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SCANDALIZING INDIAN DEMOCRACY: A CRITICAL ANALYSIS OF SECTION 2(C)(I) OF THE CONTEMPT OF COURTS ACT, 1971

Niranjan KUMAR[1]

ABSTRACT

The crime of 'scandalizing the court' has existed for centuries and can be traced to 15th century England at a time when the Courts needed to protect their 'blaze of glory' wherein any attack on the authority of the Judiciary tantamounted to an aspersion on the King's wisdom directly. While applicable to monarchical times, the current definition and use of the offence is asynchronous with a democratic system such as India, whose entire identity is based on the freedom of speech and expression and the independence of the Judiciary from the executive branch. The latest suo motu criminal contempt proceedings launched by the Indian Supreme Court against social activist and lawyer Prashant Bhushan in connection with two of his tweets have proved to be a legal quagmire for the judiciary and pertinent questions have been raised regarding the true intent of contempt of court proceedings and the independence of the judiciary. The present Article critically analyses Section 2(c)(i) of the Contempt of Courts Act, 1971 which defines the offence in India and assesses whether it stands the test of Constitutionality and can be considered a reasonable restriction on the right to freedom of speech and expression in the 21st century.

Keywords: *Contempt of Court, Scandalizing the Court, Judiciary, Freedom of speech and expression*

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I. INTRODUCTION

The law of contempt in India has its roots in England's monarchical legal structure, where the judicial system was a mere instrument of power in the hands of the Monarch for multiple centuries. The king used to delegate his judicial powers on the judges who acted as his representatives. In the landmark case of ***R v. Almon***,[2] who reiterated that any slanderous act directed at the judicial institutions would be tantamount to contesting the dignity and authority of the king. Over time, any behavior that contradicted the judges' orders and instructions, prohibiting their compliance came to be regarded as punishable.

In *Articles 129 and 215*, respectively, the *Constitution of India* gives the Supreme Court and the High Court the authority to punish for contempt. *The Contempt of Courts Act, 1971*, which came into being as a result of the report submitted by the *Sanyal Committee*, complements these articles and is the primary legal structure governing the offence of 'contempt of court' in the Indian landscape. *Section 2* of the statute divides contempt into two kinds, namely Civil and Criminal contempt, with *Section 2(b)* dealing with civil contempt and *Section 2(c)* with criminal contempt. Civil contempt refers to the wilful disobedience to any judgement, decree, or order of a court. Whereas, Criminal Contempt deals with any act which scandalises the court, prejudices any judicial proceeding or interferes with the administration of justice.

Through the course of this article, the author seeks to analyze the constitutional validity of *Section 2(c)(i)* the *Contempt of Courts Act, 1971* [hereinafter referred to as "**the Act**"] and whether the provision and its use by the Honorable Courts today is violative of *Articles 19 14*, and the preambular values and basic features of our Constitution.

Section 2(c)(i) [hereinafter referred to as "**the impugned sub section**"] reads as follows:
"2. *(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—*
(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court;"

[2] *R. v Almon*, [1765] Will. 243.

The article is split into 4 parts, wherein Part II will analyse if the above sub section violates Article 19(1)(a) of the *Constitution of India*; Part III will delve into the unconstitutionally and incurably vague nature of *Section 2(c)(i)*; Part IV will assess if and how the sub section is manifestly arbitrary and a violation of *Article 14*, and lastly; Part V will look into how the offence of *'scandalizing the court'* is rooted in colonial assumptions and is a violation the principles of natural justice.

II. SECTION 2(C)(I) AND ARTICLE 19(1)(A), A REASONABLE RESTRICTION?

2.1 The Test of Overbreadth

It is a well settled principle in law that any legislation having the effect of restricting the right to free speech and expression on any of the grounds enumerated in *Article 19(2)* must be couched in the narrowest possible terms and cannot cast a "wide net".[3]

The impugned sub-section has an extremely wide import and is incapable of objective interpretation and even-handed application. To draw an illustration of the same; a mere interrogation by a traffic constable about whether the red beacon on the hood of a judge's car was authorized was held to be contempt on the grounds of "scandalizing the court".[4]

In the case of ***Kameshwar Prasad v. State of Bihar***,[5] the Court opined that;

"the imposition of a blanket-ban on all demonstrations of whatever type, innocent as well as otherwise, cannot be upheld."

Thus, we see that the sub-section imposes a "blanket ban" over any manner of criticism of the judiciary and hence is liable to be struck down as overbroad,[6] and not a reasonable restriction under *Article 19(2).* Moreover, the freedom of speech and expression also includes the right to criticize any institution.[7]

Even though a Constitution Bench of the Supreme Court has distinguished between defamation of an individual judge and the offence of contempt of court in ***Brahma Prakash***

[3] *Shreya Singhal v Union of India*, [2015] 2 SCC 1.

[4] *Allahabad v State of U.P.*, [1993] AIR [1993] All. 211.

[5] [1962] Supp [3] SCR. 369.

[6] *Chintaman Rao v State of Madhya Pradesh*, [1951] AIR [1951] SC 118; *State of Madras v V G Row*, [1952] AIR [1952] SC 196.

[7] *S. Rangarajan v P. Jagjivan Ram*, [1989] SCR [2] 204.

Sharma v. State of Uttar Pradesh,[8]the offence is yet applicable in instances where speech has been directed not against the court but against an individual judge.[9]This signifies the overbroad language of the impugned sub-section, which grants courts at every level an absolute power to quell any and all criticism of the courts or judges.

2.2 Criminalizes speech in the absence of proximate and tangible harm

The right to free speech and expression is essential to a functioning democracy[10] and cannot be abridged on the basis of a mere speculation of harm.[11]The impugned sub-section restricts speech on the basis of a "*tendency*" to scandalize or lower the authority of the courts. This is constitutionally impermissible in the absence of some evidence or connection,[12] which alters the harm from a purely speculative one to a real, proximate and likely one.[13]Further, dissenting and critical views are almost always likely to have such a tendency, and the impugned sub-section has the effect of targeting speech of this kind as a result.

This Apex Court observed in ***S. Rangaraian v. P. Jagjivan Ram***[14]that;

"*The anticipated danger should not be remote, conjectural or farfetched and should have proximate and direct nexus with the expression, equivalent of a 'spark in a powder keg.'"*

Hence by criminalizing the mere likelihood of tangible and material harm, the impugned sub-section remains incapable of amounting to a reasonable restriction under *Article 19(2).*

The real test of constitutionally permissible restrictions of speech has been laid down by the US Supreme Court as the *"clear and present danger test"* in the case of ***Bridges v. California***[15]wherein the Court opined that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. It is this connection of harm which can be distinctively found in *Sections 2(c)(ii)* and *2(c)(iii)* of the *Contempt of Courts Act,*1971, but not in *Section 2(c)(i).*

[8] [1954] S.C.R. 1169.

[9] *D.C. Saxena v the Chief Justice of India* [1996] 5 SCC 216.

[10] *Maneka Gandhi v Union of India,* [1978] AIR [1978] SC 597.

[11] *Pennekamp v State of Florida,* [1945] 328 US 331: 90 Law Ed 1295,

[12] *Ram Manohar Lohia v State of Bihar,* [1966] 1 SCR 709,

[13]*Kameshwar Prasad v State of Bihar,* [1959] AIR [1959] Pat 187; *Shreya Singhal v Union of India,* [2015] 5 SCC 1.

[14] [1989] 2 SCC 574.

[15] 341 U.S. 242 [1941] [United States of America].

2.3 Has a Constitutionally impermissible Chilling Effect

A law is said to have a *chilling effect* when it stifles legitimate speech through excessively broad laws.[16]It is the unwanted prohibition of one's free speech for the fear of criminal sanction thereby having the devastating impact through self-censorship in a free democracy.[17]

In the case of ***P.N. Duda v. P. Shiv Shankar,***[18]the Court held that;

"*Judges have their accountability to the society and to criticize a judge fairly albeit fiercely, is no crime but a necessary right."*

The Court further observed that in a free marketplace of ideas, criticisms about the judicial system or Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice.

However, the over breadth and vagueness[19] of the words in the said provision creates the uncertain threat of criminal penalty and the resulting reality of its inconsistent application has the effect of threatening dissenters and silencing bonafide critics.[20] As a result, the impugned sub-section is consequently liable to be struck down on account of having a chilling effect on free speech and expression as it stifles legitimate criticism[21]and dissent[22] to the detriment of the health of the democracy.

In addition to creating a chilling effect as outlined above, the impugned sub-section impacts dignity and liberty under *Article 21*.[23] The right to reputation has been held to be a vital subset of *Article 21*[24] and a conviction under the impugned subsection not only leads to imprisonment, but it also impacts the fundamental right to reputation of the speaker or dissident.

[16] *Wieman v Updegraff*, 344 [1952] U.S. 183 [1952] [United States of America].

[17] *Anuradha Bhasin v Union of India*, [2019] WP[C] 1031.

[18] [1988] 3 SCC 168.

[19] *Petronet LNG Ltd v India Petro Group*, [2009] SCC OnLine Del 841.

[20] *Maneka Gandhi v Union of India*, [1978] 1 SCC 248.

[21] *R Rajagopal v State of Tamil Nadu*, [1994] 6 SCC 632.

[22] *S.Khushboo v Kanniammal*, [2010] 5 SCC 600.

[23] INDIA CONST. art. 21.

[24] *Om Prakash Chautala v Kanwar Bhan*, [2014] 5 SCC 417; *Subramanian Swamy v Union of India*. [2016] 7 SCC 221; *Umesh Kumar v State of A.P.*, [2013] 10 SCC 591; *Kishore Samrite v State of U.P.*, [2013] 2 SCC 398.

2.4 Fails the Test of Proportionality

The adherence to principle of proportionality is necessary for a law to be a reasonable restriction under *Article 19(2)*,[25] the principle has evolved into a four-pronged test, as set down in ***Modern Dental College and Research Centre v. State of Madhya Pradesh***[26]and affirmed in ***K.S. Puttaswamy v. Union of India:***[27]

a) The existence of a legitimate state aim;
b) The rationality prong, the existence of a rational nexus between the aim and the infringement of the right;[28]
c) The necessity prong, that the infringement is the least restrictive measure available for the fulfillment of the aim, and;
d) A balance should be struck between the extent of the restriction and the benefit that the State hopes to achieve by its imposition.[29]

While the aim of the impugned sub-section is to maintain public confidence in the courts, its uncertain application in a plethora of judgments has resulted in the opposite. Lord Denning in ***Regina v. Commissioner of Police***[30]opined that public confidence in the Judiciary must rest on "*surer foundations*" and not on contempt provisions alone.

In ***Internet and Mobile Association of India v. Reserve Bank of India***;[31]the Court held that there is an obligation to implement the least intrusive measures while dealing with infringement of a right. Here, *Section 2(c) (ii)* and *(iii)* of the Act already contain provisions fulfilling the aim of the legislation,[32] rendering *Section 2(c)(i)* unnecessary.

The sub-section is in contravention of rationality prong, as it fails the test of over breadth, and the test of proximate harm resulting in the nonexistence of a rational nexus between the already fulfilled aim and the infringed right.

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[25] *State of Madras v VG. Row*, [1952] SCR 597.

[26] [2016] 7 SCC 353

[27] [2019] 1 SCC 1.

[28] *Arunachala Nadar v State of Madras*, [1959] AIR 1959 SC 300.

[29] *Chintaman Rao v State of Madhya Pradesh*, [1951] AIR 1951 SC 118.

[30] *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn*, [1968] 2 QB 118 [England & Wales].

[31] [2018] W.P[C] No. 528.

[32] Contempt of Courts Act, No 70 of 1971, *Objects and Reasons*.

Lastly, the impugned sub-section creates an untenable imbalance between the extent of the restriction and the benefit that the State hopes to achieve by its imposition. By criminalizing all criticism of the judiciary in sweeping terms, the limitation imposed by sub-section is excessive, arbitrary and beyond what is required[33] as it creates an imbalance.[34]

III. SECTION 2(C)(I), ITS INCURABLY VAGUE NATURE AND THE IMPOSSIBILITY TO DEMARCATE THE SCOPE AND LIMITS OF THE SECTION

The phrase *"scandalizes or tends to scandalize*" in the impugned sub-section invites subjectivity and greatly differing readings and application which is incapable of being certain and even-handed.[35] It is an established proposition of law that a statute using vague terms such that it is difficult to define or limit[36] its scope is liable to be held to be invalid.

Inconsistencies in the application of the law have arisen due to its incurably vague nature like; in the cases of ***P. Shiv Shankar***, [37] wherein the respondents were held not guilty of scandalizing the court despite referring to Supreme Court judges at a public function as "antisocial elements i.e. FERA violators, bride burners and a whole horde of reactionaries" but in ***D.C. Saxena***[38]where the respondent was held guilty of criminal contempt for alleging that a Chief Justice was corrupt and that an F.I.R. under the I.P.C. should be registered against him.

In ***Kartar Singh v. State of Punjab***[39] this Hon'ble Court has held that;

"*it is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning..."*

[33] *MRF Limited v Inspector Kerala Government*, [1999] AIR [1999] SC 188, 191.

[34] *Om Kumar v Union of India*, [2000] AIR [2000] SC 3689.

[35] *KA Abbas v Union of India*, [1973] AIR [1973] SC 123.

[36] *State of Madhya Pradesh v Baldeo Prasad*, [1961] 1 SCR 970.

[37] *P.N. Duda v VP. Shiv Shankar*, [1988] 3 SCR 547.

[38] *D.C. Saxena v the Chief Justice of India* [1996] 5 SCC 216.

[39] [1994] 3 SCC 569.

It has also been provided in the landmark case of ***Shreya Singhal v. Union of India***[40] that ordinary people must be able to understand what conduct is prohibited, and what is permitted, as the Constitution does not permit a net large enough to catch all possible offenders and then leave it for the Court to decide who could be held guilty.

The impugned sub-section thus clearly fails the test outlined by the Constitution Bench in the above cases. The prohibitions in the impugned sub-section lack any clear definition and do not provide persons with a reasonable opportunity or adequate warning regarding what is prohibited, and is consequently liable to be struck down on account of vagueness.

IV. SECTION 2(C)(I) IS MANIFESTLY ARBITRARY AND VIOLATIVE OF ARTICLE 14

The impugned sub-section fails the test of manifest arbitrariness laid down by the Hon'ble Supreme Court in ***Shayara Bano v. Union of India***[41] and followed in ***Navtej Singh Johar v. Union of India***[42] in which a widely and vaguely worded offence of colonial vintage criminalized otherwise lawful and constitutionally protected activity;

"The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. The arbitrariness doctrine when applied to legislation would involve a law being disproportionate, excessive or otherwise being manifestly unreasonable."

It is the settled position that a statute enacting an offence or imposing a penalty has to be strictly constructed.[43]In contrary to the same, the broad and ambiguous wording of the impugned sub-section violates *Article 14* by leaving the offence open to differing and inconsistent applications. This uncertainty in the manner in which the law applies renders it manifestly arbitrary and violates the right to equal treatment.

[40] [2015] 5 SCC 1.

[41] [2017] 9 SCC 1.

[42] [2018] 10 SCC l.

[43] *Sakshi v Union of India*, [2004] 5 SCC 518.

The violation of *Article 14* is evident in the cases relating to punishment for the offence of "*scandalizing the court.*"In ***P.N. Duda v. P. Shankar***[44]the allegation of judges being biased toward rich class people was held not to be "*scandalizing"* the court. But, in ***E.M.S. Namboordripad v. T. Narayan Nambiar,***[45] the statement that Supreme Court judges are inclined towards the rich class was held to be a contempt of court. These instances per se show the inconsistency, and arbitrariness with respect to *Section 2(c)(i).*

Another example of the arbitrariness in the impugned sub-section is seen in the cases of ***Bathina Ramakrishna Reddy v. The State of Madras***[46]where the appellant alleged theHigh Court judge to be indulged in bribery and after investigation, it was found that the allegations were true, even then the court held the appellant liable for contempt of court. But, in another case of ***Brahma Prakash Sharma v. State of Uttar Pradesh***[47] when the appellant claimed two High Court judges as incompetent in law, the court affirmed the contention of the appellant and didn't hold him liable for contempt of court.

While this confusion was resolved to some extent with *The Contempt of Court Amendment Act, 2006* by which truth has been permitted as a valid defence, the court in the ***M.K Tayal case***[48]refused to accept 'truth' as a defence and held the contemnor liable by stating that the truth exposed was not bonafide and in public interest.

Hence, the arbitrary and inconsistent application of *Section 2(c)(i)* by the judiciary in contravention of *Article 14 of the Constitution* warrants its removal from the *Contempt of Courts Act,* 1971.

[44] [1988] SCR [3] 547.

[45] [1971] SCR [1] 697.

[46] [1952] SCR 425.

[47] [1954] SCR 1169.

[48] *Court on its own motion v M.K. Tayal & Ors.*, [2007] 98 DRJ 41 [DB].

V. SECTION 2(C)(I) IS PART OF A COLONIAL HISTORY OF OPPRESSION AND IS VIOLATIVE OF THE PRINCIPLES OF NATURAL JUSTICE

The offence of "*scandalizing the court"* was obsolete in England by the end of the 19th century and was only considered suitable to "colored" people from the colonies, such as India.[49] Both the Privy Council of England and the Supreme Court of India have acknowledged the underlying subtext of racism in the law in ***Dhooharika v. Director of Public Prosecution***[50]and ***Delhi Judicial Service Association v. State of Gujarat***[51]respectively.

Furthermore, the offence of "*scandalizing the court*" has either been abolished or drastically changed in a number of common law countries. The United Kingdom Parliament has abolished the offence through the *Crime and Courts Act, 2013 (Section 33),* acting on the recommendations of their Law Commission.[52]The offence has also been held unconstitutional in Canada in ***R. v. Kopyto***[53] on the grounds that it fails the test of proportionality, and casts an undue burden on free speech and expression guaranteed under the *Canadian Charter of Rights and Freedoms.*

Contempt proceedings are considered to be quasi-criminal in nature.[54]In the case of ***Fowler v. Padget***[55]it has been held that it a basic principle of natural justice that the intent and the act must both concur to constitute the crime. The impugned sub-section takes away even the basic protection of *mens rea*, holding that all words that "*scandalize or tend to scandalize"* regardless of the intention/recklessness with which they were uttered are to be considered an offence under the provision.[56]

In ***Regina v. Gough,***[57] it was observed that in the exercise of contempt jurisdiction;

[49] *McLeod v St Aubyn*, [1899] AC 549 [England and Wales].

[50] [2014] UKPC 11 [England and Wales].

[51] [1991] 4 SCC 406.

[52] United Kingdom Law Commission, *Contempt of Court: Scandalising the Court,* LC 335 [2012].

[53] [1987] 62 O.R. [2d] 449 [Canada].

[54] *Sheoraj v A.P. Batra*, [1955] AIR 1955 All 638.

[55] [1798] 101 ER 1103.

[56] *In Re: Arundhati Roy v Unknown*, [2002] AIR 2002 SC 1375.

[57] [1993] 2 All ER 724.

"*It is vitally important to avoid giving the impression that the judge is biased or that the decision has been prompted by personal animus*."

However, in the ***Balwani's case***,[58]rather than referring the contempt matter to some other bench, the same bench at which the shoe was allegedly thrown took cognizance without even a "cooling-off" period, violating the right to an independent tribunal and in serious violation of the principle "*Nemo judex in causa sua."*

[58] [1999] AIR 1999 SC 1300.

VI. CONCLUSION

The offence of scandalizing the court in India desperately needs a reassessment and the recent Prashant Bhushan case is adequate proof of the same. The fact that mere tweets and social media comments are being pulled up as contempt, scandalizing the court is resulting in a chilling effect detrimental to our democracy where the critics' voices are reducing in number due to the fear of criminal proceedings.

The line between rational criticism and scandalous remarks has been blurred in the current scenario and is virtually non-existent, thus putting at risk the accountability of the judiciary, which is central to preserving the rule of law. One of the most important aspects of any democracy is the freedom to critique and ask questions, and this ability must not be curbed or deterred because of due to apprehension of an extreme and unlikely reaction from the judiciary.

Although it is important to preserve judicial dignity, it cannot and should not be achieved by quelling opposing opinions. *Section 2(c) (ii) and (iii)* of the Act already contain provisions fulfilling the aim of the legislation, rendering *Section 2(c)(i)* unnecessary.

Our courts must accept the English approach not only in terms of having "broad shoulders" but also in recognizing that judicial dignity is a direct product of the judiciary's actions and not an individual opinion. There is no clear trend, as can be seen from the "scandalizing judiciary" precedents. What may be disrespectful to Judge A might not be disrespectful to Judge B.

In this context, a revision on criminal contempt is desperately required to preserve Indian Democracy, following the example of the United Kingdom, which in 2013 abolished the crime of scandalizing the judiciary as a form of disrespect of court based on the recommendations of the United Kingdom Law Commission that held the offence to be in contravention of the right to freedom of speech and expression.