Contempt of Court and Free Expression - Need for a Delicate Balance

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“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.” Lord Denning

Introduction:

“Rule of Law” is the basic principle of governance of any civilized and democratic society. The principle asserts supremacy of law bringing under its purview everyone, individuals and institutions on par without any subjective discretion. It connotes the meaning that, “Whoever the person may be, however high he or she is, no one is above the law notwithstanding how powerful and how rich he or she may be.” It is through the courts that the rule of law reveals its meaningful content. The Indian Constitution is based upon the concept of Rule of Law and for achieving this cherished goal, the framers of Indian Constitution has assigned the special task to the judiciary. Among other organs, judiciary being the guardian of the rule of law holds key position, for it is deemed as not only the third pillar, but the central pillar of democracy. In order to facilitate the judiciary to perform its duties and functions effectively, the dignity and authority of the courts have to be respected and protected at all costs.

The framers of the Indian Constitution recognized that the maintenance of dignity of court as one of the cardinal principles of rule of law in a democratic set up. The power and authority to uphold the majesty of the judiciary has been entrusted to the judiciary itself by empowering it with the contempt jurisdiction. The Contempt jurisdiction allows the Court of Records to punish the contemnor for scandalizing the judiciary and for disobedience of its orders. The law of contempt in India has its roots to English law. In 1883 the Privy Council held that the Chartered High Courts in India has summary jurisdiction to commit for the contempt for scandalizing them or their Judges. The Chartered High Courts of Calcutta, Bombay, and Madras which were Courts of Record had been exercising the summary jurisdiction to punish for contempt. Persisting on with the powers exercised by the Court of Record, the Constitution of India sustained and conferred the contempt powers with the higher judiciary it being Court of Records. As such under Articles 129 and 215 of the Constitution of India, Supreme Court of India and High Courts of States respectively are empowered to punish people for their respective
contempt. It is now well settled that independently and apart from other statutory law relating to contempt, the Supreme Court and the High courts by reason of Articles 129 and 215 respectively have inherent power to punish for contempt of the Supreme Court and the High Courts.4

**Origin of Contempt Jurisdiction and Statutory recognition:**

Contempt primarily signifies disrespect to that which ought to get legal regard. The origin of Contempt jurisdiction traces back its history to the monarchic rule of England where contempt was an offence more or less direct against the Sovereign and its authority. In the much celebrated judgment *R v. Almon*, Wilmot J. observed that this power in the courts was for vindicating their authority, and it was coeval with their foundation and institution and was a necessary incident to a court of justice6. It was probably the first judgment in the legal history that marked the judicial interpretation of the contempt power in its true essence. The judiciaries across the globe where the courts have been entrusted with contempt jurisdiction follow the dictum of Wilmot J.

In India, almost all the laws replicate the English statutes and contempt law is no exception to it. The law of contempt received statutory recognition in the form of Contempt of Court Act, 1926 (the 1926 Act). The 1926 Act was repealed since it was not a comprehensive piece of legislation as such it was replaced by the Contempt of Court Act, 1952 (the 1952 Act). However the scope of the 1952 Act was not wide enough to define as to what constitutes contempt of the court, apart from many other flaws in provisions of the Act. The 1952 Act was repealed and replaced by the Contempt of Court Act, 1971 upon the recommendation of the committee set-up in 1961 that overhauled the law of contempt of courts in India. The Committee under the chairmanship of the late H.N.Sanyal, the then additional Solicitor General made a comprehensive examination of the law and problems relating to contempt of court in comparison with various foreign countries. Evaluating the law relating to contempt, the doyen of the Indian Bar Mr. Fali Nariman in the speech delivered on the topic “The Law of Contempt –is it being stretched too far?” said the offence of scandalizing the court is a mercurial jurisdiction in which there are no rules and no constraints. He and other were perfectly correct in saying there should be certainty in the law, and not uncertainty. After all, the citizen should know where he or she stands. There are two reasons for the uncertainty in the law of contempt of court. In the Contempt of Court Act, 1952 there was no definition of ‘contempt.’ Secondly, even when a definition was introduced by the Contempt of Court Act, 1971 (vide Section 2), there was no definition of what constitutes scandalizing the court or what prejudices, or interferes with the course of justice. What could be regarded as scandalous earlier may not be regarded as scandalous today and what could earlier be regarded as prejudicing or interfering with the course of justice may not be so regarded today.7

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4 Sukhdev Singh Sodhi v Chief Justice and Judges of the PEPSU High Court AIR 1954 SC 186
5 (1765),Wilm.249. at p.254
6 Oswald’s Contempt of Court,3rd edition, reprint 1993, Butterworth’s publication.
7 2007 CriLJour/16 XII Justice Markandey Katju, Judge, Supreme Court of India.
Since contempt of court has not been specifically and assertively defined in Indian Constitution or in any statute dealing with contempt of courts, analyzing the authorities would be a guiding factor, according to the Blacks Law Dictionary. Contempt of Court is, ‘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…’ Oswald defines contempt to be constituted by any conduct that tends to bring the authority and administration of Law into disrespect or disregard or to interfere with or prejudice parties or their witnesses during litigation.

The Contempt of Courts Act, 1971 (the 1971 Act) defines contempt under Section 2 (a) which states, “contempt of court” means civil contempt or criminal contempt,

Clause (b) “civil contempt” means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court:

Clause (c) “criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which –

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings’ or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

The definition of the contempt of the court in the 1971 Act is too exhaustive, leaving much to the discretion of the judge or judges in interpretation of what constitutes contempt of court, no specific guideline is provided under the definition so as to confine the judicial interpretation in the contempt proceedings. The contempt power in a democracy is only to enable the court to function effectively, and not to protect the self-esteem of an individual judge.

**Distinction between the Judicial and Administrative acts of the Courts:**

The law of contempt has been enacted to secure public respect and confidence in the judicial process. If such confidence is shaken or broken, the confidence of the common man in the institution of judiciary and democratic set up is likely to be eroded which, if not checked, is sure to be disastrous for the society itself. The Contempt jurisdiction would arise only when the contemptuous acts interferes with functioning of the judicial process, and would in no case be applicable to the administrative functions discharged by the courts. However, the Indian contempt law applies strict liability rule equally to the

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8 6th Edi., 1997
10 In re: Arundhati Roy, AIR 2002 SC 1375
judicial as well as administrative actions of the courts. The Supreme Court in Mishra vs. Registrar of Orissa blurred the distinction between the judicial and administrative capacities of a judge for purposes of invoking the contempt power. The decision of Apex Court extended the contempt power even to the area of administrative functions of a judge. The obliteration of the distinction between judicial and non-judicial action of the judiciary may result in an excessive sacrifice of freedom of speech. As such under the English contempt law there is a clear distinction between the judicial and administrative action of the courts concerning an action under the contempt of court.

The English Contempt of Courts Act, 1981 Section 2 prescribes strict liability for scandalising a court only if it takes the form of a publication addressed to the public and creates a substantial risk that the course of justice will be seriously impeded or prejudiced in relation to certain pending proceedings which are in active prosecution in a court. In other cases of scandalizing the court, there would be no strict liability and absence of mens rea would be a good defence. Thus, in England under the Contempt of Court Act, 1981 the strict liability rule is to be applied only when the publication interferes with the course of justice “in particular legal proceedings”. Even in case of publication, the contemner has one special defence under Section 5 the English Contempt of Courts Act, 1981, he can plead that the publication was part of a discussion in good faith of public affairs or matter of general public interest and that any prejudice to particular legal proceedings was only incidental.

The major objective of the English law was to bring contempt law in compliance with the requirements of the European convention on Human rights to which England is a party. The English Act, 1981 is in consonance with the right of free expression recognized throughout the world democratic countries as an essential constituent for development of democracy.

**Contempt of Court and Free Expression:**

The right to free expression and speech as envisaged in Article 19(1) (a) of Constitution of India provides the right to hold and express opinions and ideas subject however to reasonable restrictions imposed under Clause (2) of the article. The supporters for the freedom of speech and expression argue that they should be allowed to write and publish any criticism on judiciary which is true and fair, devoid of any contempt proceedings.

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11 AIR (1974) SC710
* In the European Convention on Human Rights, Article 6 provides that: 'In the determination of his civil rights and obligation or of any criminal charge against him, everyone, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
* "In conclusion, I wish to reaffirm that as a writer I have right to state my opinions and beliefs. As a free citizen of India I have the right to be part of any peaceful dharna, demonstration or protest march. I have the right to criticize any judgment of any court that I believe to be unjust. I have the right to make common cause with those I agree with. I hope that each time I exercise these rights I will not be dragged to court on false charges and forced to explain my action." Arundhati Roy in her reply affidavit to the Supreme Court of India, In Re: Arundhati Roy(2002)3SCC343
The rights to scrutinize, discuss and comment on the judiciary has been raised time and again calling for reforms in the law relating to the contempt of court. Mr. Soli Sorabjee, Ex Attorney General justified robust criticism of judgments; however, severe and painful, as necessary for effective functioning of the judiciary under a democratic set-up. According to Lord Atkin’s, “Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny of respectful, even though outspoken, comments of ordinary men”\(^\text{13}\). The debate of overriding effect of the contempt law over the fundamental right under article 19(1) (a) has been a burning issue among jurists, policy makers and reformists. In *E.M.Sankaran Nambbodiripad v T. Narayanana Nambiar*\(^\text{14}\) it has been held that while Article 19(1) (a) guaranteed the freedom of speech and expression, Article 19(2) showed that it was also intended that contempt of court should not be committed in exercising that right. The liberty of free expression is not to be compounded with licence to make unfounded allegations of corruption against judiciary. The abuse of the liberty of free speech and expression carries the case nearer the law of contempt.\(^\text{15}\)

The Contempt of Court jurisdiction is exercised not to protect the dignity of an individual judge but to protect the administration of justice from being maligned.\(^\text{16}\) Thus a defamatory attack on a judge may be a libel so far as the judges is concerned and it would be open to him to proceed against the libeler in a proper action if he so chooses. But in case of publication of the disparaging statement that is calculated to interfere with the due course of justice or proper administration of law, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court’s administration of justice, or if it likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

However it is observed in the recent past that judges were assigning to themselves the task of reviving their self-esteem under the guise of judiciary dignity, curbing the fundamental right to speech which includes fair criticism. The Supreme Court in *Rajesh Kumar Sing vs. High court of Judicature of Madhya Pradesh, Bench Gwailor*\(^\text{17}\) severely criticized judges for assigning to themselves the task of resurrecting the judiciary’s dignity and observed that judges think the judiciary’s dignity is so brittle that it crashes the moment a judgment is criticized or a judge’s integrity is questioned. While dealing with the matter, Justices RV Raveendran and Lokeshwara Singh Panta opined that “Judges, like everyone else, will have to earn respect…. Court should not readily infer an intention to scandalize courts or lower the authority of courts unless such intention is clearly established.”

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\(^{13}\) Ambard v. Attorney General of Trinidad and Tabago (1936) AC322,335  
\(^{14}\) AIR 1970 SC2015: 1970 (2) SCC325  
\(^{15}\) M.R.Prashar v. Dr. Farooq Abdhullah (1984) 1 Cr LC 433  
\(^{16}\) Supreme Court Bar Association v. Union of India & others, AIR 1998 SC 1895  
\(^{17}\) AIR 2007SC2725
An “activist’ judiciary”, that intervenes in public matters to provide a corrective to a corrupt, dysfunctional executive, surely has to be more, not less accountable. To a society that is already convulsed by political bankruptcy, economic distress and religious and cultural intolerance, any form of judicial intolerance will come as a crippling blow. If the Judiciary removes itself from public scrutiny and accountability, and serves its links with the society that it was set up to serve in the first place, it would mean that yet another pillar of Indian democracy will crumble. A judicial dictatorship is a fearsome a prospect as a military dictatorship or any other form of totalitarian rule. Should courts become intolerant of criticism or expressions of dissent, it would mark the beginning of the end of democracy.

Contempt of Court and the Media:

Frankfurter, J. in Pennekamp v. Florida observed:

“If men, including Judges and journalists were angels, there would be no problems of contempt of Court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding Judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for contempt of court is a safeguard not for Judges as persons but for the function which they exercise.”

Freedom of the press is basically the freedom of the individuals to express themselves through the media or the press. The court in Hiren Base has held that though the press is free to criticize the judicial system under Article 19 (1) (a), and thought it “stands as one of the great interpreters between the government and the people” it cannot commit contempt of court in the garb of criticism. The fundamental right to freedom of speech in the context of a news item scandalizing a judge was exhaustively considered by a Division Bench of the Orissa High Court in Lokanath Mishra v State of Orissa. It was held that it was in the public interest to ensure that allegation or criticism which is scandalous or tend to scandalize or tend to lower the authority of the court is not permitted because in functioning of democracy an independent judiciary is to function without fear or favor and its strength is the faith of the public in general in the institution. The Supreme Court in Re: Harijai Singh and Anr. has pointed out that a free and healthy press is indispensable to the function of a true democracy but, at the same time, cautioned that the freedom of Press is not absolute, unlimited and unfettered at all times and in all circumstances. Lord Dening in his Book “Road to Justice” observed that Press is the watchdog to see that every trial is conducted

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18 In Re: Arundhati Roy AIR2002SC1375
19 (1946) 90 Led 1295 at p.1313
20 Srinivas Mohanty v Dr. Radhanath rath 1997 (84) CLT648
21 AIR 1969 Cal 1 at P.3 (SB):72 CWN 82
22 1999 Cri LJ4719
23 AIR 1997 SC 73
fairly, openly and above broad but the watchdog may sometimes break loose and has to be punished for misbehaviour.

The Supreme Court in State v Ram Chander observed, “Freedom of Press, liberty of speech and action, so are as they do not contravene the law of contempt are to prevail without let or hindrance. But at the same time the maintenance of dignity of the courts is one of the cardinal principles of rule of law in a free democratic country and when the criticism which may otherwise be couched in language that appears to be mere criticism results in undermining the dignity of courts and course of justice in the land it must be held repugnant and punished. No court can look with equanimity on a publication which may have tendency to interfere with the administration of justice.” The reasonableness of contempt law as applied to press and media raises the two contrasting public interests issues, that of protecting fair trial and preserving freedom of press. “The power to punish for contempt of court is the means by which the legal system protects itself from publications which might unduly influence the result of litigation. The dilemmas caused by conflict between the demands of a fair trial and a free press are real enough. We pin a certain faith on the ability of Juries, Judges and tribunals to resolve disputes, so we are justified in being concerned about the effect of outside influence on their deliberations especially the sort of pressure generated by circulation-seeking sensationalism. The smooth working of the legal system is a very important, but not always overriding consideration in holding the delicate balance of public interest between the rights of suspects and litigants to a fair trial and the need for society to know about the issues involved in their cases and about the effectiveness of the system which resolves those issues. Too many contempt decisions, especially before the 1981 contempt of courts act, treated ‘the public interest’ as synonymous with the interest of those involved in the legal processes. Imposing secrecy and censorship without regard for the countervailing benefits of a free flow of information about what happens in the court.” The public interest in ensuring and maintaining both protecting fair trial and preserving freedom of press necessitates a delicate balancing exercise. It is a sensitive and subtle task to reconcile these two ultimately conflicting public interests.

**Conclusion**

Free expression is the fundamental fountain-head of democracy. The right of free expression does not however confer right to denigrate others right of person and reputation as such the right of free expression is subject to reasonable restrictions. Bonafide criticism of any system or institution including the judiciary cannot be objected on any pretext, be it under the conferred constitutional power or the statutory contempt law. The freedom of speech bestowed under the constitution and the independence of the judiciary are the two essential and most important constitutes of democracy in a country. Reconciling these two competing public interest issues and maintaining a balance, presents a challenge to any given democratic set-up. Healthy and constructive criticisms are the necessary feature for the development of the democracy. The Apex court as the

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24 AIR 1959Punjab 41
guardian of the Constitution must vigilantly protect free speech even against judicial resentment. In western countries like England and the United States contempt jurisdiction is very sparingly exercised giving much scope to the fair and constructive criticism which is considered as the pedestal of modern democracy. It is high time in India to do away with the prevalent conservative view of contempt law and bring in the liberal approach advocating free expression pursued by western and other commonwealth countries.

Realizing the need for doing away with the traditional and conservative approach, the Indian legislature brought in “The Contempt of Court Amendment Act, 2006” and introduced through amendment a new Section 13 (b) that states: “The courts may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.” With this statutory amendment now defence of truth can be pleaded in contempt of court proceedings if such an assertion of fact was in the public interest and is bona fide. This initiative by the legislature though a small step in a move to change the pre-judge notion approach of the judiciary, is a right step, for it recognized the need for balance in excising the power of contempt jurisdiction by the courts and the right of the citizen to express and hold ideas.