

CONTEMPT OR FREE SPEECH: CRITIQUING THE JUDICATURE

***Rayman Kaur**

ABSTRACT

For the democracy to persist in an economy, the significance of the rule of law is indispensable. It is the common responsibility of the bar and the bench to safeguard the rule of law. The bar and the bench should work in close conjunction to keep intact the public faith and confidence in the Indian judiciary. Furthermore, there has been a specific law to protect the dignity of the courts i.e. The Contempt Act, 1971. This Act confers an extraordinary power of penalizing upon the courts with the object to forefend it against those who aspire to undermine its ascendancy in the eyes of public.

Judiciary, the guardian of Constitution must be tolerant towards healthy criticism and especially towards those coming from its own legal fraternity. The intent of the jurist who is voicing his opinion should be taken into account instead of categorically treating each of such criticism as malicious simply on the face of it. The paper deals with the public scrutiny faced by the Indian judiciary with regard to the Contempt of Act, 1971 and how the freedom of speech and expression is being suppressed using of this Act. Further, it has highlighted certain measures that will help to preserve the supremacy of law by efficient administration of justice.

CONTEMPT OF COURT

“I would reward media if they could come out with truth” “I personally believe that truth should be a defence in a contempt case”

- Justice Khare¹

The pronouncement of the SC's verdict in the case of *Re: Prashant Bhushan and Anr.*, the Contempt of Court Act, 1971 has been brought under the scrutiny of the public, academicians and learned jurists. While the said act was introduced with the intent of safeguarding the sanctity of the judiciary, however, has ended up conferring certain powers to the judicature

*Amity Law School.

¹Pooja Vikram, Contempt of Court: An Analysis, LEGAL Desire (9th Jan 2018 & 8:16 a.m.), <https://legaldesire.com/contempt-court-analysis/>

which are now being utilised to silence the fundamental right of freedom of speech and expression.

Contempt of court is a matter concerning fair administration of justice, and seeks to punish any act hurting the dignity and authority of judicial tribunals.² Lord Diplock elaborated on the matter of content in the following manner:

Although criminal contempt of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.³

There has been no clear cut definition of Contempt of court as time and again it has received conflicting opinions from among various jurists, scholars, and masses, due to its peculiar and contentious nature. The term contempt of court is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or inhibit citizens from availing themselves of it for the settlement of their disputes.⁴ The Indian Constitution by way of Articles 129⁵ and 215⁶ has bestowed upon the SC and HC, the power to punish any person who is found guilty of Contempt of Court.

CLASSIFICATION OF CONTEMPT OF COURT

The colonial-era law fails to provide a concrete definition of Contempt under Section 2(a), to mean a civil or criminal contempt of court. Civil Contempt means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court⁷. On the other hand, Criminal Contempt means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which

- i. scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

² Mriganka Shekhar Dutta & Amba Uttara Kak, CONTEMPT OF COURT: FINDING THE LIMIT, 2 NUJS L. REV. (2009).

³ AG v. Leveller Magazine Ltd. AC 440, p. 449s (1979)

⁴ Lord Diplock, Attorney General v. Times News Paper Ltd. 3 All. E.R. 54, 71 (1973).

⁵ Indian Const. art. 129.

⁶ Indian Const. art. 215.

⁷ The Contempt of Court Act, 1971, S. 2(b)

- ii. prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- iii. interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.⁸

A contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both, provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.⁹

CONTEMPT LAW IN INDIA: HISTORICAL TIMELINE

- **1926:** Enactment of Contempt of Court Act; creation of statutory provisions for the same in the states of Rajasthan & Saurashtra.
- **1952:** Enactment of Contempt of Court Act, repealed the contempt act of 1926.
- **1960:** Bill introduced in Lok Sabha by Shri BB Das Gupta for amendments to existing law.
- **1961:** Sanyal committee set up; report submitted on February, 1963.
- **1971:** The committee report materialized as Contempt of Court Act, 1971.

CONTEMPT OF COURT v. FREEDOM OF SPEECH: PAST ACTIONS BY INDIAN JUDICIARY

In *Re: Prashant Bhushan and Anr.*, Adv. Bhushan was charged with a 'criminal contempt' with regard to his tweets against the SC & the CJI and for his allegations of corruption that he made in an interview for Tehelka magazine, which in turn has sparked a debate as regarding contempt of court & freedom of speech.

Although this is not the first case that questions the blurred lines between contempt of court & the freedom of speech. However, it is reminiscent to the previously initiated contempt proceedings against former SC Justice V.R Krishna Iyer & P. Shiv Shankar, a former HC judge.

⁸ The Contempt of Court Act, 1971, S. 2(c)

⁹ The Contempt of Court Act, 1971, S. 12.

In 1981, *J. Krishna Iyer* while speaking at a symposium on ‘Approach to Judicial Reforms’, made the following statement:

“In this country, the Jesuses are getting crucified and the Barbases are very much upheld, thanks perhaps to the judiciary”

“Our whole judicial approach has a certain independence from all civilised behaviour.”

“In fact to speak very frankly, the Indian judiciary is non est.”

The Kerala HC has been tasked with determining whether J. Iyer was guilty of contempt or not. The court came to the conclusion that the statement made by him fell under objectionable criticism of the court. However, the court stated that his remarks couldn’t be considered as criminal contempt.¹⁰

Later in 2010, J. Iyer was addressed with the question whether individuals could chastise the judiciary & if they do, then at what point would that account to a criminal contempt. He further stated that while the executive & legislature could be corrected by the judiciary for going beyond the constitution, however, the same cannot be said for the judicature that may be corrected by the public criticism only.¹¹

The Freedom of Speech & Expression as well as judicial independence is the primary attributes of a democracy. Therefore, free & open criticism provided under the freedom of expression increases the sense of accountability of the judiciary towards the public. It further, assists them in realizing where they are lagging, and such critiques is not meant to undermine the stature of judiciary, rather it thrives as a tool for betterment of this democratic institution. Unlike these healthy criticisms, there might come instances that truly intent to sabotage the authority of a judge and the judiciary as a whole then the court has been conferred with power to punish such acts under the Contempt of Courts Act, 1971.

However, the judgement in Re: Prashant Bhushan and Anr. has again reiterated that certainly there isn’t any freedom to criticize the judiciary as it would result in being held for contempt of court.

¹⁰ *Priya Anuragini and Abdullah Nasir, Contempt of Court Is Not the Weapon the SC Should Wield To Preserve Its Honour*, *The Wire* (19 Aug 2020), <https://thewire.in/law/supreme-court-contempt-of-court-respect-constitution-power>.

¹¹ *Id.*

*The Act that confers upon the judiciary the authority to initiate contempt proceedings and penalize for judicial criticism, defines such powers with uncertainty and ambiguity. For instance, it states under the act that fair and reasonable criticism shall not be termed as contempt of court whereas it is further stating that it is onto the judiciary to decide whether the criticism in question is reasonable or not.*¹²

Such a provision of the Act is in violation of the principle of natural justice as it keeps the interpretation of the term 'fair & reasonable criticism' open to the judiciary, whereas the principle of natural justice i.e. nemo judex in causa sua specifically states that 'no one can be judge in its own cause'. Also, the court exhibited huge vagueness in pronouncing judgments in two landmark cases.

*In **P.N Duda v. P. Shankar**¹³, the former HC judge & union minister alleged that the judges favoured the rich. He stated that the violators of FERA regulations, bank defaulters or zamindars evoked sympathy from the SC. However, he was not convicted in the contempt proceedings which were initiated against him.*

*A slight divergent view was taken to the above judgement in the case of **E.M.S Namboordripad v. T. Narayanan Nambiar**¹⁴, wherein, the then CM of Kerala E.M.S Namboordripad alleged the SC judges to favour the rich class. In the contempt proceedings that were initiated against him, ironically, he was held guilty of the contempt of court. Although the initial statement made by P. Shankar & the statement of E.M.S Namboordripad were exactly the same, but the decision in both these cases was unexpectedly different, therefore highlighting the incongruity in the law of contempt.*

There still lies confusion with regard to the extent of the recent amendment¹⁵ wherein truth was declared to be a defence in contempt actions. As it further states that the accused can to use truth as a defence of contempt, provided that it must be in public interest and there is bonafide intent to invoke such a defence¹⁶. However, such defence has been utterly misleading in numerous instances.

¹² The Contempt of Courts Act, 1971, S. 5.

¹³ *P.N Duda v. P. Shankar*, AIR 1988 SC 1208.

¹⁴ *E.M.S Namboordripad v. T. Narayanan Nambiar*, AIR 1970 SC 2015.

¹⁵ The Contempt of Court amend. Act, 2006, S. 6.

¹⁶ The Contempt of Court, 1971, S. 13 (b).

*In Court On Its Own Motion v. M.K Tayal*¹⁷, Delhi HC bench pronounced a severe sentence of four month on the journalists who printed an article stating that the sons of the former CJI Y.K Sabharwal had been conducting their commercial business from the judge's official residence. The respondents though in its argument submitted evidence as well but he was still held to be in contempt even without taking into account the defence of truth. Even Soli J. Sorabjee, stated once that, "The doctrine that truth is no defence clearly inhibits press freedom and journalistic activity. The press would hesitate when it ought to make comments in the public interest. A freedom as cherished as the freedom of the press cannot be made dependent upon the over sensitivities of judges"¹⁸.

Such instances of the SC have been quite indicative of an emerging and novel trend wherein even the legitimate criticism with regard to Indian judiciary has never been treated in a positive manner instead by giving courts the power to determine whether a case can be said to be a contempt or not, the courts are given extraordinary powers, which are being utilised arbitrarily.

There is no doubt that the judiciary has been tasked with the biggest responsibility, i.e., meting out justice, ensuring equality & upholding the tenets of the constitution, and therefore it needs some amount of protection that is enshrined under the contempt of court act, however, this intolerance towards constructive criticism from the people is indeed a matter of concern.

There exists a fine line of distinction between freedom of speech & expression and contempt. While the former is a fundamental right that allows them to voice their opinion, the latter permits the courts to safeguard its functioning & authority. Recently, following the verdict in *Re: Prashant Bhushan and Anr.*, the Contempt Act has come under examination. The facts of the case are as follows:

- In 2009, a case had been filed by advocate Harish Salve against advocate Prashant Bhushan with regard to an interview published in Tehelka magazine, wherein he had made allegations of corruption against the judiciary.
- In 2010, a 3-judge bench headed by J. Altamas Kabir had issued notices to advocate Bhushan & Tarun Tejpal.

¹⁷ *Court On Its Own Motion v. M.K Tayal*, AIR 2007(98) DRJ419.

¹⁸ Soli J. Sorabjee, *Truth and Law of Contempt*, Supreme Court Weekly Reporter II (Jnl.) 17 (1985).

- The case resurfaced again following initiation of fresh *Suo moto* contempt proceedings against advocate Bhushan for his tweets regarding the functioning of the SC & the CJI.

The court held advocate Bhushan guilty of contempt & he was given the option of paying a fine of ₹1 or facing a jail time of 3-months along with a ban of 3 years from practising law.

The verdict has been met with fear that that the judiciary in an attempt to safeguard its honour is using the power of contempt as a weapon. While the act as a whole is not arbitrary yet it contains certain features that may be in conflict with certain principles, hence it is imperative to revisit the origins & course of the Act in India to understand it.

ANALYSIS AND SUGGESTIONS

The offence consists in interfering with the administration of law; in impeding and perverting the course of justice... It is not the dignity of the court which is offended; it is the fundamental supremacy of the law which is challenged” Lord Clyde¹⁹

The sole intent behind the contempt act was to empower the judiciary to function efficiently, and was never meant to defend the individual dignity of its judges. The autonomous body is based on the faith and confidence of its citizens in imparting fair and undaunted justice. Such legislations aid for creating disrespect towards the judiciary and corroding its stature in the eyes of the public. It is impossible to imbibe faith in rule of law while chastising the guilty itself. It can be comfortably ensured that every offender who is acting rebellious is penalized under the apposite act while it becomes highly indispensable to ensure this power is not misused by the judiciary.

The Contempt Act, 1971 is imperative for dispensing justice to its citizens and maintaining the trust and faith of people vested upon the judicature of the country. But there still exist several shortcomings with regard to the sections of this Act. These can be vanquished by using the following measures:

- The Act should clearly distinction between the contempt of court and the contempt of judges.

¹⁹ Johnson v. Grant (1923) SC 789.

- It is pragmatic to scrap the terms ‘scandalizing the court’ and ‘prejudicing or interfering with the course of justice’ from the Act as it has the tendency of being misused by the judges owing to its vagueness.
- The contempt jurisdiction shall be used by the courts only in case of grave eventualities and not otherwise.
- It is pertinent that the courts shall encourage fair criticism. The dignity of the judiciary should instead be gained through impartial and fathom rulings and with the public having no fear of being oppressed with contempt actions.
- It is very crucial that the court handle the power of contempt impartially without making any discrimination between ordinary citizens and public figures.

CONCLUSION

The contempt act purports to maintain the supremacy of law by way of asserting impartial and equitable administration of justice. Although it has been well established that the act contains certain elements which are in direct conflict with right to freedom of speech & expression, however, the entire act cannot be viewed in a bad light. The vexed issue is that though freedom to criticize the court is a right bestowed upon the citizens by the constitution, however, in instances where such criticism is aimed at restraining the courts from carrying out its due processes & meting out justice, this law plays a vital role in preserving the sanctity of Indian Judiciary.

The contempt act was enacted with the intent of shielding the judicial institution per se and not to defend the dignity of individual judges or to condemn fair criticism by the public. But while the courts are trying to promote fair criticism made in good faith, it is difficult to differentiate a bona fide criticism from a criminal contempt under the vague and ambiguous law. The principle of Rule of Law is undoubtedly the sine qua non for the conscious functioning of a democracy. It is pertinent to note that in order to uphold the dignity of Indian judiciary, reforms to the Contempt Act, 1971 is a necessity.



INDIAN JOURNAL OF LAW, POLITY AND ADMINISTRATION

While the role of the judiciary may seem arbitrary under the law, however, it is imperative to have such a law in place to maintain the faith of the people in the system. But at the same time, one cannot overlook the fact that healthy & constructive criticism is an essential facet of democracy, and such legislations while securing the court's sanctity, inadvertently end up violating the basic tenets enshrined in the constitution. At the end I would like to conclude by saying that *the idea behind rule of law means that a society should "be ruled by law" and "not by the men in power"*.

