FREEDOM OF SPEECH AND CONTEMPT OF COURTS

*K.D. Singh**

I. INTRODUCTION

Freedom of speech and expression is the foundation of any democracy besides being a valuable freedom in itself. The freedom of thought and expression is not only valuable freedom in itself, but is basic to a democratic form of Government which proceeds on the theory that problems of government can be solved by the free exchange of thought and by public discussion. Almost all the constitutions whether democratic or socialist ensure this freedom to their citizens. However as per our constitutional scheme, this freedom, like any other freedom is not absolute and is subject to reasonable restrictions enshrined in the Constitution.

Article 19(1)(a) of the Constitution secures to every citizen the freedom of speech and expression. This clause should be read alongwith clause (2) which enables the state to impose reasonable restrictions on the exercise of the said right, *inter alia*, in relation to contempt of court.

However, in a democratic society there are other values also to be attained as well, apart from the cherished freedom of speech and expression. At times these values may come in conflict with the free speech. One such value is fair and impartial administration of justice. This social interest is sought to be protected by the inclusion of, what is called *contempt of court*, which, as stated above, is one of the restrictions contained in Article 19(2) on the freedom of speech. It is the major problem of balancing these two competing social values that has engaged the attention of the courts while exercising this jurisdiction.

The higher judiciary in India have the power to punish those who interfere with the administration of justice. This is an extremely wide power which has been given due recognition by the Constitution[1] and which has been the subject-matter of the Contempt of Courts Act, 1971[2].

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* Lecturer, Law Centre-II, Faculty of Law, University of Delhi, Delhi-110007.

1 Articles 129 and 215 of the Constitution of India make the Supreme Court and the High Courts respectively "Courts of Records" with power to punish for contempt.

2 This is the extant law on the subject.

In recent years, the contempt power has become the subject of considerable controversy.[3] This power has come to be visualized as an arbitrary power which is reposed in the judiciary and which can be used for purposes other than facilitating the administration of justice.

The concept of 'Contempt of Court' goes back to the times when the ruler or the King used to dispense justice himself. When he delegated this power of dispensing justice to courts presided over by the judges, the courts, naturally, demanded respect and obedience; and any disrespect to the court was treated as an affront to the dignity and authority of the King. Today, however, the judges do not exercise the delegated authority from the King but act as one of the wings- Legislature, Executive and the Judiciary- of the Government of a Democratic Republic. In this changed scenario the courts should mould the archaic jurisdiction to subserve the values of a Democratic Republic by protecting free speech without, however, trampling upon the equally important other social values.

The present paper endeavours to study judicial approach in balancing the twin virtues of free speech and need to uphold the majesty of law. Towards the end of the paper some suggestions for further balancing of these two cherished values have been attempted.

II. Meaning of "Free Speech"

The freedom of speech and expression means the right to express one's convictions and opinion freely by word of mouth, writing, printing, pictures or any other mode. A democratic government attaches great importance to this freedom because without the freedom of speech, appeal to reason, which is the basis of democracy, cannot be made.

In *Romesh Thapper* v. *State of Madras*[4], Patanjali Sastri, CJ observed as follows:

> " Freedom of speech and expression and of the Press lay at the foundation of all democratic organizations, for without free political

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[3] On November 12, 2003 the Karnataka High Court initiated *suo motu* contempt proceedings against several newspapers pursuant to publication of certain news reports pertaining to the "Mysore episode".

[4] AIR 1950 SC124.

> discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framer of the Constitution may well have reflected with Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vision of those yielding the proper fruits."[5]

Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.

However, it has been widely recognized that freedom of expression and speech is not an absolute right without any restraints. Any theory of freedom of expression, must take into account other values such as public order, justice, equality, moral progress of the society as a whole and need for substantive measure desired to promote those ideals. Hence, there arises the problems of reconciling freedom of expression with other values and objectives sought by a good society.[6] An important social interest lies in the fair and impartial administration of justice. This social interest is sought to be protected by inclusion of what is called, "Contempt of Court"[7], in the limitations contained in clause (2) of Article 19, on the freedom of speech.

III. Definition of "Contempt of Court"

The Contempt of Courts Act, 1971 (the "Act") has given a comprehensive and exhaustive definition of the expression "contempt of court". Clause (a) of section 2 of the Act classifies the 'contempt of court' into 'civil contempt' and 'criminal contempt.'[8]

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5 *Id.* at 128.

6 See John Rawls, A Theory of Justice (1973); Maritain Jacques, Man and the State (1954); Immanuel Kant, Metaphysics of Morals (1909).

7 *Infra.*

8 Section 2(a) of the Contempt of Courts Act, 1971 reads: " 'Contempt of Court' means civil contempt or criminal contempt."

Further clause (b) of Section 2 of the Act defines 'civil contempt' as under:

> "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."

Clause (c) of Section 2 of the Act defines 'criminal contempt' as under:

> "Criminal contempt' 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:
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> i) scandalises or tends to scanalise, or lowers or tends to lower the authority of, any court; or
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> ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
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> iii) interfers or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

Thus it could be seen that civil contempt is punished for disobedience of an order of the court made for the benefit of the parties with a view to enforcing the rights of private parties and is regarded as remedial whereas criminal contempt is punished for vindicating the dignity and authority of the court and is regarded as punitive.

In view of the definitions of civil and criminal contempts it could be noticed that the jurisdiction to punish for criminal contempt touches upon two important fundamental rights of the citizens, viz., the right to personal liberty and the right to freedom of expression.

As the jurisdiction to punish for civil contempt does not, as such, come into conflict with the citizens' right to free speech, the said aspect is not elaborated herein.

IV. Need of Contempt Law

It is fundamental that if the rule of law is to have any meaning and content, the authority of the courts and Judges and the confidence of the public in them should not be allowed to be shaken.

The following classic passage of Wilmot J. in *R.* v. *Almon*[9] explains the necessity of contempt law :

> "The arraignment of the justice of the Judges, is arraigning the Kings justice; it is an impeachment of his wisdom and goodness in his choice of his Judges, and excites in the minds of his people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever."[10]

Courts of justice in a State from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the courts perform all their functions on a high level of rectitude without fear or favour, affection or ill-will. And it is this traditional confidence in the courts that justice will be administered to them which is sought to be protected by proceedings in contempt.

A balance must be preserved between the interests of freedom of speech and the various social interests. However, the same cannot be balanced as if they are of equal weight. Commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest.

In India, the position must be even stronger than it is in England, because freedom of speech, including the freedom of the press, is a fundamental right, although subject, *inter alia*, to reasonable restrictions imposed by the law governing contempt of court. Happily, the current tendency has not been to restrict freedom of speech by resorting to the power to commit for contempt of court, barring some occasional aberrations in judicial approach.

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9 (1765) Wilm. 243.

10 *Id.* at 255.

V. Critical Appraisal Of The Judicial Pronouncements

The definition of 'criminal contempt'[11] as given in the Act is ambiguous and therefore susceptible to different interpretations as per the hunch of the Bench called upon to interpret. In particular what tantamounts to scandalizing the court has not been defined in the Act. Scandalizing the court in law connotes any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority. This scandalizing might manifest in various ways, but in substance it is an attack on individual judges or the court as a whole, with or without reference to particular cases, casting unwarranted and defamatory aspersion on the character and ability of judges. Such conduct is punished as contempt for the reason that it tends to create distrust in the popular mind and impair confidence of the people in the courts which are of prime importance to the litigants in the protection of their rights and liberties.

Shri E.S. Venkatramaih[12], the former Chief Justice of India gave an interview to a noted journalist Kuldeep Nayar on the eve of his retirement on 17th December 1989 which was published in several newspapers. In course of the interview, the former Chief Justice is stated to have made the following statements –

> "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".
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> "In every High court, Justice Venkatramaih said, there are at least 4 to 5 Judges who are practically out every evening, wining and dining either at a lawyer's house or a foreign embassy. He estimates the number of such Judges around 90 and favours transferring them to other High Courts".
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> "Chief Justice Venkatramaih reiterated that close relations of Judges be debarred from practising in the same High Courts. He expressed himself strongly against sons, sons-in-law and brothers of Judges appearing in the Courts where the latter are on the Bench. Most relations of Judge are practising in High courts of Allahabad, Chandigarh, Delhi and Patna".

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[11] Section 2(c) of the Act.

[12] *Vishwanath* v. *E.S. Venkatramaih*, (1990) Cri.L.J. 2179.

> "According to Chief Justice Venkatramaih practically in all the 22 High Courts in the country close relations of Judges are thriving. There are allegations that certain judgements have been influenced through them even though they have not been directly engaged as lawyers in such cases. It is hard to disregard the reports that every brother, son or son-in-law of a Judge, whatever his merit or lack of it as a lawyer, can be sure of earning an income of more than Rs.10,000 a month".

The Division Bench of the Bombay High Court held that the words complained of did not amount to contempt of court on the grounds that :

(a) The entire interview appeared to have been given with an idea to improve the judiciary;

(b) The Supreme Court had dismissed a writ petition[13] filed on behalf of the State Legal Aid Committee, Jammu & Kashmir for an appropriate writ commanding the Union of India or any other appropriate authority to disclose the names of 90 Judges of the different High Courts in India as mentioned by the former Chief Justice of India.

Both these grounds are not convincing. As the law stands today maligning Judges (in the manner as reported) is, who are in service and discharging judicial functions, clear contempt of court. It is more so when the maker of such sweeping statements is the former Chief Justice of India. As far as the writ petition in the Supreme Court is concerned it is obvious that the Supreme Court was not concerned with any contempt proceedings and to draw the inference that "had the statement amounted to contempt, then their Lordships of the Supreme Court would have taken *suo motu* action on the basis of the material that was placed before them" is wholly untenable.

In *EMS Namboodiripad* v. *T.N. Nambiar*[14], the Supreme Court held that while Art.19(1)(a) guaranteed the freedom of speech and expression, Art.19(2) showed that it was also intended that contempt of court should not be committed in exercising that right. The case arose out of a press conference held by the appellant, the chief minister of Kerla, in which he said that the

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[13] Writ Petition (Civil) No.126 of 1990.

[14] (1971) 1 SCR 697: AIR 1970 SC 2015.

judiciary was "an instrument of oppression" and that the judges "were guided and dominated by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor". Hidayatullah C.J. held that this was a clear case of contempt. It is submitted that the judgment is correct in the result.

In *P.N. Duda* v. *P. Shiv Shanker,*[15] Shri P.N. Duda complained that a speech made by Shri P. Shiv Shanker who was a Law Minister when he made the speech, on the occasion of the Silver Jubilee of the Bar Council of Andhra Pradesh at Hyderabad, committed contempt of the Supreme Court. The speech was addressed to Judges and lawyers, but the press was present.

In his speech the Minister had, *inter alia*, observed :

> "The Supreme Court composed of the elements from the elite class had their unconcealed sympathy for the haves.... Anti-social elements, i.e., FERA violators, bride burners and a whole horde of reactionaries have found their haven in the Supreme Court."[16]

Dealing with the first part of the speech, the Supreme Court found that the Minister had examined the class composition of the Supreme Court. With regard to the latter part, the Supreme Court observed :

> "This, of course, if true, is a criticism of the laws. The Supreme Court as it is bound to do has implemented the laws and in implementing the laws, it is a tribute to the Supreme Court that it has not discriminated between persons and persons, Criminals are entitled to be judged in accordance with law. If anti-social elements and criminals have benefited by decisions of the Supreme Court, the fault rests with the laws and the loopholes in the legislation. The Courts are not deterred by such criticisms."[17]

And accordingly he was held to be not guilty of the contempt of the court. It is submitted that Shiv Shanker was clearly guilty of gross contempt of court when he stated that :

> "The Supreme Court composed of the element from the elite class had their unconcealed sympathy for the haves, i.e., Zamindars..."

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[15] AIR 1988 SC 1208.

[16] *Ibid.*

[17] *Ibid.*

It is submitted that the Judges who believe that the above sentence does not amount to contempt of court can believe anything. There can be no doubt that the ordinary readers of a newspaper would come to the conclusion that they cannot obtain justice before the SC since it openly proclaimed its sympathy for the "haves".

It is unimaginable to comprehend the opinion of the court that "anti-social elements, i.e., FERA violators, bride burners and a whole horde of reactionaries have found their haven in SC" does not amount to contempt.

It is submitted that the judgment lays down no legal principle, is clearly wrong and productive of grave public anguish and should be overruled.

In the case of *Arundhati Roy*[18], the respondent – Arundhati Roy, in her affidavit accused the Supreme Court of proceeding against her with absurd, despicable and entirely unsubstantiated petition which, according to her, amounted to the court displaying a disturbing willingness to issue notice. She further attributed motives to the court of silencing criticism and muzzling dissent by harassing and intimidating those who disagree with it.

The SC while holding the contemner, Ms. Arundhati Roy guilty of committing criminal contempt of the Court by scandalising its authority with *mala fide* intention sentenced her to simple imprisonment for one day and to pay a fine of Rs.2000/-.

It is submitted that in view of the offending portion of the contemner's affidavit as quoted above – she was rightly held guilty of committing contempt of the court. However, surprisingly it could be noticed that the utterances of Shri P. Shiv Shankar[19] despite being more severe and scathing, were not held to be contemptuous. This zigzag and uncertain approach emanates from the lack of settled criteria to assess what 'scandalises' the court. And Ms. Roy is right when she contends, after serving out her day in jail that it is not what you say, nor its correctness and justification, but who says it determines whether or not it constitutes criminal contempt.

It is also submitted that before imposing sentence for contempt of court it has to be shown[20] that the contempt is of such a nature that it substantially

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18 In *re Arundhati Roy*, AIR 2002 SC 1375.

19 *Supra* note 15.

20 Section 13 of the Contempt of Courts Act, 1971 reads as under :
"Contempts not punishable in certain cases - Notwithstanding anything contained in any law for the time being in force, no court shall impose a

interferes, or tends substantially to interfere with the due course of justice. In the instant case, there is no finding to this effect in the judgment much less any materials to show that. On the contrary, the observations of the court to the effect that "law punishes the archer as soon as the arrow is shot no matter if it misses to hit the target"[21] clearly shows that there was no substantial interference with justice. To this extent, it is submitted that the judgment suffers from serious infirmities.

From an analysis of the judgments referred to hereinabove it can be seen that there is clear and weighty authority for the proposition that *mens rea* in the sense of intending to lower the repute of a judge or court is not an essential ingredient of the offence of scandalising the court. But the strict liability principle is somewhat qualified by the principle that the contemnor must know that his publication contains the matter complained of and there are some cases which stress that the publication in order to amount to contempt must be *mala fide*.

The law, as it stands today, does not recognise truth as a defence in criminal contempt proceedings initiated against a person for imputing improper motive against a judge. It may be, however, stated herein that vide an order in *Dr. Subramanian Swamy* v. *Rama Krishna Hegde*[22] a reference has been made to the Constitution Bench to reconsider the question whether truth can be pleaded as a defence in contempt proceedings.

It is submitted that the lack of settled criteria to assess what "scandalises" the court, the proposition that *mens rea* is not an essential ingredient of the offence of this branch of contempt, the provision that even truth is not a defence against criminal contempt and the fact that judge and the prosecutor are the very same in such proceedings have complex ramifications. Together, they demand that the Judiciary observe a tremendous amount of restraint when invoking criminal contempt. The courts in some other democratic countries have virtually given up this power. For instance, in Britain, the law is virtually a dead letter.[23]

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sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice."

21 *Supra* note 19.

22 2000 (10) SCC 331.

23 Lord Morris in *Mcleod* v. *St. Aubyn*, 1899 AC 549 observed that committal for contempt by scandalising the court itself has become obsolete in England because courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.

VI. Reforming the Law of Contempt of Court

There are many things that are wrong with the law of contempt of court. It is an arbitrary power. It involves the use of summary process rather than the ordinary procedure. A person can be found guilty of contempt even if he acted in good faith and did not intend to commit contempt. The *mens rea* is not an essential ingredient of the offence of criminal contempt. Truth cannot be pleaded as a defence in contempt proceedings. The judge and the prosecutor are the very same in these proceedings. Coupled with the lack of settled criteria – to assess what 'scandalises' or 'lowers' the authority of the court and what 'prejudices' or 'interferes' with the due course of any judicial proceeding and what 'interferes' or 'obstructs' the administration of justice 'in any other manner' – gives unbridled powers to the courts to invoke this jurisdiction, which, if not exercised with restraint, may trample upon the fundamental right of free speech of the citizenry.

The freedom of speech and expression is subject to reasonable restriction imposed by, *inter alia*, a law relating to contempt of court. Whether restrictions enshrined in contempt law are reasonable or not must be considered by undertaking the sensitive and delicate task of reconciling two ultimately conflicting public interests, i.e., protecting fair trial and preserving freedom of speech. It is however submitted that something which is constitutional need not always be desirable. The power to punish publications etc. as contempt should not be used to such an extent that free speech is eclipsed even as no one has a right in exercise of its fundamental right of free speech to lodge unwarranted, unscrupulous, sweeping and scurrilous attack on the judicial system.

From a perusal of the cases cited above it is apparent Indian judiciary has not been consistent in invoking this jurisdiction and on occasions it has been too liberal and on other occasions it has been too harsh and too touchy. Lack of settled criteria or precise definition as to what amounts to criminal contempt has resulted in this unguided power, exercise thereof, largely depends upon the hunch of the Bench. Judges have to be tolerant to the criticism, recognising the advantages and merits of such criticism. *Bonafide* comments, even erroneous and outspoken, should be allowed.

The law of contempt in India as currently interpreted by the superior courts was highly antiquated and was acting as a serious impediment to the

freedom of speech. It is significantly deterring a free and frank discussion and analysis of the approach of the courts in India. The Contempt of Courts Act, 1971 is having the effect of rendering the judiciary beyond public criticism and thus rendering it totally unaccountable. With the impeachment system having practically failed and there being no other system of enforcing accountability of the judiciary, the discouragement of public discussion and criticism of the judiciary is bound to have and is having a deleterious effect on the functioning of our democracy. The power of contempt had been misused by the courts to hold that no motives could be ascribed to judges or courts and that even truth of an imputation could not be pleaded in defence in a charge of contempt and this issue was pending before the Constitution Bench of the Supreme Court for a number of years. Gagging the people from freely criticising the judiciary and examining the motives of judges cannot be the method of inculcating respect for the judiciary. Respect cannot be forced and must be earned by its action, which must be transparent and open to criticism, however trenchant. It had become imperative for the people to demand that Parliament amended the Act. It should be made clear that no criticism of the court, howsoever, severe and no imputation against a judge or the judiciary would constitute contempt of court, unless it was shown that the imputation was baseless and *malafide*.

However, as stated above, no clear criteria are laid down as to what constitutes contempt. Even the judgments suggest both caution and severity depending on the facts. Judges should be more tolerant. People have a right to comment upon the administration of justice. Over-sensitiveness to public criticism is anathema. Restraint is desideratum. Judges should endeavour to protect free speech and civil liberties of citizenry even against judicial umbrage and to be tolerant and detached even under attacks of press.

It is submitted that it is dubious assumption that truth of the aspersion is no justification. This cannot be. If every speech under Article 19(1)(a) is subject only to reasonable restriction, truth as a plea, will be valid. To exclude truth as a defence is an unreasonable restriction. In a criminal prosecution for libel, the prosecution would fail if it were shown that specific charges were true and it was for the public good that they should be made. But there cannot be one law for a corrupt Minister and another for a corrupt judge. Our Constitution makes freedom of speech and

expression a fundamental right, and the exception to it is the law of contempt – not any law of contempt – but reasonable restrictions in that law. The Contempt of Courts Act does not say that truth cannot be a defence and will not be a defence and it is for the courts to interpret the meaning of the word 'scandalise'. It is hoped the Supreme Court would reconsider the law making the truth a valid plea in this branch of contempt jurisdiction. The Union Law Minister, H.R. Bhardwaj, introduced in the Lok Sabha on December 01, 2004 the Contempt of Courts (Amendment) Bill, 2004 providing for making truth a valid defence in the court of law.[24]

There is an element of unfairness built into contempt proceedings because the judge often decides his own cause while a person hauled up is not allowed to offer any defence other than an apology, and their frequent invoking threatens to chill legitimate democratic debate.

The classic exposition of the right of criticism is well said in the following words of Lord Atkin:

> "The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising right of criticism, and not acting is malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".[25]

The above note of caution sounded by Lord Atkin must be borne in mind by the judges while exercising contempt jurisdiction. The reform of the law of contempt in India is long overdue.

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[24] THE HINDU, December 02, 2004.

[25] *Ambard* v. *Att. General of Trinidad & Tobago*, 1936 AC 322.