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"Democracy and Contempt of Court"

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ABSTRACT

In the recent wake, of *suo moto* contempt proceeding taken against the notable senior advocate, Mr. Prashant Bhushan over his two alleged tweets and later on finding him guilty of criminal contempt of Court. As the Contempt of Courts Act, 1971 gives very wide subjective arena by wording 'tends to scandalize or tends to lower the authority of any court' to punish for its criminal contempt puts the various jurists and academician into thinking the relevancy of the British origin law in the present times when the dissent and positive criticism is considered to be the most valuable attributes of democracy. The author in the present paper will try to analyze the law through various notable judgment on the criminal Contempt of Court and reassess the relevancy of the law in the present scenario with some suggested changes if any required.

"It is a prized privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity should be afforded for vigorous advocacy no less than abstract discussion".[1]

- **INTRODUCTION**

In today's society, when you criticize Prime Minister you will be asked to go to Pakistan or labelled as anti-national, when you criticize the Government the charges of sedition be put upon you, when you criticize the Legislators then you will be charged for breach of Parliamentary privileges and when you criticize the Judges then you will be facing the contempt of court. All these charges were put under the grab of rule of law but these are definitely not being the attributes of modern, progressive and democratic society.[2]

The jurisdiction available to the Courts to punish for its contempt is a much-debated jurisdiction when it comes to the criminal Contempt of Court. The Contempt of Court law derives its origin from the British times when it was enacted for the first time in 1926, i.e. the Contempt of Courts Act 1926. Thereafter it was replaced by the Contempt of Courts Act 1952 and finally it was again replaced by the Contempt of Courts Act 1972, which is the present applicable law. Ironically in the Act of 1972 also 'Truth' was not available as the defence even though it was drafted and enacted by the Parliament of independent democratic country, but it was added to the Act much later with the Amending Act of 2006.

Unfortunately, after drafting and enacting the masterpiece i.e. the Constitution of India in 1950 which is the lengthiest written constitution in the world, we keep on embracing all the colonial era laws which were imposed upon us by the alien regime with altogether different

[1] Justice Brennan of U.S. Supreme Court in *New York Times Company v L.B. Sullivan*; 376 US 254.
[2] Dr Yogesh Pratap Singh, *No Criticism Culture!* (2020), https://www.livelaw.in/columns/no-criticism-culture-161640 (last visited Aug 22, 2020).

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objects and motives, the Contempt of Courts law is one of them. Since, during the British regime, the India was not free nor was a democratic set up and neither the people of India were supreme, rather it was Britishers who were supreme and they made law according to their convenience and to uphold the British imperialism. The Act of 1972 was enacted to define and limit the power of the Courts to punish for its contempt and gives the procedure for it, and also to uphold the majesty of Judicial system for better administration of justice.

One of the earliest case of Contempt of Court in England was *R v Almon* (1765), where a publisher from London had printed a pamphlet which alleges charges upon Chief Justice Mansfield for acting "officiously, arbitrarily, and illegally". Thereafter the publisher has been charged with the Contempt of Court and Justice Wilmot observed that the authority of the Courts will fade away if people were allowed to say that "Judges at their chambers make orders or rules corruptly". The purpose of the law as stated by Justice Wilmot is to "keep a blaze of glory" around them.[3]

However, thereafter in England also the doctrine of scandalizing the court was used very rarely and sparingly. In 1968, Lord Denning in case of *Regina v Commissioner of Police of the Metropolis, ex parte Blackbur*[4], stated that "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 foundation. 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. It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. We must rely on our conduct itself to be its own vindication…. Silence is not an option when things are ill done."

Later on, in 1974, the Phillimore Committee presented its report and stated that even the most scandalous attacks on the judges needs to be ignored because most of them comes from the "disappointed litigants or their friends" and to give them due consideration while starting a proceeding against them would mean to give them a greater publicity.[5]

Unlike Britain, United States do not have any such law for scandalizing the dignity of the Court. Justice Felix Frankfurter of the Supreme Court of United States in *Bridges v California* (1941) has called the English law of scandalizing the court as a sheer example of "foolishness".

In the case of *MacLeod v St. Aubin*[6], Lord Morris has stated that "the power summarily to commit for contempt is considered necessary for the proper administration of justice. It is not

[3] Abhinav Chandrachud, *Treat contempt with contempt*, THE HINDU, November 24, 2016, https://www.thehindu.com/opinion/op-ed/Treat-contempt-with-contempt/article16689354.ece (last visited Aug 23, 2020).
[4] (1968) 2 WLR 1204.
[5] Chandrachud, *supra* note 3.
[6] (1899) Appeal Cases 549.

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to be used for the vindication of a judge as a person. He must resort to action for libel or criminal information".

In India, Section 2(a) of the Contempt of Court Act, 1971divides the act of 'Contempt of Court' into two categories: -

i. Civil Contempt, and
ii. Criminal Contempt.

Section 2(b) of the said Act further defines 'Civil Contempt' as '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.

Section 2(c) of Act further define 'Criminal Contempt' as '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 proceeding; or
III. Interferes or tends to interferes with, or obstruct or tends to obstruct, the administration of justice in any other manner;

The term 'scandalizing' here would widely be meant to that publication or remark which have the effect of undermining the confidence in the judiciary reposed by the general public. The problem here lies with the wide discretion left for the court to interpret as to what remark or publication would have the tendency of scandalizing the court and further which would ultimately interfere or obstruct the administration of justice.

Defences available in cases of Criminal Contempt:

I. Innocent publication and distribution of matter. (Section 3)
II. Fair and accurate report of judicial proceedings. (Section 4)
III. Fair criticism of judicial act. (Section 5)
IV. Bonafide complain against the presiding officer of a subordinate court. (Section 6)
V. No substantial interference with due course of justice. (Section 13)
VI. Justification by truth. (Section 13(2))

- **FREEDOM OF SPEECH AND LAW OF CONTEMPT -**

With the enactment of Constitution of India in 1950, the citizens of India got the fundamental right of freedom of speech and expression under Article 19(1)(a) of Constitution. This is right guaranteed by the Constitution to all its citizens and put a bar upon the legislative action to invoke such law which restrict this right. The freedom of speech is the most cherished right given to its citizen by any democratic country. Free speech is considered to be the lifeline of any democratic institution. It is a right with us since the primitive times. For a liberal democracy like in India, to be a success, the person who are sitting in authority must be open to fair and reasonable criticism of them from the citizens. Dissent is an integral part of freedom of speech. It requires the sustained effort to be sensitized towards the freedom of

speech as accept dissent as an important factor for the institution to thrive. This need to be accepted by the people in authority that truth and wisdom has no monopoly and there may be many perception of a thing.

However, freedom of speech and expression is not an absolute right but the restriction can be imposed on it under Article 19(2) of Constitution of India, in which the Contempt of Court is one of those exceptions. Although in modern liberal democracy the restriction imposed on such right should be narrowly imposed and the right in themselves is to be interpreted widely which means that restriction should be treated as exception and not as rule and the right is to be treated as rule and not as exception, nevertheless, the compliance of these principle is often lacking in most of the institutions.[7]

Thus, there is thin line of balance which is to be maintained between the individual right of speech and expression on one hand and to avoid any potential threat to the administration of justice by use of such right on other hand.

John Stuart Mill has stated that *"…if any opinion is compelled to silence, that opinion may, for ought we can certainly know be true… To deny this is to assume our own infallibility*."[8]

Another instance of such freedom of press can be cited here is from England, in 1987 where the daily newspaper of UK had printed the upside-down picture of three senior judges of England namely Lord Ackner, Lord Brandon and Lord Templeman. The title of this publication was put as "YOU FOOLS". The publication was made concerning their recent order in upholding the ban imposed on publication of book on the ground of it carrying sensitive information which was otherwise available on public domain already. But this report did not bring any contempt action against publisher. As account shared by our former Supreme Court judge Hon'ble Mr. Justice Markandey Katju and an eminent jurist Mr. Fali S. Nariman, when asking Lord Templeman as to why no contempt proceedings were initiated against the publisher, he smiled and said that Judges in England takes no notice of personal insults.[9] He further stated that the statement was just a matter of personal perception of people, for someone they might be fools and for someone they might be intellectuals, this however have no direct connection with hampering the process of administration of justice.
In another example from United States, Justice William O. Douglas in a case has stated that Judges are supposed to be "men of fortitude, able to thrive in a hardy climate", who are themselves be able to shrug off any contemptuous statements.[10]

[7] BIBHA TRIPATHI, CONTEMPT OF COURT AND FREEDOM OF SPEECH: EXPLORING GENDER BIASES (2010).
[8] Online Guide to Ethics and Moral Philosophy, http://caae.phil.cmu.edu/Cavalier/80130/part1/sect4/texts/Mill_OnLiberty.html (last visited Aug 24, 2020).
[9] Manu Sebastian, *Contempt By 'Scandalizing the Court': A Battle of Perceptions on An Uneven Field* (2020), https://www.livelaw.in/columns/contempt-by-scandalizing-the-court-a-battle-of-perceptions-on-an-uneven-field-160380 (last visited Aug 22, 2020).
[10] Chandrachud, *supra* note 3.

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However, with time the doctrine of scandalizing the court fell in disuse and on the recommendation of the Law Commission, this doctrine was abolished altogether.

In the case of *Het Ram Beniwal v Raghuveer Singh*[11], the Apex Court has held that "Every citizen has a fundamental right to speech, guaranteed under Article 19 of the Constitution of India. Contempt of Court is one of the restrictions on such right. We are conscious that the power under the Act has to be exercised sparingly and not in a routine manner. If there is a calculated effort to undermine the Judiciary, the Courts will exercise their jurisdiction to punish the offender for committing contempt".

- **INDIAN COURTS ON LAW OF CONTEMPT -**

In the case of *Perspective Publication Pvt. Ltd. v State of Maharashtra*[12] Hon'ble Supreme Court in a three-judge bench while hearing an appeal from the Bombay High Court in which the appellants have been found guilty of having committed contempt against Justice Mr. Tarkunde. In a weekly periodical Mainstream, the appellant had alleged learned Justice Tarkunde of receiving some pecuniary benefit in quid pro quo for passing a judgment in favour of party. The bench of learned Hon'ble Judges has put law on criminal contempt summarily as follows:

1. It will not be right to say that committals for contempt scandalizing the court have become obsolete.
2. The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of justice.
3. It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."
4. A distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as contempt.
5. Alternatively, the test will be whether the wrong is done to the Judge personally or it is done to the public.
6. The publication of a disparaging statement will be an 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 is likely to cause

[11] (2017) 4 SCC 340.
[12] (1969) 2 SCR 779.

> embarrassment in the mind of the Judge himself in the discharge of his judicial duties."[13]

In another case of *Rustom Cowasjee Cooper v Union of India*[14], the Constitutional Bench of Hon'ble Supreme Court while hearing the contempt proceedings against the reporting of the speeches made in a meeting wherein the speakers have criticized the ten-Judges majority judgment of the Supreme Court on declaring the Banking Companies (Acquisition of Transfer of Undertakings) Act to be unconstitutional. Apex Court had observed that "there is no doubt that the Court like any other institution does not enjoy immunity from fair criticism… while fair and temperate criticism of this Court or any other Court even if stong, may not be actionable, attributing improper motives, or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken."

The dissenting opinion of Hon'ble Mr. Justice Krishna Iyer in the case of *Shri Baradakanta Mishra v Registrar of Orissa and Another*[15] is that "the law of contempt is not made for the protection of Judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

The then Chief Justice of India, Justice Gajendragadkar in *Special Reference No. 1 of 1964*[16], hold that "we ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, 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. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

In a contempt proceedings against the former Chief Justice of India Mr. Justice E. S. Venkataramiah, in case of *Vishwanath v E.S. Venkatramaih*[17], where he has given an interview to a senior journalist Mr. Kuldeep Nair on the eve of his retirement in which Mr. Justice has stated that "the judiciary in India has deteriorated in its standards because such judges are appointed as are willing to be influenced by lavish parties and whisky bottles. He further stated that almost in every High Court there are at least 4 to 5 Judges who are practically out every evening, winning and dinning either at a lawyer's house or foreign

[13] Shobha Gupta, *Law of Contempt of Court- In A Face-Off with Right to Freedom of Speech and Expression Which Includes Right of Fair Criticism* (2020), https://www.livelaw.in/columns/law-of-contempt-of-court-in-a-face-off-with-right-to-freedom-of-speech-and-expression-which-includes-right-of-fair-criticism-161770 (last visited Aug 22, 2020).
[14] (1970) 2 SCC 298.
[15] (1974) 1 SCC 374.
[16] (1965) 1 SCR 413, 501.
[17] 1990 Cri LJ 2179 (Bom).

embassy. According him the number of such Judges are around 90 and he favors them transferring to other High Courts. He reiterated that close relations of the Judges should be barred from practicing in the same High Courts where their relatives are Judges. He strongly condemns the practice of appearing as an advocate in the same High Court where their relatives are sitting on bench. He stated that most of those relations are practicing in the High Courts of Allahabad, Delhi, Patna and Chandigarh. According to him in all the High Courts the close relatives of such Judges are thriving. There is allegation that certain judgments have been influenced through them even though they have not been directly engaged as lawyers in such case. The division bench of the Bombay High Court had dismissed the petition and held that the words complained of do not amount to contempt of court on the ground that the entire interview appears to have been given with the idea to improve the judiciary.[18]

Mr. Justice Sabyasachi Mukharji in *P.N. Dua v P. Shiv Shanker*[19] has observed that, "it has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalizing remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffers from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is criticism which the judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time, we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done".

- **CONCLUSION**

From the careful perusal of the above discussed judgments it is crystal clear to the point that the purpose to punish criminal contempt was never to avoid or curb any dissent or fair criticism but to punish those offenders who have put an obstacle in the administration of justice, and it was never been so misinterpreted by the Courts of our country or any foreign country. Any criticism, howsoever strongly worded is often seems to be very little in front of the supreme majesty of the Courts and thus not every strongly worded criticism has the tendency of lowering the authority of the Courts or hampering the administration of justice. However, it is always advisable to not to intermix the two-different entity those are Judge as a person and the institution i.e. Courts. A genuine fair dissent or criticism rather gives a golden opportunity to look back and reassess the expression. The Apex Courts of India and of various countries have observed in its various decision that the jurisdiction of criminal contempt should be invoked very cautiously and sparingly unless it is clear from the fact beyond reasonable doubt that the remark was made with a view to create an obstacle in the administration of Justice and should be appropriately punished. To quote Mr. Justice Krishna

[18] LIVELAW NEWS NETWORK, *"As Long as You are Upright, Don't Care If Your Shadow Is Crooked": Story of Bombay HC Refusing Contempt Action Against an Ex-CJI For His Critical Remarks* (2020), https://www.livelaw.in/top-stories/story-of-bombay-hc-refusing-contempt-action-against-an-ex-cji-e-s-venkatramaih-161734 (last visited Aug 22, 2020).
[19] (1988) 3 SCC 167.

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Iyer here "It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of bona fide concern for improvement".[20]

In the concluding paragraph, the Author will like to suggest that in progressive liberal democracy, the freedom of speech and expression should be the rule and its restriction should be the exception. There was and always will be the need to retain the jurisdiction of the Courts to punish for its criminal contempt not for maintaining the dignity of the individual judges or of the Courts which is on much higher pedestal to get easily disturb, but for the smooth functioning of the judicial mechanism for the administration of justice.

[20] *Re S. Mulgaokar:* (1978) 3 SCC 339.