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(Un)Freedom to Criticize the Judiciary in India: Colonial Origins and Postcolonial Realities

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Introduction

Fear of criticism has forever engulfed the defenders of the freedom of criticism. The [stifling of dissent](#) by state institutions that are expected to uphold free expression is [not unusual](#). Arrest, humiliation and targeting of social activists, lawyers, journalists and academics in India have been a constant feature of political life and entered a particularly worrying phase in contemporary times. The law has emerged as a tool of domination in its most naked and primitive form. Among other laws such as sedition, the invocation of contempt of court in India has been particularly disturbing; specifically, the power of the court to punish individuals for making scandalous remarks against judges or the judiciary. Owing to the colonial origin of contempt of court laws and the relationship of such laws with maintaining the sanctity of state institutions, a positivist analysis may amount to no more than ‘vulgar criticism’ joining the rhetorical bandwagon of analysing contradictions in the concept of contempt of court.¹ Instead, an attempt is made here to study the unholy link between the law’s colonial foundation and postcolonial application.

¹ The term ‘vulgar criticism’ is attributed to Karl Marx. He uses it in opposition to ‘true criticism’ of constitutions and laws, which does not merely imply contradictions as existing, ‘but explains them, grasps their essence and necessity’. Karl Marx, *Critique of Hegel’s Philosophy of Right* (CUP, 1970) 92.

Postcolonial realities are significantly shaped by colonial experiences. British colonialism in India was not just a historical episode but an attempt to seal the fate of its subjects for times to come. The effect of colonialism goes beyond temporal or geographical analysis, it shapes the congenital habits and political aspirations of people. State institutions continue to follow colonial practices and laws reflect the same propensity. The colonial agenda of the civilising mission constructed the dyads of civilised/uncivilised, literate/illiterate, knowledge/ignorance and so on. Colonial policies attempted to kill critique and promote subjugation. The experiences of colonial rule made erstwhile colonizers arguably tolerant votaries of universal freedoms and in the postcolonial era formerly colonised elites jumped into the shoes vacated by their colonial masters. The continuation of these dyads in an esoteric way has kept the lamp of domination glowing in postcolonial states, preserved and perpetuated by prevalent structures. Laws relating to criminal contempt on the ground of scandalizing the court exemplify such structures.

Though criminal contempt laws in India may appear a purely domestic issue, the impact of international law is formative. International law and politics helped create and sustain such laws. The foundations of international law were [profoundly shaped by colonialism](#). International law provided the legal justification for colonial expansion, which imposed the sovereign state and its machineries on colonised societies. For instance, the [roots of contempt law in India](#) are in the taking over of Indian territories by the East India Company and subsequent issuance of the *Charter of 1726* by the King of England, by virtue of which Mayor Courts were constituted. The development of international human rights law after the Second World War does not dislodge concerns relating to the continuation of colonial practices; on the contrary, international law remains [structured by the history of colonial encounter](#). International human rights law places the sovereign state at the centre of the realisation of human rights by expecting 'states to police themselves'.² It is only when self-policing fails that the international machinery gets activated,³ thereby making the implementation of human rights primarily dependent upon national procedures. Moreover, as [Richard Falk](#) puts it: 'Sovereignty based on territorial boundaries and international recognition, and given emotional content by nationalist and patrioteering ideologies, tends to override human rights concerns whenever the two sources of rights clash'. In this way, international law and politics structurally creates the possibility of the denial of human rights, and helps sustain colonial practices reproduced within sovereign states.

² Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York, 2016) 12.

³ Ibid.

Scandalizing the Court

Section 2(c) of the *Contempt of Courts Act 1971* states, inter alia, that any publication which 'scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court' amounts to criminal contempt. The *Act* does not specifically define the phrase 'scandalizing the court'. The Supreme Court of India has used this phrase in numerous cases but defined it vaguely, using loose and unclear words and circumlocutory phrases.⁴ If one is unhappy with the court's judgment or the conduct of judges, she has to speak the language of the law to critique it. The moment one imputes external motives to the judges, it may amount to scandalizing the court. Such is the indeterminacy in using the criteria that, on one occasion, where a newspaper article alleged bias on the part of a judge of the Bombay High Court in deciding a case, the [Supreme Court of India held](#) that truthfulness or actual correctness of facts alleged is not a good defence under the law of contempt (unlike in an action of libel for instance). However, through an amendment in 2006, truth was identified as a valid defence though only in situations where the court is satisfied that it is in the public interest and the request for its invocation is bona fide.

In dealing with criminal contempt cases, the Supreme Court has also tried to argue that the freedom to criticize is not available to everyone. This is in continuity with decisions of colonial courts. In 1899, the Privy Council in [McLeod v St. Aubyn](#) noted that contempt by scandalizing the court had almost become obsolete in England. However, Lord Morris opined in his judgment: 'in small colonies consisting principally of coloured populations the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of, and respect for the Court'. Criminal contempt of court was used to suppress any form of dissent, alternative opinion and individuality.⁵ It was considered part of the white man's burden to ensure that the colonised think, act and behave the way colonisers demand. Installing sovereign states in the Westphalian sense into postcolonial societies was possible only through making sure that such thinking was internalised by local masses. Criminal contempt of court was one way of achieving such internalisation. It became a tool to introduce the apparatuses of the modern state in colonised societies, checking radical dissent, maintaining institutional hegemony, and guaranteeing the legitimization of ruling ideas.

⁴ For an analysis of court judgments on scandalizing the court see Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (Penguin, 2017) 155-202; Gautam Bhatia, *Offend, Shock, or Disturb* (OUP, 2016) ch 9.

⁵ For an analysis of judgments on contempt of court during colonial times in India, see Rajeev Dhavan, *Contempt of Court and the Press* (Tripathi, 1982) 41-51.

Demeaning criteria continued to be used throughout colonial times to determine the conditions under which criticism of the judiciary was permissible. In *Ambard v Attorney General for Trinidad & Tobago*, it was noted that in deciding the cases relating to scandalizing the court 'local conditions' must not be lost sight of. Application of cultural relativism in the colonies to exclude dissent helped preserve the civilizational superiority of the global north over the global south. Such application shows that the civilising mission did not ipso facto mean the extension of individual rights that existed in Britain to its colonial subjects everywhere. Rather, it was to transform the relationship between the state and colonial society and reify European standards into global acceptance. This was possible only if the local population internalized the transformation of sociopolitical relations. Allowing criticism of the judiciary, an institution that promises neutrality and defines legitimate expectations, would have posed a significant threat. For this reason, it would be a mistake to see the law of contempt as merely 'a political weapon to deal with criticism of British justice in India'.⁶

The scope of exclusionary criteria on who could criticize the judiciary gradually got enlarged. In *Re Abdul Hasan Janbar and Others*, the Allahabad High Court in 1926 considered illiteracy among the masses as ground to sentence the contemnor. Justice Cecil Henry Walsh stated that:

[T]o the uneducated and illiterate, matter which appears in print necessarily carries greater weight. They do not as a rule possess the balance of Judgment, which *education* confers, to be able to distinguish between what may be merely idle and foolish and what is deliberately intended to misrepresent the truth.⁷

The narrative of superior rationality based on certain forms of education further conditioned and constrained the freedom to criticize.

After decolonization, even though the law relating to criminal contempt of court has acquired a more moderate form, it retains colonial tendencies. When the *Constitution of India* was being drafted, a member of the Constituent Assembly (Biswanath Das) echoed [his apprehensions about the use of contempt law](#) by the judges in independent India as they were 'trained under the British tradition and they have misapplied justice and kept us down'. Das further added that 'many penniless lawyers became judges and regulated and controlled the affairs and rule of the alien Raj by the word "contempt of court" and the chicken-hearted lawyers got frightened at them'. The conduct and loyalty of local judges to British rule was strategic. For the

⁶ Dhavan (1982) 49.

⁷ Italics added.

British, it amounted to 'eliciting the consent of at least some sections of the traditionally dominant classes' for their rule and also demonstrating local representation in the colonial administration through 'the symbolic arrangement of political space'.⁸ Speaking on 17 October 1949, [Biswanath Das](#) doubted that after independence judges had changed to 'have a better realization of their function and duties'. Nevertheless, interventions such as his failed to make an impact, and the Constituent Assembly [decided to recognise](#) contempt of court as a reasonable restriction to freedom of speech and expression under Article 19 of the *1950 Constitution of India*, without defining its actual scope in [hopes](#) that judges will not 'behave as they have been behaving in the past'.

While the [contempt law in India](#) is inspired by the British position, the last successful prosecution on this ground in England and Wales was in 1931. Based on a recommendation of the Law Commission of England and Wales in 2012, the offence of criminal contempt on the ground of scandalising the court has been abolished.⁹ Indeed, 'Indians are the only surviving Englishmen', [Malcolm Muggeridge](#), an English journalist and satirist, once reportedly said. It is worth noting that the rationale for the abolition of scandalizing the court by the Law Commission of England and Wales was based on domestic reasoning. The Law Commission did not find the offence of scandalizing the court in itself contrary to the European Convention on Human Rights.¹⁰

Courts in independent India continued the colonial practice of looking at the freedom to criticize from the perspective of educational status and socioeconomic conditions. Therefore, the Allahabad High Court in [State v Raghubir Sabai Kaithwar](#) (1966) stated that:

The democracy in India is less than two decades old, where a vast majority of the population is still *illiterate* and sadly suffers from lack of responsibility and propriety. The social and economic conditions of the public in India are again such that it would be very dangerous, to grant them the liberty of scandalizing the courts in unbridled manner.¹¹

⁸ Partha Chatterjee, 'Was there a Hegemonic Project of the Colonial State?' in Dagner Engels and Shula Marks (eds.), *Contesting Colonial Hegemony: State and Society in Africa and India* (British Academic & St Martin, 1994); as reproduced in Diana Brydon (ed.), *Postcolonialism: Critical Concepts in Literary and Cultural Studies, Vol IV* (Routledge, 2000) 1519, at 1520.

⁹ Law Commission of England and Wales, *Contempt of Court: Scandalising the Court* (2012).

¹⁰ *Ibid*, para 93(2).

¹¹ Italics added.

Therefore, Supreme Court explained the justification for scandalizing the court by putting democracy and public interest on the one hand, and individual freedom on the other as competing ideas.

The idea that not everyone has the right to criticize the judiciary gradually acquired more disturbing attributes. In [Re Arundhati Roy](#) (2002), the Supreme Court of India went further in identifying the kind of persons who can criticise the court and those who cannot. The Supreme Court noted that criticism if made in good faith and public interest 'may not' amount to contempt. However, it further explained what is meant by good faith and public interest, in the following words:

To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, *his knowledge in the field regarding which the comments are made* and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself.¹²

The 1997 Booker Prize winner Arundhati Roy was judged not to qualify under the abovementioned test as she lacked 'special knowledge of law and the working of the institution of judiciary' and 'only claimed to be a writer of repute'. More recently, on 27 April 2020, the [Supreme Court](#), after emphasising that freedom to criticize is guaranteed to every citizen, noted: 'However, that citizen must have some standing or *knowledge* before challenging the ability, capability, knowledge, honesty, integrity, and impartiality of a Judge of the highest court of the land'.¹³ The institutional habit to demand, rather than command respect is a colonial inheritance, and Indian courts seem to have developed a discomfortingly familiar native standard in relation to the exercise of freedom to criticize the judiciary.

Power fears the exercise of freedom to dissent by the subalterns, marginalised and oppressed, particularly when it is in furtherance of a class consciousness intending to question and transform dominant societal structure. Therefore, Indian courts tend to use contempt law differentially in relation to certain types of criticism. For instance, the following statement, inter alia, was [judged contemptuous](#): 'Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and illiterate person the judge instinctively favours the former'.¹⁴ As Upendra Baxi notes,

¹² Italics added.

¹³ Italics added.

¹⁴ See also [Het Ram Benival and Ors v Raghunveer Singh and Others](#), Supreme Court of India, 21 October 2016; cf [Hari Singh Nagra and Ors v Kapil Sibal and Others](#), Supreme Court of India, 15 July 2010; [PN Duda v P. Shiv Shanker and Others, Supreme Court of India](#), 15 April 1988.

'contempt power asserts itself more vigorously against class analysis of the judiciary'.¹⁵ The scope of freedom to criticize the judiciary in India is not just limited but selective and arbitrary.

Concluding insights

A few inferences may be drawn. First, the 'knowledge' criterion achieves the same result as the dyads invoked by colonisers. Confining knowledge to technical legal language delegitimizes other forms of knowledge that contribute to cognitive skills. It discards knowledge based on lived experience and perceives law as a phenomenon functioning independent of social realities. In the same manner that the British rejected that there could be civilisations beyond their imagination of civilisation, the jurisprudence relating to scandalizing the court is myopic towards different forms of knowledge. By negating the plurality of knowledge, both in form and content, it perceives and installs its own imagination as an authoritative truth based on higher rationality. Likewise, by extending the freedom to criticize to only few who are conversant with a special form of knowledge, it fails to allow for Luxembourg's insight that

Freedom is always and exclusively freedom for the one who thinks differently. Not because of any fanatical concept of 'justice' but because all that is instructive, wholesome and purifying in political freedom depends on this essential characteristic, and its effectiveness vanishes when 'freedom' becomes a special privilege.¹⁶

Second, the law on scandalizing the court does not just suppress and regulate dissent, but also creates a culture of constructing freedoms in an exclusionary way with an intention to discipline dissenters. Such disciplining is portrayed as important for maintaining the sanctity of the relationship between state and society as positioned by the modern nation state and its institutions. As Partha Chatterjee mentions, 'the entire business of colonial rule was to appear as one great experiment in the education of a backward people in the ways of modern social life'.¹⁷ The colonised elites were the first to be trained in this modern way of life and thereafter devotedly carried the bastion of the civilising mission, hence enabling a native version of the white man's burden. Postcolonial ruling elites strived 'to establish a similar colonial relationship between the state and society'.¹⁸ Law relating to scandalizing the court evidences this trajectory.

¹⁵ Upendra Baxi, *Marx, Law and Justice* (Tripathi, 1993) fn 11.

¹⁶ Rosa Luxembourg, *The Russian Revolution* (trans. Bertram Wolfe, Workers Age, 1940) chapter 6.

¹⁷ Chatterjee (2000) 1522.

¹⁸ Ashish Nandy, *The Romance of the State and the Fate of Dissent in the Tropics* (OUP, 2008) 8.

Third, the effect of colonialism was not just territorial but also cultural and social subjugation. British policies were successful in achieving both direct and indirect obedience. Likewise, the law relating to criminal contempt by scandalizing the court results in both active and passive compliance. By punishing or reprimanding a person for contempt, the court not only punishes the person for her individual conduct but symbolically establishes the limits of acceptable behaviour and fixes the boundaries of dissent for others to follow. So the effect of individual trials is not isolated to the specific facts of a given case, but rather works as a tool ensuring long lasting social control. Such exercises of power, compelling active and passive compliance, follow the respective forms that Gramsci identifies of force and consent, authority and hegemony, violence and civilisation.¹⁹ Every conviction serves to create a habit or a belief system to be internalized by the society.

The silence of international law regarding the offence of scandalizing the court does not mean the issue is peripheral to the discipline. It is deeply knit within the international system to preserve states' judicial sovereignty. It is no accident that the question of compatibility of the offence of scandalizing the court with international human rights obligations has not been raised during the Universal Periodic Review [process](#) and in Human Rights Committee's [documents](#) on India, despite questions being raised in the [submissions made by civil society before the Committee](#), and in [other documents](#). Under the indeterminate formulation of rights in treaties, silence of international bodies may be taken by states as a sign of compatibility and potential justification for laws such as the offence of scandalizing the court.

What then of the freedom to criticize? Depending on who wants to exercise them, freedoms guaranteed by the postcolonial liberal legal order may be a facade. Their guarantee is selective and it often becomes difficult to ascertain whether exceptions are part of the rule or the rule is the exception. The scope of free expression seems to be defined by the deferential application of its exceptions, and not vice versa. From a functional standpoint, it recurrently offers differential treatment to those who bow to and to those who resist political, legal and social institutions. That is how hegemony operates. It sustains oppression behind the facade of a formal system based on freedom, justice and rule of law. Those who dare to dissent are forced to play multiple games, to use the vocabulary of the mainstream to critique the mainstream under conditions laid by the mainstream. This is particularly true for postcolonial societies. The future of the Indian people was planned before India emerged as an independent nation and the charade of freedoms in the postcolonial state was plotted

¹⁹ Antonio Gramsci, *Selections from the Prison Notebooks* (International, 1971) 170.

way before territorial independence was attained. The people were designed to be unfree, unaware of their revolutionary potential.