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"Revisiting the Frailty of Criminal Contempt of Court in India"

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Abstract

The constitutionally enshrined power of the apex court to punish for contempt of itself was codified by the legislature in the Contempt of Courts Act, 1971. While the Act simplified the procedure for trying cases of contempt before a competent court, it still had certain shortcomings, which have been discussed in this paper. In addition, this paper discusses the interaction of the law of contempt with other constitutionally guaranteed rights such as that of freedom of speech, and it later attempts to strike a balance between the two by suggesting appropriate reforms in the present statutes so as to make the provisions in complete conformity with the common law principles of 'independence of judiciary' as well as the 'rule of law'. The primary objective of this paper, nevertheless, is centralised around setting certain defined standards concerning culpability of contemnors in order to distinguish condemnable judicial misdemeanours from constructive criticisms aimed at ameliorating the judicial machinery.

I. INTRODUCTION.

As the sole guardian of the 'rule of law', the judiciary has been entrusted with provisions to penalize judicial misdemeanour which debilitates its authority. While these provisions are imperative to ensure that justice is delivered in an undefiled manner, the corresponding judicial misdemeanour which triggers their application is often acknowledged as a 'contempt' of the court. It is usually defined as "*any act which is calculated to embarrass, hinder, or obstruct the court in administration of justice, or which is calculated to lessen its authority or its dignity.*"[1]

Under common law jurisdictions, the power to punish for contempt has been recognized as an 'inherent' as well as a 'plenary' power of the courts.[2] The courts were vested with this power since the subject matter of 'contempt' was considered to substantially hinder the administration of justice by dishonouring the authority of the judiciary.[3] Likewise, the Indian Constitution grants the Supreme Court ('SC') and every High Court ('HC') the power to punish for 'contempt of itself', by designating them as 'Courts of Record' under Article 129 and 215 respectively. Further, the SC had adjudged that since its power to punish for contempt had been constitutionally enshrined, the same could not be "abrogated or

[1] GARNER, BRYAN A. & H.C. BLACK, BLACK'S LAW DICTIONARY, 288 (5th ed., 1979).
[2] *Ex parte* Edwards, (1867) 11 Fla. 174, at 186.
[3] A. Ramalingam v. V. V. Mahalinga Nadar, AIR 1966 Mad. 21.

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stultified".[4] Hence, once a court is recognized as a 'court of record' by a statute, the power to punish for its own contempt is said to instinctually ensue.[5]

In India, the procedural element of the law on contempt is governed by the 'Contempt of Courts Act, 1971,' ('Act') which essentially recognizes two disparate forms of contempt, i.e. civil and criminal. While civil contempt has a remedial function in as much as coercing compliance with the court's orders is concerned, criminal contempt has a punitive element which is aimed at guarding the public interest in the integrity of the judicial process.[6] The analysis of this paper will be limited to the latter vis-à-vis the procedure employed by the courts in adjudging the matters placed before it.

The analysis would be engendered with Part II, which would discuss the development of the law of criminal contempt, the same would then be assessed with respect to its conflicting interests with matters such as that of freedom of speech. Accordingly, in Part III, I would attempt to bring out certain peculiarities relating to balancing the interests between protecting the constitutionally guaranteed rights and the authority of the courts. This will finally be followed by the conclusion, in Part V, of this paper.

II. JUXTAPOSING THE LAW ON CRIMINAL CONTEMPT WITH THE CONSTITUTIONAL GUARANTEES OF DEMOCRACY.

Article 19(1)(a) of the Indian Constitution guarantees freedom of speech to the citizens of India. This right, however, is subject to certain qualifications i.e. reasonable restrictions on the grounds set out in Article 19(2), which specifically relates to the contempt of court.

Accordingly, the SC in a judgment stated that, "*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*."[7] The aforementioned dictum inevitably raises a few contentions pertaining to the law on criminal contempt, such as, how far is the judiciary justified in curbing free speech for safeguarding its dignity and status? Further, to what end do we sacrifice the constitutional guarantees of free speech under the garb of violations of judicial authority? What distinguishes constructive criticism from scurrilous abuses? In other words, where does one draw the line?

The SC had adjudged that Article 129 of the Constitution is independent and is not subject to the restrictions under Article 19(1)(a).[8] Further, judges have been exercising these powers in

[4] Pallav Sheth v. Custodian & Ors., AIR 2001 SC 2763; C. K. Daphtary v. O. P. Gupta & Ors., AIR 1971 SC 1132.
[5] Delhi Development Authority v. Skipper Construction Co. (Pvt.) Ltd. & Anr., AIR 1996 SC 2005; Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895; AIR 2017 SC 225.
[6] Kalyaneshwari v. Union of India & Ors., (2012) 12 SCC 599; Witham v. Holloway, (1995) 183 CLR 525, at 532.
[7] Shri Baradakanta Mishra v. The Registrar of Orissa High Court & Anr., AIR 1974 SC 710.
[8] D.C. Saxena v. Hon'ble the Chief Justice of India, AIR 1996 SC 2481; 1996 (5) SCC 216.

the past, 'as if they are infallible,' and do not commit any mistakes."[9] I believe that such judgments call for a greater judicial restraint in exercise of its powers, since the tendency of the judiciary is to designate itself to near despotic powers under the garb of violations of its authority.[10] To substantiate further, the term 'scurrilous abuse'[11] is in my opinion, subjective enough for potential misuse. This 'wider articulation' empowers the court to bring any publication which it thinks hampers the administering of justice, within the ambit of offence of contempt.[12] For, in certain cases, what might appear as innocuous comments to a layman, might qualify as a "*vicious stultification"*[13] for the judiciary.

In addition, the need for demarcating the line between statements falling under the ambit of the Act and those qualifying as constructive guidelines to the judiciary, is further reinforced because of the uninhibited discretion which the judiciary enjoys while trying cases of contempt. Firstly, in contempt proceedings, the court is both 'the accuser as well as the judge of the accusation,' which is in blatant violation of the basic principle of natural justice, i.e., '*nemo debet esse judex in propia causa,'* which prohibits a person from being a judge in his own cause.[14] Courts have been justifying the same by stating that in contempt proceedings, the matter is strictly between the court and the contemnor.[15] Secondly, *mens rea* is not considered as a pre-requisite for the commission of the offence of contempt. For, the courts find it redundant to show that the defendant intended to impair public confidence in the administration of justice.[16] Further, even though truth has been included as a defence with the passage of the Amendment Act of 2006, the same comes with the caveat that it can be used as a defence only if it is in 'public interest'. The ascertainment of public interest is again left solely to the discretion of the judge.

Another factor insinuating towards the judges' unbridled discretion while adjudging cases of contempt, is their propensity to treat personal attacks on their character as contempt, under the pretence of which they neglect to adjudge matters from the facet of free speech.[17] While a libellous allegation on the conduct of a judge might attract penal provisions, the same may

[9] Rajeev Dhavan & Balbir Singh, *Publish and Be Damned—The Contempt Power and the Press at the Bar of the Supreme Court*, Journal of the Indian Law Institute, Vol. 21(1), (1979), pp. 1-30, at 6.
[10] Rahul Donde, *Uses and Abuses of the Potent Power of Contempt*, Economic and Political Weekly, Vol. 42(39), (2007), pp. 3919- 3922, at 3920; R. GOLDFARB, THE CONTEMPT POWER, 1-2 (1963); Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts-A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978).
[11] The Contempt of Courts Act, 1971, § 2(c)(i).
[12] Virendra Kumar, *Free Press and Independent Judiciary: Their Juxtaposition in the Law of Contempt of Courts*, Journal of the Indian Law Institute, Vol. 47(4), (2005), pp. 447-468, at 453.
[13] Narmada Bachao Andolan v. Union of India & Ors, (1999) 8 SCC 308.
[14] Rajendra Sail v. M.P. High Court Bar Association and Ors., 2005 (3) SCR 816, at 2480, ⁋ 25.
[15] See, 1991 Cri LJ (NOC) 8 (DB) (Cal); *See also*, dictum of Mustill LJ. in R v. Griffin, (1989) 88 Cr. App. R. 63, at 67.
[16] A.G. v. O'Kelly [1928] IR 308, A.G. v. Connolly, [1947] IR 213, In Re Hibernia National Review Ltd, [1976] IR 388 (Sup Ct), In Re Kennedy and McCann, [1976] IR 387 (Sup Ct).
[17] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 325-328 (1967); Law Commission of England and Wales, *Contempt of Court: Scandalising the Court*, Report No 335, at 6 [18], (2012).

not always amount to contempt.[18] Moreover, in case of 'libel', one has to bring a suit and prove the charge, whereas in the case of contempt, it is the court which initiates the proceedings and the contemnor is often punished summarily even without proof of the actual injury.[19] Even the Privy Council had observed that, *"although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character".*[20] These aforementioned factors tend to widen the court's discretion, making them authoritatively free to ascertain as to whether an act constitutes contempt.[21] While ideally, such a decision must be dependent on the 'totality' of facts and circumstances.[22]

III. JUDICIAL ACTIVISM V/S JUDICIAL DESPOTISM: STRIKING A BALANCE.

The SC, in 2002, stated that if criticism is permitted to everybody in the name of 'fair' criticism, "*it would destroy the institution [of courts] itself*."[23] However, in another judgment, Sabharwal J., was of the view that "*no criticism of a judgment, however rigorous, can amount to contempt of court, provided it is kept within the limits of reasonable courtesy and good faith*."[24]

In light of these statements, it can be deduced that the need of the hour is to reform the provisions regulating the law of contempt in a way which effectively balances the right of freedom of speech on one hand, and the protection of the authority of the judiciary, on the other. The recognition of criminal contempt by the Act, in its present form has inexorably engendered an intolerant judiciary. Thus, unless a more stringent definition of criminal contempt is adopted, the very purpose for which powers of contempt were conferred to the judiciary shall stand negated.

Firstly, I believe that the Act must be amended to include the element of *mens rea* as a pre-requisite to constitute contempt. A positive intention to interfere in the course of justice must be established before a person can be punished for contempt. In addition, the offence of 'scandalising the court' must be quashed, since its lack of clarity often leads to arbitrariness which is based solely on the predilections of judges. Further, the judge against whom the allegedly contumacious act has been committed must not sit in judgment over the alleged

[18] Gulab Singh v. District Magistrate, AIR 1950 All. 11 (F.B.); Sukhdeo v. Brij Bhushan, AIR 1951 All. 667; In Re Sudhir Chandra, AIR 1952 Cal. 258; State v. Editors and Publishers of E.T., & P., AIR 1952 Orissa 318; State v. Rajeshwari Prashad, AIR 1966 All. 588.
[19] P.N. Dube v. P. Shanker, AIR 1988 SC 1208.
[20] Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court, I.L.R. 10 Cal. 109.
[21] Ahmed Ali v. The Superintendent, District Jail, Tezpur and others, 1987 Cri LJ 1845 per K.N. Saikia, Actg. CJ and TC Das J.
[22] In Re S. Mulgaokar, AIR 1978 S.C. 727, at 734, ¶ 17.
[23] AIR 2002 SC 1375.
[24] In Re Rajendra Sail, 2005 (3) SCR 816, at 2484, ¶ 43.

contemnor. Lastly, the contempt judgment should be made a matter of record,[25] since this requirement would enhance the effectiveness of the right to appeal as well as curb the current vagueness associated with the law of contempt.[26]

Criminal contempt as an offence is considered to be both "a crime in the ordinary sense"[27] and also "an offense *sui generis*."[28] Hence, contemnors must be proven guilty beyond a reasonable doubt,[29] in a proceeding where they are presumed innocent, given notice of the charges against them and provided with the assistance of counsel.[30] Also, with regards to summary proceedings, it can be stated that while the proper administration of justice may require immediate action to deal with certain disruptive conduct, it does not necessarily follow that the proper administration of justice requires the conduct to be subject to immediate punishment as well.[31]

IV. CONCLUSION

It would be trite to state that free press and independent judiciary are *sine qua non* for upholding the rule of law in any democratic republic. This paper was aimed at highlighting the myriad conundrums associated with the present law of criminal contempt of court vis-à-vis the corresponding rights that have been guaranteed to the citizens via the Constitution. The rationale of the offence of contempt, namely, the undermining of public confidence in the administration of justice often tends to be speculative and some even consider it to be too vague a principle to justify imposing restrictions upon freedom of speech.

Discussing the current problems with the Act of 1971, governing the law on contempt, it was stated that since its provisions have been couched in extremely wide language, they often fall prey to the predilections of judges, thereby, defeating the very purpose for which these powers were enshrined to the courts in the first place. It's unfortunate, therefore, that in the context of exercising the power of contempt by the courts, the tenet of judicial activism has been inevitably mirrored by the evil of judicial despotism. The court has, in recent times, shown an increasing intolerance to criticism and has exercised its contempt powers in a retrograde manner to hamper all voices of dissent.

To conclude, I would like to assert that since courts form an indistinguishable part of our constitutional democracy, they must submit themselves to fair criticism by the people. Respect of the court must thereby, be earned through the quality of judgments and impartiality of the approach of the court and not via oppressive actions of contempt.

[25] Hawaii Rev. Laws §269-5 (1955); N.Y. Judiciary LAW §752; N.J. STAT. ANN. §2A:10-3 (1952).
[26] The Victorian Law Reform Commission, *Contempt of Court: Consultation Paper*, at 26, (2019).
[27] Bloom v. Illinois, 391 U.S. 194, 201 (1968).
[28] Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966).
[29] Hicks *ex rel*. Feiock v. Feiock, 485 U.S. 624, 632 (1988).
[30] Cooke v. United States, 267 U.S. 517, 537 (1925).
[31] Law Commission of New Zealand, *Reforming the Law of Contempt of Court: A Modern Statute*, Report No 140, 2017, 63–4; DPP (Vic) v Green and Magistrates' Court [2013] VSCA 78 [60(1)] (Tate JA) and [99] (Whelan JA).