncertainty concerning the exercise of the powers of contempt of court. Whether the archaic notion of admiration that contempt law seeks to protect at all exists, and whether the public is viewed as so gullible to the opinions of the media as to undermine the image of the court are issues subject to many a doubt. Further, the admission of truth as a defence vide amendment of the statute and subsequent denial of the same in the *Mid-Day Newspaper* case has once again put a question mark on the neutrality of the judiciary and the helplessness of the defendant in a contempt proceeding. The doubt created because of the loops in the statutory provision of truth as a defence has permeated to the question of judicial accountability. In light of this, it is felt that there is no place for contempt powers in a modern judicial system, and definitely not in the form it is currently manifested in. A more relaxed system will reflect greater confidence on the part of the judiciary, and may find inspiration from the famous quote of Chief Justice Marshall of the US Supreme Court, "Power of judiciary lies not in deciding cases, nor in imposing sentences, nor in punishing for contempt, but in the trust, confidence and faith in the common man."

