

## **CONTEMPT OF COURT VIS A VIS FREEDOM OF SPEECH: A NEED TO RELOOK?**

- Sakshi Subag\*

*“If we desire respect for the law, we must first make the law respectable.”*

- Louis D Brandeis

### **ABSTRACT**

Freedom of speech and expression and the independence of judiciary are the two essential elements of society. According to Article 19(2) of International Covenant on civil and political rights (ICCPR) and Article 19(1)(a) of the Indian constitution, everyone shall have the right to freedom of speech and expression.

But, Article 19(2) of the Indian Constitution imposes various restrictions on this fundamental right. Apart from that there is a direct limitation being tempered by the fundamental duties inserted by the 42nd Constitution Amendment Act 1976. Moreover, apart from the power to proceed in contempt under Contempt of Courts Act, 1971, Supreme Court and High Court are court of records and have the power to punish for contempt under Article 129 and 215 of the constitution.

This immunity is misused by the judicial officers for their own selfish desires and also violates Article 13(1) and 13(2) of Indian Constitution which guarantees laws violating fundamental rights are protanto void. Judicial Cases like Veera Swamy v. union of India, Re Arundhati Roy, Mysore sex scandal, web India makes it necessary for advocates, jurists and press to criticize the court and its functioning otherwise they will not be answerable for their actions. An independent and fair judiciary is a *sine qua non*. Transparency is required in every limb of democracy for its effective functioning.

### **I. INTRODUCTION**

The recent reforms in the judiciary concerning the justifiability with the contempt law has become a question of debate. The extraordinary contempt power was granted to the courts to protects the law as it is the responsibility of the judiciary to protect the functioning of court. However, every coin has

two sides. This extraordinary power of court is violating the freedom of speech and expression mentioned under article 19(1) of the Indian constitution.

Freedom to express is the hallmark of a democratic country. The future of a developing and democratic country depends upon the civil liberties enjoyed by the citizens in the form of significant rights and freedom to speak and express. The Apex Court has defined freedom of speech and expression as “a right to express one’s convictions and opinion freely by word of mouth, writing, picture or any other manner addressed to eyes”<sup>1</sup> and freedom of the Press as the right to publish their views.<sup>2</sup> But, this very basic right is bounded by various unreasonable restrictions imposed by the Contempt of Courts Act, 1971.

The freedom of speech and expression granted under the Indian constitution and the independence of a fair judiciary are the two indispensable standing stones of a democratic country. However, this extraordinary power of judiciary violates and infringes with the right of freedom of speech and expression and tries to supersede it.

## **II. AN ANALYSIS OF CONTEMPT OF COURT ACT, 1971**

The special contempt jurisdiction originated in England to enforce the court orders. It was formed to ensure the fair judiciary and punish those who tries to insult the dignity of court. According to Black’s law dictionary, Contempt of court is defined as “A willful disregard of the authority of a court of justice or legislative body or disobedience to its lawful orders.” If someone has been found guilty for contempt of court, a trial can be held against him however the trial for contempt cases is entirely different from the normal ones.

### **Mens Rea and Contempt of Court:**

Presence of mens rea to do an act is an essential ingredient in fixing culpability of an accused in criminal proceedings. However in contempt proceedings, especially in cases of criminal contempt, it

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<sup>1</sup>Information v. Cricket Association 1995 (2) SCC 161

<sup>2</sup>Bennett Coleman, and Company Limited v. Union of India AIR 1973 SC 106

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is insufficient to know that whether the person lowering the dignity of court has mala fide intention or not? Intention is irrelevant in cases of contempt of court. This position is amply demonstrated in the case of *Re: Vijay Kumar*<sup>3</sup>, In this case, the chief minister of Bengal was found guilty for contempt when he criticized the functioning of court for the benefit of people. Now the question arises here is Is judiciary immune for its misconducts? And if so then how the interest of the general public will get protected?

### **Classification of contempt of court:**

Contempt of court can be classified under two heads :

1. Civil contempt
2. Criminal contempt

"Civil contempt"<sup>4</sup> is defined as "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". It means a wrong committed against a individual who was entitled to get relief from the decree of court., the contemptner can be punished with fine and a maximum imprisonment of six months. Civil contempt is against a person while criminal contempt is against the judiciary.

Criminal contempt offends the reputation of court and insults the dignity of the court. The contemptner can be punished with a maximum simple imprisonment of six months or fine of two thousand rupees or both<sup>5</sup>. "Criminal Contempt"<sup>6</sup> is defined as the publication of words irrespective of oral or written which,

1. scandalizes or tends to scandalize the authority of court or,
2. interferes or tends to interfere in judicial proceeding or
3. obstructs or tends to obstruct the administration of justice.

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<sup>3</sup>Re: Vijay Kumar (1996)6 SCC 466.

<sup>4</sup> Section 2(b) of the Contempt of Courts Act of 1971

<sup>5</sup>Section 12 of Contempt of Court Act, 1971

<sup>6</sup>Section 2(c) Contempt of Courts Act of 1971

**Contempt power under Indian constitution:**

Article 129 and 215 of the Indian constitution makes supreme court and high court court of records. A court of record is such court whose records and judicial proceedings are preserved for further proceedings having evidentiary value binding on all other courts and can punish for its contempt. Article 121 and 211 of the constitution prohibits the legislature and the parliament to make allegations on the judges of supreme court or high court in discharging their duties. By implication under Article 124(4) of the Indian constitution and The Judges Inquiry Act, 1968 no one apart from president has the authority to accuse a judge of his misconduct.<sup>7</sup> Now the question arises that whether this excess discretionary power is maintainable or not ?

**III. CONTEMPT POWER : IS THE FREEDOM TO EXPRESS IN TROUBLE ?**

The Contempt of Courts Act, 1971<sup>8</sup> was introduced with the purpose of gaining confidence in the eyes of general public and to protect the fair administration of judiciary but now it has evolved as a means of controlling criticism against unfair practices and protecting the individual interests of judges<sup>9</sup>. Article 129 and 215, conferring the Supreme Court and High Court with contempt power runs contradictory to the article 19(1)(a) which grants freedom of speech and expression to the citizens.

In *Maneka Gandhi v. union of India*<sup>10</sup>, Justice P.N. Bhagwati emphasized that “Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means-government of the people-by the people-for the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential”.

Now the judges are unreasonably exercising their powers as if they are infallible, and cannot commit mistakes. Now the third class magistrates are also punishing people for contempt. In contempt cases, Court is the prosecutor and judge himself sits and decides the case in which he has felt that contempt

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<sup>7</sup>Dr. DC. Saxena v. Hon'ble the Chief justice of India, AIR 1996 SC 2481

<sup>8</sup>Chhotu Ram v. Urvashi Gulati 2001(7) SCC 530

<sup>9</sup>In *Brahma Prakash Sharma v. State of U.P.* 1953 SCR 1169

<sup>10</sup>*Maneka Gandhi v. Union of India*<sup>10</sup> AIR 1978 SC 597

of court has been committed. This violates the maxim Audi Alterem Patrem. In the case of Mr. B. G. Homiman v. state of U.P., the editor of a timely magazine commented “I will prefer going to jail rather than submitting to the ex- parte decision of court” Allahabad High Court held him guilty of contempt of court. In such a situation how the interest of the public can be safeguarded.

### **Legal regime concerning contempt law**

Contempt proceeding is sui generic. Contempt proceedings are of quasi-criminal nature. There are provisions of law against the contempt of court act which creates a question mark on the validity of contempt law. These are:-

- a) Contempt of court is not an offence with regard to the section 4(2)(i) of the criminal procedure code. According to the Indian Oaths Act, 1873, a person guilty of contempt can not be recognized as an offender. Similarly, he is not an accused under Article 20(3) of the constitution. The procedure for trials of criminal proceedings are mentioned under Cr.P.C. the contempt cases are tried on summary process without any fixed procedure.
- b) The Cr.P.C and C.P.C. are not applicable in contempt proceedings though mentioned under Section 14, 15, 17 and 18 of the contempt act, the procedure mainly depends upon the discretion of judges.<sup>11</sup>
- c) Summary procedure is followed in contempt cases, unaffected by the law of evidence which is the main reason behind the misuse of the contempt law.

### **Judicial interpretations of Indian Cases**

Different jurists have different views on the contempt of courts act. Lord President Clyde, Phillimore Committee, and justice Frankfurter expressed the opinion that the contempt law exists for the maintenance of fundamental supremacy of law. Justice Tek Chand, V.G. Ramachandran and the Allahabad High Court<sup>12</sup> are of the view that the purpose of contempt law is to maintain the supremacy

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<sup>11</sup>Sukhdev Singh v. Tej Singh 1954 SCR 454.

<sup>12</sup> State v. Rajeswari Prasad AIR 1966 All. 588, 589

of courts of justice and the stream of justice. Justice V.R. KrishnaIyer<sup>13</sup>, K.J. Aiyar and the Delhi High Court<sup>14</sup> emphasized that contempt jurisdiction exists for the protection of the rights of the public.

In *Printers Mysore Ltd. v. Asst. Commercial Tax Officer*, the Supreme Court held that freedom of press has always been a cherished right in all democratic countries and the press has rightly been described as the 'fourth estate'. The freedom of press is not so much for the benefit of the press as for the benefit of the general community because the community has a right to be supplied with information and the government owes a duty to educate the people within the limits of its resources. The judiciary should not be is not immune from criticism<sup>15</sup>. In *C.K. Daphtary, Sr. Advocate and Others v. Shri O.P. Gupta and others*, Shrikri held that, "Before discussing about any other issue we should propose to dissolve this contempt of courts act".

Lord Denning commented "we will never use this jurisdiction as a means to uphold our own dignity. Nor will we use it to suppress those who speak against us".<sup>16</sup> According to T.T. Krishnamachari "Contempt of Court" is a limitation of freedom of speech<sup>17</sup>. Krishnamachari argued that "the contempt of court act further imposes restrictions even on statement made in bonafide intention in actual but the purpose with which the contempt of court act was formed was to cover the lacunas of law in that it was cognate to "libels, slander, defamation or any matter which offends against decency or morality or the security of, or tends to over throw the state" which were already included as restriction on freedom of speech.

In *Supreme Court Bar Association v. Union of India*<sup>18</sup>, the constitutional bench held the special jurisdiction of contempt law as an "unusual type" combining "the jury, the judge and the Hangman". There are cases from lowest to highest courts proving that judges have been impartial at many times. It is very difficult to determine whether contempt has taken place or not especially when the court is part to the case and judge also.

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<sup>13</sup>Daradakants Misra v. Registrar, Orissa High Court AIR 1974 S.C. 710, 732.

<sup>14</sup>Omesh Saigal v. R.K. Dalmia AIR1969 Del. 214, 218.

<sup>15</sup>Re: S. Mulgaokar C.J. AIR 1978 SC 727

<sup>16</sup>R v. Commissioner of Police 2001(7) SCC 530.

<sup>17</sup>Constitutional Assembly Debates , vol. 10, p. 394

<sup>18</sup>Supreme Court Bar Association v. Union of India<sup>18</sup> 1998(4) SCC 409.

In *Rajendra Sail v. Madhya Pradesh* the high court and supreme court gave opposite decisions regarding a contempt case on the well settled contempt law which gave rise to an important question that are the well settled principles governing contempt of courts are not yet settled?

In analysis of these judicial proceedings the researcher found that the provisions related to the contempt law are scattered with varying emphasis.

#### **IV. INTERNATIONAL LAW AND STATNDARS**

Laws in India are based on the laws in other countries. Mainly India the laws adopted by the England and America.

##### **Position in the U.K.**

Earlier the contempt of court was offence in England but later on with the conclusion of various judgments in cases like *Ex p. Bread Manufactures Ltd case*<sup>19</sup> and *A.G. v. Times Newspapers*<sup>20</sup> and the efforts of jurists namely Lord Morris, Lord Diplock, Lord Cross, Lord Reid and The Phillimore Committee many liberalizations in the contempt law took place and later on The Contempt of Courts Act, 1981 was framed. now the courts in England understands the need of balance between contempt laws and freedom of speech an expression. They have enlarged the area of freedom of speech and expression restricting scope of contempt law.

##### **Position in the U.S.A**

Judicial interpretations of the cases *Schaefer v. United States*<sup>21</sup> and *Schenck v. United States*<sup>22</sup> that laws pertaining to the freedom of speech and expression would reveal that the Supreme Court of United States has upheld “Congress shall make no law ... abridging freedom of speech or of the press.”

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<sup>19</sup>Ex p. Bread Manufactures Ltd case(1937) 37 S.R. (N.S.W.) 242,249-250.

<sup>20</sup>A.G. v. Times Newspapers (1974)A.C. 273.

<sup>21</sup>Schaefer v. United States 251 U.S.466.

<sup>22</sup>Schenck v. United States 249U.S.47.

The contempt law in U.K. and U.S. indicates how necessary it is to have a balance between the two. According to article 19 of the International covenant on Civil and Political Rights, 1966, freedom of speech and expression is a basis right and no restrictions should be imposed on it and surprisingly India is a signatory member of this convention

## **V. CONCLUSIONS AND RECOMMENDATIONS**

A proper balance between the scandalizing the court and freedom to speech and expression is sine qua non for the country. It is unfair and immoral that the some rights given to the citizens are bounded by a lots of restrictions. Judges are not inflammable. They judges should not be overprotected. The excess discretionary power of the judges is not maintainable.. the contempt of court act had made the scope very limited giving little scope for criticizing for fear of coming under the prohibiting area of Article 19(2) and contempt of court is one such restricted area in the name of which restrictions can be imposed in the exercise of freedom of speech expression. Deep Respect for the judicial dictum is equally important but the same time freedom of speech and expression should not be circumscribed in the name of contempt power of court. Contempt of court is a powerful weapon in the hands of the law courts by reason where for the exerciser of jurisdiction must be with due care and caution and for larger interest in the administration of justice.

### **Recommendations**

The researcher suggests the following judicial strategies to reduce the rigor of contempt proceedings:

- Distinguish contempt from defamation

The first judicial strategy is to distinguish contempt from defamation. It should be an important factor in whether the said publication is attacking the dignity of the court or the reputation of a judge. Only the latter should be considered as contempt.

- Differentiating the judge from his judgment



The second judicial strategy should be separating the judge from his judgment. A criticism of judgement should not be considered as criticism of judge.

- Due preference should be given to intention

The third judicial strategy should be giving due preference to intention and identifying the purpose behind such act or allegation.

*“We are not final because we are infallible, but we are infallible only . because we are final.”*

- Justice Jackson