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# INDEPENDENT JUDICIARY AND FREEDOM OF PRESS FOR FREE AND FAIR REPORTING

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## ABSTRACT

"Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men"

Lord Atkin

The law of contempt of court is a highly controversial subject. Where the constitution shields the judiciary from disparaging remarks to ensure 2 independent judicial system, the believers of freedom of speech and expression consider the law to be arbitrary and against the exercise of their fundamental right provided under Article 19(1)(a). The freedom of speech and expression by itself is not an absolute right and is subjected to reasonable restrictions which include contempt of courts. Moreover, the acts which may constitute contempt are not exhaustive and are identified by the courts subjectively; this indefinite structure is the moot point of discussion for the legal fraternity. The law of contempt of courts was not discussed during the conception of the Constitution and the Contempt of Courts Act was enacted with a view of alleviating this lacuna. The legislative intention of the Act is to set boundaries to the powers of Courts in cases of contempt while ensuring that the sanctity of courts remains spotless. The act has been reforming since the time of its adoption and the esteemed members of the judiciary have served an instrumental role in defending the majesty of the courts. Even though the acts amounting to contempt are non-exhaustive, the Contempt of Courts Act encompasses certain exceptions which include fair and accurate report of judicial proceedings. Media in the contemporary age has garnered the status of the 4th pillar of democracy and therefore, its liberty has emerged as an essential to secure public interest.

This research traces the evolution of the law of contempt, the constituents of fair and accurate reporting and how the media and judiciary interact in light of the fundamental right guaranteed under freedom of speech and expression. It also analyses the inherent challenges to fair reporting and the stance of the judiciary the subject with a view to promote constructive criticism and accurate report of judicial proceedings.

**Keywords:** Contempt, Judiciary, Report, Freedom of Speech and Expression etc.

## **Introduction**

For a democracy to function efficiently, an independent judiciary which holds the trust of the society is indispensable. The Constitution expressly provides for an independent judiciary and ensures that it is shielded from unwarranted disparaging remarks. The inherent structure of the constitution insulates the judiciary and puts it at a pedestal from where it assumes the role of the prosecutor as well as the judge in its own matter. Articles 129 and 215 confer the status of courts of record to the Supreme Court and High Courts of the country which makes the judicial proceedings conducted in these courts accessible to the public. Certainly, the intention is to strengthen the faith in judiciary by ensuring transparency but this same provision warrants criticism from the public and press. The right to freedom of speech and expression is not an absolute right and the reasonable restrictions provided under Article 19(2) contain within its ambit contemptuous publications and reports. This position of law has given rise to long standing conflicts of law of contempt and the freedom of speech and expression along with freedom of media. The media acts as a bridge between the truth and the society. The onus of delivering honest and unbiased facts is on the media and therefore, the freedom of press and media is of utmost significance for public interest.

The Section 4 of the Contempt of Courts Act provides an exception to the otherwise vigorous law of contempt by exempting fair and accurate report of judicial proceedings from the purview of contemptuous acts. The fact that media's freedom and fair and accurate reporting cannot be viewed in isolation has been recognised by the judiciary and therefore, a few demarcating points have been outlined by the Supreme Court for segregating constructive criticism from indecent and vindictive reporting. In *Re: Prashant Bhushan & Ors.*, the debates surrounding this subject were refuelled recently when an activist-senior advocate posted tweets directing scandalous remarks at the Chief Justice of India and stating that the Apex Court has been instrumental in the destruction of democracy. The arguments that the tweets did not interfere with due process of law and administration of justice were rejected and the Hon'ble Court held that the tweets scandalise the courts and weaken the faith of the public in judiciary which affects the administration of justice adversely. The tweets were honest opinions of the contemnor and the Courts have iterated that the judicial proceedings are open to critique if the remarks are made in good faith and for public interest. However, in this case the essentials of fair criticism were futile as the Apex Court relied on its judgment in *Re: Arundhati Roy* which demanded the assessment of surrounding circumstances, motive and the knowledge of the contemnor in

the field. The question of law herein is the distinction between contempt and its exception and the answer to which is considered open-ended.

### **Evolution Expressions And Contempt-History**

The law of contempt of court originated in England and paved its way in India during the colonial era. This branch of law was developed differently from other branches as it has been subjected to reformation through the minds of Judges instead of the legislative bodies. The concept of contempt of court is derived from *Contemptus curiae* which is a phrase used in English law for over eight centuries now. The law gave authority to penalise or punish those who fail to comply with what the law directs. The supporters of this law believe that dissenting opinions directed at the judges and judiciary create an atmosphere of apprehension and disbelief in the general public and therefore, an attack on the judiciary is an attack on the society.

Where the intention of the law was to prevent disobedience and uphold the faith in judiciary, it has evolved into a branch of law that confers wide discretionary powers on the Courts. The problematic area of the law of contempt is that many believe it is an arbitrary power since the procedure followed in contempt cases is not the ordinary, but summary procedure. A person can be held guilty of contempt in a case where he may be stating truth in good faith without intending to commit contempt. From an overview of the law of contempt of court it can be seen that the intention of law is to curb even the slightest criticism directed at the judiciary. A bare perusal of the provisions of the Contempt of Court Act gives an insight into the unfathomable power of the judiciary when it comes to the protection of its dignity and status, particularly section 23 which explicitly confers indefinite powers to the Apex Court and the High Courts of the country. However, there are certain exceptions to activities that amount to contempt, which includes fair and accurate report of judicial proceedings as enshrined in section 4 of the Act. Fair and accurate report of judicial proceedings is imperative in functioning of an independent and impartial judiciary; unbiased press and independent judiciary strengthen the authority of law and aids in maintenance of order in society. A free media and accountability of judiciary are sine qua non for a democratic country and hence, the protection of both is crucial for maintenance of rule of law- where judiciary is entrusted with the responsibility of keeping the spirit of constitution alive and deciding disputes, media is a tool that propagates society in the direction of righteousness and ensures public interest.

### **Independent Judiciary and Freedom of Press for Fair and Accurate Reporting**

The co-existence of free media and independent and impartial judiciary is a much-debated issue. A free media is an extension to the fundamental right of freedom of speech which is granted to all the citizens of this country. Article 19(1)(a) of the Constitution of India grants citizens the right to express their opinions and the advocates of the right demand the liberty to freely publish their true opinions without being charged with contempt. However, the exercise of this right cannot override the reasonable restrictions imposed by virtue of Article 19(2) which implies that abuse of freedom of speech and expression brings the case within the sphere of contempt of court. The argument posed by the school of thought opposing the contempt of court's provision believes that the Act not only confers discretion to the courts to act whimsically but also takes away any and all possibility of scrutinizing the Courts and Judges by creating a bubble in which a Judge serves the role of both the prosecutor and the deciding authority. A judicial system that is insulated from any external participation defeats the system of checks and balance which the Judiciary is supposed to protect and through its authority restricts the free flow of media and fair reporting of proceedings.

### **Fair And Accurate Reporting- Conflicts With True Reporting**

The drafters of Constitution had not considered contempt of court formerly. In 1947, the interim report on fundamental rights was released which had neither mentioned the contempt of court nor was contempt of court referred to in the discussion of the interim report. Furthermore, the Draft Constitution of February 1948 and its discussion did not consider the possibility of contempt of court being a limitation on freedom of speech. It was T. F. Krishnamachari who suggested that the law of contempt of court could possibly be a hindrance in free exercise of freedom of speech and expression in 1949 right before the Constitution of India was adopted. He was of the opinion that the introduction of the law of contempt of court was to fill the void that levelled contempt with defamation, libel and slander.

Contempt can be broadly classified into two categories- civil and criminal. Criminal contempt refers to publication or expression which scandalizes the majesty of the courts, influences the due course of judicial proceedings or affects administration of justice negatively. The reporting of judicial if not covered under section 4 of the Act would amount to criminal contempt. The media and press are a mirror of the society's expectations and afflictions and the Courts of this country shoulder the responsibility of administering justice as all conflicts at some stage or the other require clarification and interpretation from the Judiciary in case of conflict and it is common parlance that media plays a pivotal role in the interaction of public and judiciary.

However, conflicts may arise when published reports influence the minds of the people consuming the reported content in order to shake the confidence of general public in the sanctity of courts. The Calcutta High Court opined that even though the media has the right to criticize a judgment, it must do so fairly and accurately, without blurring the facts or law. When the press fails to do so, it is failing the society by producing a tainted image of the judiciary and invites judgment by the public on the basis of an inaccurate image. The Calcutta High Court also observed that such publication and reporting cannot be saved under Article 19(1)(a) of the Constitution as this inaccurate reporting interferes with the judicial proceedings and tarnishes the dignity of the Court.

In a democratic setting, a concerned and informed citizen has the liberty to express his perspective to analyse and criticize a judgment if in his opinion the judgment is unfair. A legal scholar, commentator, newspaper editor or a TV reporter, acting in good faith may publish either orally or in written strong words to express their dissent on the judgment of the courts in the exercise of their fundamental right. However, care has to be taken that the facts and law are not distorted in their reports and that distasteful language is not incorporated in the reports. In order to maintain transparency and faith in the judiciary, Supreme Court and the High Courts are given the status of courts of record as provided by Articles 129 and 215 of the Constitution respectively, therefore giving an opportunity to the public and media to scrutinize the verdicts and functioning of the courts. Sanyal Committee was the first of its kind to emphasise the significance of a free media and independent judiciary, the Committee observed that a free media is a mode to achieve freedom of speech whereas an independent judiciary is the medium to ensure a free society."

It goes without saying that reports of judicial proceedings can be published at two stages- when the Court has iterated the verdict and during the pendency of a trial. However, an interesting thing to note here is the language of the provision Section 4 of the Act does not incorporate the word true but fair and accurate. Interpretation of law has enormous facets and this happens to be an extremely conflicting one. The media being a major influences on the emotions and analysis of the viewers and readers, has a crucial responsibility of painting clearly differentiated black and white pictures, there shall be no grey in the representation of facts and law. The truth shall be discovered from every possible corner to ensure that an honest report is presented to the public for formation of unbiased and fair perspectives. When the High Court of Nagpur was posed with the question whether a publication that creates an impression that the accused person's case is not sustainable and thereby invites attention at libel and slander directed at the

accused amounts to contempt or not, observed that if the report represents facts accurately and is devoid of malice, the publication cannot be considered contempt. The Hon'ble Court in the same judgment also held that this exception does not include publications presenting falsified facts as they prejudice a fair trial and true reporting is also subject to the condition that it does not interfere with the material aspect of the trial to maintain fairness. An obvious inference from this dictum is that true reporting is not congruent to fair and accurate reporting. In *Y.V. Hanumantha v. K.R. Pattabhiram and Anr.*", the High Court of Andhra Pradesh highlighted that even if a statement is published with the belief that it is true, the statement shall amount to contempt of court if it influences the truth prior to its ascertainment before the court through due course of proceedings. In *Brigadier E.T. Sen (Retd.) v. Edatata Narayanan*<sup>12</sup> the matter in dispute was whether the publication of a letter connected to a case would come within the ambit of contempt of court or would it fall under the privilege of fair and accurate reporting of judicial proceedings. The Hon'ble Court in this case was lenient and gave respondents the benefit of doubt, the Court observed that the letter was merely used as a tool for identification whereas the publisher wrongly assumed that the letter was duly annexed as evidence which was sheer ignorance on the part of the publisher. Further, the Court set a precedent by stating that this case was an exception and henceforth such publications would be subjected to contempt proceedings wherein ignorance of law would not serve as an aid to the contemnor.

### **Reports And Publication Amounting to Contempt- Is Fair Reporting An Absolute Exception?**

Before the aforementioned question is answered, it is essential to understand which kind of reporting and publication would amount to contempt. If the contents of the report are not covered under Section 4 of the Contempt of Courts Act, the reporting amounts to criminal contempt. However, the substantial and procedural aspects of criminal contempt are different from the general criminal matters. The judiciary has decided ample disputes when it comes to contempt proceedings and the analysis of the judiciary's stance and the nature of criminal contempt can be studied on 4 grounds

1. The role of Courts
2. Assessment of mens rea
3. Open-ended definition of Contempt
4. Adoption of summary proceedings.

## **The Role of Courts**

In order to uphold the rule of law and principles of natural justice, it is imperative that the party to a dispute is not the adjudicating body. India follows the adversarial system of justice which means that the judges and the court assume a neutral role while adjudicating a matter to ensure an impartial and independent judiciary. Contempt proceedings are an exception to this established position of law as herein, the judiciary whose sanctity is in question is the adjudicating body in the case. The constitutional provisions enshrined under Articles 129 and 215 which were included to keep the dignity of our judiciary intact by allowing the courts of record to take suo motu cognizance of contempt matters or at the request of a litigant are inherently flawed for contradicting the principles of natural justice. In this position, the aspect which complicates this conflict further is that the accused person or media can be held liable when the disputed publication or report does not even impact the judicial proceeding.

## **Assessment of *Mens Rea***

It is a well-settled position of law that the element of mens rea is to be acknowledged while determining criminal liability. However, the Apex Court in the matter of *Re:Dr. D.C. Saxena and Dr. D.C. Saxena v. Hon'ble the Chief Justice of India* observed that the section 2(c) of the Contempt of Courts Act does not involve the element of a guilty mind and that the assessment of mental element in contempt is insignificant. Whereas, major importance was given to the aftermath of representation made. The answer to whether the report or publication materially influences the proceeding is absolutely irrelevant.

## **Open-Ended Definition of Contempt**

It has been already discussed that the Act itself confers arbitrarily wide discretionary powers to the courts of record in contempt proceedings and therefore, there is absence of defined skeletal lines describing what constitutes contempt. The Courts have themselves observed that the contempt of court is not vague but it is also allowing the courts to fix and interpret what contempt of court shall imply, in essence, the courts have the liberty of evaluating which publication or report amounts to contempt.

## **Summary Proceedings**

Lastly, it is interesting to note how the contempt proceedings are an exception to the otherwise lengthy and time-consuming criminal proceedings. The Courts under this Act are empowered to expedite the contempt cases by adopting summary procedure in proceedings. The rationale

behind this fast track procedure is two-fold, one is to ensure that no apprehensions arise in the minds of people which can potentially tarnish the reputation and dignity of the judiciary and second is that the conduct of the judiciary is not subject of a trial. This implies that the contemnor who has published the disputed report is not afforded an opportunity prove that the contents of the report were published in good faith and are therefore justified, since the contempt proceedings are categorically a matter between the contemnor and the court exclusively, not the judge who plays a pivotal role in the functioning of courts." The inference from the above stated grounds is clear that publishing any statement against the judicial proceedings comes with its own set of challenges for the person or press publishing and reporting the proceedings. A pressing and delicate question that arises is, where is the line drawn for distinguishing contempt from fair and accurate reporting?

The intention of legislature is highlighted in the Act through its Preamble which was to restrict the powers of Court while exercising their powers under the contempt cases and defining the limits to their authority. Sections 3, 4 and 5 enlist the cases exempted from the purview of criminal contempt; however the challenges in identifying the cases falling under these categories are tackled through a defined set of principles. The Apex Court has been instrumental in laying down these principles through a plethora of judgments. First and foremost, the courts are required to differentiate between contempt and libel. The test to determine the difference between the two is whether the remark or report affects the judicial proceeding materially or is the remark a defamatory statement which is directed at the judge. If the report or remark affects the proceeding, only then shall the contents of such report amount to contempt. In the case of *Rajendra Sail v. 18 Madhya Pradesh High Court Bar Association and Ors.*" the Apex Court upheld the judgment of High Court while observing that if a remark, prima facie is contemptuous, it cannot be considered as a statement made inadvertently. The case was initiated when Hitavada newspaper, published a report citing that the decision of the High Court is "rubbish" and that a judge who is nearing his retirement was not competent to deal with a sensitive case involving murder. The report suggested that the bench was already biased and sold and that Rajendra Sail possessed cogent evidence to establish that one of the judges of the deciding bench was bribed. The claims of the publishers of the report were that they were unaware of the publishing of report, which were held to be irrelevant in case of contempt.

Secondly, in the same case, Justice Sabharwal observed that, the judge shall be separated from the judgment. As soon as the verdict is declared, the judgments of the courts of record become



accessible to the public and therefore invite opinions. However, care must be taken while reporting because it is the judgment and not the judge which can be scrutinised and criticised.

Thirdly, Justice Sabharwal in *Re: Roshan Lal Ahuja* held that reporting made in good faith for public interest by incorporating dignified language shall not constitute contempt. Furthermore, the Supreme Court of India has also highlighted the importance of surrounding facts of each case in isolation, the Court realises that each case is different and cannot be dealt with in the same manner which clearly indicates that the law of contempt of court shall be employed with utmost caution as it is not a protective tool for judges rather, it is enacted with the intent of safeguarding the sanctity of judiciary. When the reporters of *The Tribune* were held liable for reporting and publishing an incorrect report maligning the senior judges of the Supreme Court and Chief Justice of India, the Apex Court held that inaccurate reports published by the media cannot use the shield of public interest and good faith. The editor, printer and publisher of the said report claimed that the report was printed under the assumption that the details received by them were true as they received the details from an esteemed journalist. The Court vehemently disregarded their plea but approved their apology taking into account the peculiarity of the incorrect receipt of information and unconditional apology."

### **Intersection of Freedom of Speech and the Right of Press to Fair Reporting**

The Supreme Court has observed that the freedom of press is vital for the development of a democratic republic as it is through a free media that the actual facts are delivered to farthest corners of the country and that, freedom of press is an extended limb to the freedom of speech and expression provided under Article 19(1)(a). The Supreme Court has also regarded free media as the greatest freedom of all.

The judiciary is inherently placed in a vacuum when it comes to the system of checks and balances, where the judiciary ensures that this balance is maintained, the organ itself is immune from surveillance for exercise of its powers. The Constitution expressly provides independence and impartiality of judiciary and affords enormous protection to the judiciary and judges by virtue of Articles 121 and 211 which prohibits the Legislative bodies from discussing the efficacy and conduct of the judges, the contemplation and conversation can only take place by presenting a motion before the President seeking removal of the judge according to Article 124(4). The simple inference that can be drawn from this legislative framework is that, no person or entity can question the competency, conduct or behaviour of a judge.<sup>25</sup> Furthermore, the Contempt of Courts Act, 1971 grants more authority and insulation to judges through

section 2(c)(i) which includes scandalizing a judge under criminal contempt. The question that arises now is that, in presence of all the aforementioned protections and Article 19(2) which enlists reasonable restrictions on freedom of speech, why should the courts prohibit discussions on matters that are of public importance solely on the ground of pending trial or litigation? With the rise and boom of electronic reach and consumption of media, the patterns of society have evolved tremendously over the last few years. In this age, when the global scenario is accessible to the public which portrays the accountability and answerability of international judicial systems to their citizens, it is inevitable that the currents will be influenced in our country as well. It has been observed in as early as 1957 that the law of contempt of courts is more stringent in India than anywhere else." Some accomplished advocates are also of the opinion that the judges can react either of the two ways towards a publication, first being- "publish and be damned" (they can be unaffected by the opinions), second being- "come forward and explain yourself and the Indian system seems to implement the latter approach in most cases 22 The catch here is that the law of contempt and provisions enshrined in the Constitution of India are conducive for securing an independent judiciary so that the judges are not harassed for delivering what is deemed just in the eyes of law. On the other hand, media plays a pivotal part in educating the society and ensuring that the matters of public interest are not compromised. The media is immensely powerful when it comes to influencing the minds of public, whenever the media publishes any report on the judicial proceedings an infinite loop of discussion begins. If the press does not use its reach and prowess judiciously, a publication may leave a lasting imprint on the reader irrespective of whether the report is accurate or inaccurate. In case the report contains misplaced content, even an apology may prove ineffective for reversing the formed opinions. Therefore, reasonable restrictions on freedom of speech and expression along with the provisions safeguarding the courts from contempt aid in pre-emption of contemptuous reports and publications.

### **Conclusion and Suggestions**

The judiciary has been given immense protection flowing from the Constitution and the Contempt of Courts Act for justifying the principles of natural justice and rule of law in administration of justice. However, the insulation of judiciary is limited to the protection of the sanctity of courts and dignity of the judges. The law of contempt does not extend to the judgements and proceedings which may attract constructive criticism and allows fair and accurate reporting of judicial proceedings. Media serves as the platform for interplay of the judicial system and public interest. The grey area in this interface is the determination of

contemptuous acts from publications and reports issued in public interest whenever a question of law and fact is involved. The demarcation of the same cannot be completely defined as the examination of each case is subjected to their particular circumstances. The dichotomy of the situation is that supporters of absolute freedom demand greater liberty and advocates of independent judiciary demand reasonable restrictions. This constant battle leaves the judiciary even more vulnerable to criticism. The sensitive nature of both the ends of spectrum requires a delicate balance of freedom of speech and ethical conduct so as to evade contempt. As long as the reporting remains fair in its spirit, neither the press nor the public need to tread with fright of committing contempt.