CONTEMPT LEGISLATION: A TIGHTENING NOOSE AROUND FREE SPEECH

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ABSTRACT

Change is inevitable! As and by a country progresses, the citizens become au fait with their rights and duties. During such progress, obsolete legislations pose as hindrances. Laws which once were used by the colonial barbarians to stifle dissent and criticism against them, should hold no place in today's world. The law regarding contempt is one example of such a turn of events. The article unfolds by providing an insight into the definition of contempt and its development through time. The authors through this article have tried to enunciate how the unbridled power of contempt can, in both a theory and a praxis, be termed as a tool that stifles the fundamental right of freedom of free speech. It explains that contempt of court is a reasonable restriction and that the right of freedom of speech and expression is not absolute as no right can be. It establishes firmly that the contempt legislation in India provides for vague definitions and provisions that irrevocably affects the fundamental rights of a citizen. It also mentions the existence of a thin demarcating line between criticism and contempt and how in most cases is forsaken by the courts. Further, the article goes on to throw light upon the ludicrous instances where the power of contempt was used to criminalise dissent that ultimately mars the reputation of the accused. Towards the end, the authors have imbibed suggestions that would provide a hand in implementing amendments to the present law. We present this article, hoping that it would stimulate further commitment in exploring the nebulous and fragile axes of contempt law that hitches its way to silence criticism and bring out a deliberate attempt in resolving this burning issue and alongside restoring faith in the judiciary.

Keywords: Speech, Expression, Freedom, Restriction, Contempt, Constructive criticism, Natural Justice.

"IF LIBERTY IS TO MEAN ANYTHING AT ALL, IT MEANS THE RIGHT TO TELL PEOPLE WHAT THEY DO NOT WANT TO HEAR."

— George Orwell

INTRODUCTION

Speech and expression are primitive forms of communication. It holds immense power and conveys one's ideas, unfettered by the fear of retribution. The freedom of speech and expression being regarded as the first condition of liberty and the mother of all liberties, has a preferred position in the hierarchy of liberties in a civil society. The untrammeled flow of words is the essence of an unhindered social structure, to have it taken away would mean a nation's downfall. The judiciary being one of the three pillars of democracy is considered to be the guardian of all rights, but when it comes to its integrity, it spares no being and holds them guilty of contempt. This is when the freedom of speech and the contempt of court cross paths. The tussle between the two has led to several decisions by the judiciary some of which have been highly criticized since they seemingly threaten the paramount right of free speech.

UNDERSTANDING CONTEMPT

One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may also be a contempt of this court in prejudicing mankind against persons before the cause is heard.[1] A contempt of court is a matter which concerns the administration of justice and the dignity and authority of judicial tribunals.[2] . The law dealing with contempt of courts is for keeping the administration of justice pure and undefiled[3]; and, jurisdiction in contempt is not a right of a party to be invoked for the redressal of its grievances.[4]

The notion of contempt is a British rule that subsided centuries ago. It was in 2013 that Great Britain abolished it.[5] It was said by its Law Commission that it was not only intended 'to prevent people from getting the wrong impression of the magistrates ... but it is also important that the public does not get the right idea when there are shortcomings.' This clearly was done

[1] In re: Read v. Huggonson, (1742) 2 Atk. 469.
[2] A. Ramalingam v. V. V. Mahalinga Nadar, AIR 1966 Mad. 21
[3] In re: Bineet Kumar Singh, AIR 2001 SC 2018; Shakuntala Sahadevram Tewari (Smt.) & Anr. v. Hemchand M. Singhania, (1990) 3 Bom CR 82
[4] Ibid at 2.
[5] Human rights law and policy review, Freedom of speech vis-a-vis contempt of court, Dec 7, 2020

with an aim to cover up judicial bribery. It nonetheless conflicted with the freedom of speech and expression.

The law of contempt in India is governed by the Contempt of Courts Act 197. The Act categorizes the offence of contempt into civil and criminal contempt.[6] The Supreme court and the High Courts are vested with the power to hold for contempt by virtue of Articles 129 and 215 of the Constitution of India, respectively. These powers are read in conjunction with Article 142(2) of the Constitution and Section 228 of the Indian Penal Code. Contempt of court has been defined as 'Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity'[7]

RIGHT OF FREE SPEECH VS. CRIMINAL CONTEMPT OF COURT:

The corner-stone of the contempt law is the accommodation of two constitutional values - the right of free speech and the right to independent justice. [8] Mere fair comments on the judges or inconsequential contemplation about their decisions should not be the basis for initiating contempt proceedings. The ignition of contempt action should be substantial and malafide interference with fearless judicial action. It has been reiterated by the Hon'ble Supreme Court of India that, the well-settled principle that jurisdiction in contempt is not to be invoked unless there is a real prejudice which can be regarded as substantial interference with the due course of justice.[9] Dissemination of complete information facilitates 'Right to Know'. The right to know, receive and impart information has been recognized within the right to freedom of speech and expression.[10] Right to know has some broad special purposes to serve[11], including aid in the discovery of truth and strengthening the capacity of an individual in participating in decision making. Muzzling of the free flow of information is pernicious to the idea of institutional checks and balances and is also detrimental to public interest.[12] A blanket ban on the right to freedom of speech and expression holds the power to shake the conscience of this country.

"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

[6] Contempt of Courts Act 1971, p. Section 2(a).
[7] Black's Law Dictionary 4th Ed. Rev.6-1971, pg. 390.
[8] M/s Chetak Construction Ltd. Vs. Om Prakash and others. JT 1998 (3) S.C.
[9] Rizwan-ul-Hasan v. The State of Uttar Pradesh, (1953 SCR 581)
[10] State of U.P. v. Raj Narain 1975 SCR (3) 333
[11] Bennett Coleman and Co. Ltd. v. Union of India, 1973 AIR 106.; Marsh v. Alabama (1945) 326 US 501
[12] Garrison v. Louisiana, 379 U.S. 64, 77 (1964.)

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", were the words of Justice Blackburn while elucidating about the Contempt laws. Every and all citizens of a democratic country, may they be statesmen or commoners, have the right to comment outspokenly and fairly on the matters that concern the public at large. It is not a question whether any case is subject to appeal or not; citizens still have the right to point out the judiciary's mistake or call a judgement full of fallacies. Their hands are tied due to the nature of their offices and hence, the only way to let the citizens know, the only way to show vindication is solely through their actions and conduct.

He further states, "Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."[13] Consistent with the esteem and dignity in which the court is held, it is expected from the court to conduct itself in a way that is decent and magnanimous, i.e., to avoid stepping into political and similar controversies.[14]

Encroaching upon a citizen's right to express their opinion by initiating contempt proceedings could prove counterproductive as it could lead into resentment and people might actually lose faith in the judiciary.[15] The Hon'ble Supreme Court of India in the case of Rajesh Kumar Singh vs High Court of Judicature of Madhya Pradesh expressed its concern over the growing popular perception about the judges being over-sensitive in contempt matters. It was observed that the misuse of contempt jurisdiction could erode the public confidence in the judiciary.[16] Holmes J. in the case of Regina v. Secretary of State for the Home Department[17] observed that the right to speech and expression is the lifeblood of democracy that includes the right to fairly criticize in good faith, the work of the court in private or public.

Contempt conviction threatens the right to free speech when a person is charged with criminal contempt under the court's inherent power or through the 1971 Act. The court of law is vested

[13] Lord denning, Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn (1968) 2 All ER 319 (CA)
[14] Manisha Mukharjee v. Asoke Chatterjee, (1984) 2 CHN 261
[15] Bridges v. California, 314 U.S., 252, 268 (1941).
[16] Rajesh Kumar Singh vs High Court of Judicature of Madhya Pradesh Appeal (crl.) 321 of 2001
[17] [1994] QB 198

with unbridled powers to hold any person guilty of contempt.

The Supreme court in the case of In Re Vinay Chandra Mishra[18] has exceeded its contempt powers wherein the license of a practicing lawyer could be suspended if convicted of contempt. This judgement was later corrected in the Supreme Court Bar Association v. Union of India[19]. The court observed that the grounds of punishment to determine whether an advocate is guilty of professional misconduct or not could not be expanded and this power of contempt should in all cases be used sparingly to do complete justice to the parties.

NEBULOUS PROVISIONS OF CONTEMPT UNDER INDIAN LEGISLATION

Section 2 (c) of the Contempt of the Courts Act, 1971 defines criminal contempt as when anything is published, or done, which "scandalizes, or tends to scandalize, or lowers or tends to lower the authority of, any court", or "prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding," or "interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner." The phrases "scandalizes or tends to scandalize" and "lowers or tends to lower the authority" can be seen in the Act without any proper explanation for it. The Act is silent as to what situations would be considered as scandalizing and what acts would be considered as the act resulting in lowering the authority of the court. This vagueness leaves it open for unreasonable, dubious and differing interpretations. As long as the words 'scandalizing the court' are present (in the statute book), it will be susceptible to arbitrary exercise of power," retired Madras high court judge K Chandru said.[20]

Section 13 of the Act was inserted by way of an amendment in the year 2006. According to Section 13[21] The courts cannot punish for contempt unless it is 'satisfied' of the presence of obstruction in the administration of justice and there lies no punishment if the person charged 'justifies' his acts by truth as a valid defence. There lies a clear manifestation of prejudice where the life and reputation of a person depends upon the terms like satisfaction and justification on which the court relies.

Upon a bare reading of this section, it can be established that the statute, therefore, puts an

[18] AIR 1995 SC 2348
[19] (1998) 4 SCC 409
[20] Murli Krishnan, Contempt of court provision vague: Former Supreme Court, High Court Judges, Hindustan Times, August 24, 2020 01: 18 AM.
[21] Contempt of courts Act Section 13: Contempt not punishable in certain cases

obligation on the court to assess the situation without taking into consideration the facts and the magnitude of the interference with the course of justice or due process of law as established.[22]. But when such an investigation runs parallel to Article 19(2) of the Constitution, it is found that the threshold followed in the statute is the likelihood of obstruction to the administration of justice. Section 13 suffers from vagueness as it lowers the threshold of reasonable restriction by constructive hinders to the administration of justice[23] whereas, there must be 'actual' obstruction to claim the grounds of Article 19(2) of the Constitution as held in the landmark judgment of Shreya Singhal v. Union of India.[24]

The international guidelines on judicial accountability being part of the Bangalore Principles of Judicial Conduct[25] necessitates that the court of law shall at all times be impartial. According to Principle 2, contempt of court should be used only as a last resort and must conform to all procedural standards. One of the major manifestations of prejudice is exploitation of the power of contempt.

COURTS AND CRITICISM

Undoubtedly, the Contempt of Courts Act, vests a very powerful weapon that rests in the hands of the court of law for larger public interest[26] and power to punish for contempt is a rare species of judicial power which by its very nature calls for the exercise with great care and caution.[27]

The power to punish for contempt was "arbitrary, unlimited and uncontrolled", and therefore should be "exercised with the greatest caution: that this power merits this description will be realised when it is understood that there is no limit to the imprisonment that may be inflicted or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal.[28]

We ought never to forget that the power to punish for contempt, large as it is, must always be exercised wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Judges and courts are alike open to criticism and if reasonable argument is

[22] C.K. Daphtary v. O.P. Gupta, 1971 AIR 1132, 1971 SCR 76
[23] Hrutika Pandey and Gursimran Kaur Bakshi, From Criticism to Contempt: Twitter and Free Speech in India, JURIST – Professional Commentary, September 14, 2020
[24] Shreya Singhal v. Union of India, AIR 2015 SC 1523
[25] UNODC, Commentary on Bangalore Principles of Judicial Conduct
[26] Prem Surana v. Addl. Munsif and Judicial Magistrate, (2002) 6 SCC 722.
[27] Bal Kisan Giri v. State of U.P., (2014) 7 SCC 280; Prag Das v. P.C. Agarwal. 1975 Cr. L.J. 659 at p. 661 (All.).
[28] Legal Remembrancer v. Matilal Ghose & Ors., (1914) I.L.R. 41 Cal. 173

offered against any judicial act as contrary to law or to the public good, no court could or would treat it as contempt of court. Therefore, contempt jurisdiction has to be exercised assiduously with caution and restraint.

There have been many instances where the decisions of the courts have been highly criticised with regard to contempt conviction. In the instances where criminal contempt proceedings have been initiated for mere tweets, it has been argued that the same courts which are the upholders of freedom of speech and expressions are the only ones on the verge of threatening it.[29] In a recent contempt of court case[30], the hon'ble Supreme Court initiated Suo motu contempt proceedings against an Advocate on Record (AOR) for his tweets. On the part of the advocate, it was claimed that the comments were constructive criticism which should not be termed as contempt. To prove a point the Hon'ble Supreme Court fined the AOR with a meagre sum of 1 INR. In yet another case, on March 6, 2002, the Hon'ble Supreme Court held Booker's Prize winner Arundhati Roy[31] guilty of criminal contempt and sentenced her to simple imprisonment of 1 day and imposed a fine of 2000 INR for voicing her distress by protesting alongside the Narmada Bachao Andolan.

ABROGATION OF THE PRINCIPLE OF NATURAL JUSTICE

The Act of 1971, does not recognize one of the basic principles of natural justice, viz, nemo debet esse judex in propria causa, i.e., no man shall be a judge in his own cause. While proceeding in the cases of contempt law, the court arrogates to itself the powers of a judge, jury and executioner. This would lead to perverse outcomes.[32] It is an uncomplicated exercise that the court acts as a neutral party to the conflict of articles. But if the court is itself the victim seeking recompense for the violation of its dignity, can it also be the impartial judge trying the case.

It's one of the rare categories of cases in which principles of natural justice don't apply. Judges hear cases despite being aggrieved persons — either individually or as members of the institution. There is no visible tool to rule out possible bias, except their own sense of fairness, justice and good conscience. It calls for greater self-restraint; unless there is direct interference with the due course of judicial proceedings or obstruction in the administration of justice, courts

[29] The Wire, on January 29, 2021.
[30] In re: Prashant Bhushan 2020 SCC OnLine SC 588
[31] In Re: Arundhati Roy v. Unknown, AIR 2002 SC 1375
[32] Rahul Donde, Commentary, Vol. 42, Issue No. 39, 29 Sep, 2007.

should avoid invoking contempt jurisdiction. Section 5 of the Act of 1971 states that fair criticism of judicial acts cannot be termed as contempt. The irony of this situation is that, it is the judiciary against whom criticism is made holds the power to decide whether the criticism was constructive or not.

FROM INITIATION TO CONVICTION

Initiation of contempt proceedings itself the inceptive point threatening free speech which rather magnifies in manifolds after conviction. Conviction does not remain the sine qua non when it comes to blemishing reputation, the process starts as soon as criminal contempt proceedings are initiated. In whatever amounts the contemptuous statements or actions are, the magnitude of punishment and the harm to reputation remains the same. Even though any such accused is legally exonerated, his reputation and dignity are tarnished infinitely.

lt 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. Section 12 of the Act provides for serious penal consequences for expressing one's constructive criticism, permanently scarring the reputation of that person. When the basic definition of what can be demarcated as scandalizing is unclear, such penal consequences should not be invoked.

ROOM FOR IMPROVEMENT

'Judges should not silence criticism with threat of Contempt of Court but should remove the weakness and drawback that crept into the judicial system', was correctly observed by Justice H. R. Khanna in The State of Bihar vs Contempt Agst. Dr. Suman Lal[33]. While exercising the contempt jurisdiction these words of Professor Harold J. Laski must always be kept in mind: "Every time an intellectual has the chance to speak out against injustices, and Yet remains silent, he contributes to the moral paralysis and intellectual barrenness that grips the affluent world."

It is a need of the hour that the Courts show empiricism, tolerance and dignified indifference[34] towards critical view. To iron out the uncertainty of the courts approach on contempt convictions and pertinent question on the Act of 1971, a literal solution would be a reference

[33] The State of Bihar vs Contempt Agst. Dr. Suman Lal, OR. CR. MISC. (DB) No.4 OF 2009
[34] In Re: S Mulgaokar, AIR 1978 SC 727

to the constitutional bench. It would help give the definition of contempt law a stringent approach and ease out the scuffle between contempt and free speech. A robust, strong, uninhibited, and informed criticism of the functioning of the judiciary is desired by the retired supreme court judges for the purpose of judicial accountability. The major obstacle in this path is the Contempt of Courts Act and its Section 2(1)(c) on 'scandalizing the court'. This was challenged before the Supreme Court. Unless it is struck down, it being unlikely that the Parliament will repeal it, intolerant judges retain in their power the weapon which silences criticism and has a chilling effect.

CONCLUSION

There exists a substantial question as to whether and when a court criticism will amount to contempt or whether there exists any predetermined formula that would clearly establish which critique would constitute contempt. It is a point of cognizance and also an open question as to how the striking integrity of the Court plummets by words or action of a person. While it is to be noted that the constitution guarantees the right to freedom of speech and expression, contempt of court is indeed one of the reasonable restrictions that act as a rider to this right since no right can be absolute. It is indeed assertive that free speech or expression cannot be equated or confused with a license to make unfounded and irresponsible allegations against the judiciary[35]. Yet, when a court exercises its contempt powers, it is pivotal to be prudent when restriction is imposed upon fundamental rights. Criminalizing speech and imposing harsh sanctions exerts a rather chilling effect on the fundamental right to freedom of speech. To be able to express one's views and criticise when the authorities fail to deliver justice is the key to have a check on the foundation of democracy. Afterall, India is the largest democracy in the world!

[35] Radha Mohan Lal v. Rajasthan High Court, (2003) 3 SCC 427