

Topic: Criticise vis a vis Freedom of speech and Expression: A debate on Contempt proceedings.

Abstract:

It was rightly said by John Milton that for establishing any liberal society it is necessary to give the right to freely express their views and opinions to members of the society. It acts as a precursor for the smooth conduct of any democratic society. With this regard, Article 19(1)(a) of the Indian Constitution guarantees the right to freedom of speech and expression to every citizen of our country. Every citizen has the right to freely express his aspersions and convictions. Judiciary is open for public scrutiny wherein the people and the press have the right to comment and criticize any judicial act. Lord Denning rightly said that press acts as a watchdog wherein it observes the fair, open and aboveboard nature of any judicial proceedings. But there might be a situation wherein the criticism would carry the tendency of lowering down the authority of the judge and even obstruct the administration of justice. For this, the Court has the power to punish any such act which tends to demean the value of judiciary with contempt of court under The Contempt of Courts Act, 1971.

Key words: Freedom of speech and expression, Article 19(1) (a) of Indian Constitution, Restrictions imposed on Freedom of speech and expression, Contempt of court proceedings.

Introduction:

Freedom of speech and expression is indispensable in a democracy. In *Romesh Thapper v/s State of Madras*¹, Patanjali Sastri, J., rightly observed that – ‘Freedom of Speech and of the Press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. ’Freedom of Speech and Expression is defined under **Article 19(1)(a)** of the Constitution of India which states that all the citizens of India have a right to freedom of speech and expression. The philosophy behind this Article lies in the Preamble of the Constitution of India- ‘where a solemn resolve is made to secure to all its citizen, their liberty of thought and expression’. The exercise of this right is, however, subjected to reasonable restrictions for some purposes being imposed under **Article 19(2)** of the Constitution of India.

Meaning and scope – Freedom of speech and expression means the right to express one’s own convictions and opinions freely by words of mouth, writing , printing, pictures or any other mode. It thus includes the expression of one’s ideas through any communicable medium or visible representation, such as, gesture, signs and the like². The expression connotes also publication and thus the freedom of the press is included in this category. The freedom of speech and expression includes liberty to propogate not one’s views only. It also includes the right to propogate or publish the views of other people³, otherwise this freedom would not include the freedom of the press.

Freedom of press: The fundamental right of the freedom of the press implicit in the right to freedom of speech and expression is essential for political liberty and proper functioning of

¹ AIR 1950 SC 124

² *Lowell v/s Griffin*, (1938)303 US 444

³ *Srinivas v/s State of Madras*, AIR 1931 Mad 70.

democracy. The American Press Commission has said,” Freedom of the press is essential to political liberty. When men cannot freely convey their thoughts to one another, no freedom is secured, where freedom of expression exits the beginning of a free society and means for every retention of liberty are already present. Free expression is therefore, unique among liberties”.⁴

Grounds of Restrictions: Clause (2) of Article 19 contains the grounds on which restriction on the freedom of speech and expression can be imposed – (a) Sovereignty and integrity of India.

(b) Security of the State. (c) Friendly Restrictions with Foreign States. (d) Public Order. (e) Decency and Morality. (f) Contempt of Court. (g) Defamation. (h) Incitement of an offence.

Contempt of Court proceedings:

Restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of court. The Contempt of Courts Act, 1971, defines the expression ‘Contempt of Court’ as follows: According to section 2, ‘Contempt of Court’ may be either ‘civil contempt’ or ‘criminal contempt.’ 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. ‘Criminal contempt’ means the publication (whether by words spoken or written, or by signs or by visible representations or otherwise) or any matter or the doing of any other act whatsoever, which -

(i) Scandalizes or tends to scandalize, or lowers the authority of any court;

(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.

Under the Act, contempt of court is punishable with imprisonment for a term of 6 months, or which may extent to Rs.2,000, or with both.

A judge, a magistrate or any person acting judicially shall also be liable for contempt of his court in the same manner as any other individual is liable under this Act. Thus, judges have no general immunity from criticism of his judicial act. The terminology used in the definition is borrowed from the English law of contempt and embodies concepts which are familiar to that law which by and large, was applied in India. The expressions “scandalize”, “lowering the authority of the court”, “interference”, “obstruction”, and “administration of justice” are therefore to be understood by our courts with the aid of English law.

In *Baradakant v/s Registrar, High court, Orissa*,⁵ the appellant, senior Judicial Officer, was convicted and sentenced under the Contempt of Courts Act, 1971 by a Full bench of Orissa High Court. The facts of the case were that on March 28, 1971, a disciplinary proceeding was started against him and he was placed under suspension. On receiving the suspension order the appellant wrote three letters to the High court and one to the Government. It was the contents of these letters on which the present contempt proceedings were launched against him and he was

⁴ *Brij Bhushan v/s State of Delhi*, AIR 1950 SC 129

⁵ AIR 1974 SC 710

punished. The Supreme Court held that contemptuous allegations made with reference to the administrative functions of High Court amount to criminal contempt. Administration of justice is closely associated with the Court of Justice which have to perform multifarious functions for due administration of justice. Any lapse from the strict standards of rectitude in performing these functions is bound to affect administration of justice. The whole set of court is for the purpose of justice and the control exercised by a judge over his assistants have also the object of maintaining the purity of justice. It is, therefore, important for the superior Court to be vigilant about the conduct and behavior of the subordinate Judge as a Judge to administer the law. Adjudication of cases between parties is not the whole administration of justice as laying down the law or doing justice between the parties. Thus when the High Court under Article 235 functions in disciplinary capacity it does so in furtherance of administration of justice.

It was held that the defamatory criticism of a Judge functioning as a judge even in purely administrative or non-adjudicatory matters amounted to criminal contempt. The imputations in the above – mentioned letters have grossly vilified the High Court and has substantially interfered with the administration of justice and therefore the appellant was rightly convicted of the offence of the criminal contempt.

It is interesting to note that Indian judges have been touchier in the cases of contempt of court as compared to English judges. For example, in the case of *Balogh v. Court Crown*⁶, the defendant said to the judge, “You are a humourless automaton. Why don’t you self-destruct?” The judge just smiled but didn’t hold him liable for contempt of court. In an instance where a person tagged judges as ‘fools’, Fali S. Nariman asked Lord Templeman that why the person isn’t tried for contempt of court, he answered that they (English judges) don’t take notice of such comments.

It is the judiciary that needs to understand the importance of criticism of any judicial action and not to hold every such act as contempt of court. Lastly, the judge should remember the following words of Lord Denning whenever a case of contempt of court comes in front of them:

“Let me say at once that we will never use this jurisdiction 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.”

Expression of opinion cannot constitute contempt of court: Prashant Bhushan to SC

New Delhi, Aug 3 (PTI) The expression of opinion, “however outspoken, disagreeable or unpalatable to some”, cannot constitute contempt of court, activist lawyer Prashant Bhushan said on Monday in his reply to a show cause notice issued by the Supreme Court. The top court on July 22 issued notice to Bhushan for hearing on August 5 the criminal contempt proceedings initiated against him for his two alleged derogatory tweets against the judiciary, observing his statements *prima facie* “brought the administration of justice in disrepute”. In a 142-page reply affidavit filed through lawyer Kamini Jaiswal, the activist lawyer has referred to several apex court judgements, speeches of former and serving judges on contempt of court and the “stifling

⁶(1975)1QB73

of dissent” in a democracy and his views on judicial actions in some cases. Bhushan also stood by his two tweets.

“The respondent (Bhushan) states that expression of his opinion however outspoken, disagreeable or however unpalatable to some, cannot constitute contempt of court. This proposition has been laid down by several judgments of the Supreme Court and in foreign jurisdictions such as Britain, USA and Canada,” he submitted. He also referred to the freedom of speech and expression under Article 19 (1)(a) of the Constitution, and said this right was the ultimate guardian of all the values that the Constitution holds sacred.

“The relationship between Article 19 (1A) and Article 129 (this gives power of contempt to SC) is governed by Article 19(2). Article 19 (2) (reasonable restrictions) recognizes the fetters that can be placed on freedom of speech & expression under the court's power to punish for contempt under Article 129.“ "Reasonable restriction" being the operative word under Article 19(2), any exercise of contempt powers by the Supreme Court must necessarily not be of a nature that goes beyond "reasonable restrictions",” Bhushan said in the affidavit.

To prevent a citizen from forming, holding, and expressing a ‘bonafide opinion" in public interest on any institution that is a creature of the Constitution is not a reasonable restriction and violates the basic principles on which our democracy is founded, he said. The affidavit said the power of contempt under Article 129 of the Constitution should be “utilized to aid in administration of justice and not to shut out voices that seek accountability from the court for the errors of omissions and commissions”.

It said that to curb constructive criticism from “persons of knowledge and standing” is not a "reasonable restriction". Preventing citizens from demanding accountability and reforms and advocating for the same by generating public opinion is not a "reasonable restriction", it said, adding that the Article 129 cannot be pressed into service to stifle bonafide criticism.

The affidavit also raised objections related to procedures on taking up the contempt petition filed by one Mehak Maheshwari on July 21. Earlier, the apex court had issued notice to Bhushan, and had also sought assistance of Attorney General K K Venugopal. While referring to the tweets by Bhushan, the apex court had said these statements are prima facie capable of "undermining the dignity and authority" of the institution of the Supreme Court in general and the office of Chief Justice of India in particular, in the eyes of public at large.

Recently, Bhushan filed a separate plea seeking recall of the show cause notice of July 22 order in the contempt proceeding initiated for his alleged contemptuous tweets against the judiciary. Simultaneously, Bhushan along with former Union Minister Arun Shourie and veteran journalist N Ram have also moved the Supreme Court challenging the constitutional validity of a legal provision, dealing with criminal contempt on the ground of “scandalizing the court”, saying it was violative freedom of speech and right to equality.

Power of judiciary lies neither in deciding cases, nor in imposing sentences, nor in giving punishment for its contempt, but in the trust, confidence and faith of the general public. Criticism is important for it helps to give us a new perspective and opens our eyes to things we may have

overlooked or never considered. But where do we draw the line between Contempt and criticism? Contempt of court is back in the news. This follows the initiation and conviction of contempt proceedings against a veteran advocate-activist by the Supreme Court of India, on its own motion.

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

Way forward

- The Law Commission has held that there is a need to retain the provision regarding the contempt of courts. However, it also recommended the definition of contempt should be restricted to civil contempt, i.e., willful disobedience of judgments of the court.
- The contempt of court should not be allowed to be used as a means to prevent criticisms.
- In recent times, it is more important that courts are seen to be concerned about accountability, that allegations are done by impartial probes rather than threats of the contempt action, and processes are transparent.
- If the contempt has to continue, a review mechanism within the judiciary should be there as a safeguard against judicial tyranny.

In an era in which social media are full of critics, commentators and observers who deem it necessary to air their views in many unrestrained and uninhibited ways, the higher judiciary should not really be spending its time and energy invoking its power to punish for contempt of itself.

Office of the Attorney General and its role in contempt cases

Attorney General of India has refused consent to a plea to initiate criminal contempt action against an actor for “scandalizing” the Supreme Court.

Note important power, functions and limitations of AGI. A bluff can be created with the dicey statements in the prelims.

What is the case for prior approval in Contempt Cases?

The prior consent in writing of the Attorney General is required for the Supreme Court to initiate criminal contempt action in a case a/c to the Contempt of Court Act, 1971. AGI consent in a form of check on the much-debated suo-motu power of criminal contempt.

The Scales of Justice

Despite of this giving due consideration to the freedoms at stake the Supreme Court has advised caution in *Jhaleswar Prasad Paul* in the following words: ‘The power is special and needs to be exercised with care and caution. It should be used sparingly by the courts on being satisfied regarding the true effect of contemptuous conduct.’ In this case the court went ahead further in

defining and restricting the contempt jurisdiction to avoid its misuse in the following words: 'The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the order of the court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. 'Further, contempt of court in essence should not be contrary to the right of freedom of speech and also it should not be used for defending the judges' individual egos, or even esteem. On the other hand as held in *M.R. Prashar v. Dr. Farooq Abdullah* the court ruled that 'The liberty of free expression is not to be compounded with a licence to make unfounded allegations of corruption against judiciary.' This demonstrates an attempt to attain the mean position of equity where on the one hand freedom of speech is protected and on the other dignity and freedom of the court to function, and its functionaries is upheld. Likewise In *re Ajay Kumar Pandey* it was observed: 'fair comments, even if, out-spoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must batten themselves to uphold their dignity and the majesty of law.'

Conclusion

While it is to be noted that all citizens of India are guaranteed the right to freedom of speech and expression, contempt of court is indeed one of the reasonable restrictions that can act as a rider on this right. None of the fundamental rights guaranteed to Indian citizens are absolute. The right to freedom of speech and expression is also subject to certain other reasonable restrictions such as defamation, decency and morality, public order and incitement of offences. One could argue that the ambit of the reasonable restrictions enshrined between clause 2 to 6 of Article 19 of the Constitution of India are so wide that they restrict the very rights that clause 1 of Article 19 enshrines. However, the reasonable restrictions were included with the objective of maintaining balance as the framers of the constitution knew that if they were to enshrine absolute rights on Indian citizens, dire circumstances would ensue leading to a failure of constitutional machinery. After all, the Constitution of India as we know it is a living document that has survived for over seven decades. Globalized human society as a singular entity and individual societies are moving towards the consensus of a world where an individual has greater autonomy, rights and dignity. Healthy and constructive criticisms are the necessary features for the development of democracy. In this perspective focus should be given precedence over 'dignity of court', but not blindly. In this backdrop, there is a need to revisit the need for a law on criminal contempt, where India can learn from Britain which abolished the offence of scandalizing the judiciary as a form of contempt of court in 2013 based on the fact that the law was vague and not compatible with freedom of speech.

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