

CONTEMPT OF COURT: THE NEED FOR A FRESH LOOK

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The topic of Contempt of Court often comes up for discussion and comment. Some talk of reforming the Law of Contempt, others suggest abolishing this power in Courts altogether, etc. There are a large number of books and articles on the subject.

The attempt is here to give the subject a new look by going into the Fundamental Principles.

The basic principle in a democracy is that the people are supreme. It follows that all authorities, whether Judges, Legislators, Ministers, Bureaucrats, etc. are servants of the people.

Thus, the preamble to the Constitution of India states :

“We, The People of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens :

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

These words emphasize the republican and democratic character of our Constitution, and show that all power ultimately stems from the People.

Once this concept of popular sovereignty is kept firmly in mind it becomes obvious that the people of India are the masters and all authorities in India (including the Courts) are their servants. Surely the master has the right to criticize the servant if the servant does not act or behave properly. It would logically seem to follow that in a democracy the people have the right to criticize the Judges. Why then, it may be asked, should there be a Contempt of Courts Act which to some extent prevents people from criticizing Judges or doing other things which are regarded as Contempt of Court? This is a question which calls for a close examination, and this is what is attempted here.

The Constitution has no doubt been created by the people. But this instrument has itself created the Courts, which means that the people in their wisdom realized that there must be a forum (or fora) where disputes between the people could be resolved and grievances of the people redressed peacefully.

It is in the nature of things that in every society there will be disputes between the people and grievances of the people. If there is no forum to resolve these disputes and redress these grievances peacefully, they will be resolved violently with bombs, guns, knives and lathis. Hence the judiciary is a great safety valve. By giving a hearing to a person having a grievance, and by giving a verdict on the basis of settled legal principles, the Court pacifies that person, otherwise the grievance may erupt violently. The judiciary thus maintains peace in society, and no society can do without it.

Looking at it from this angle one can immediately realize that in a democracy the purpose of the Contempt of Court power can only be to enable the Court to function. The power is not to prevent the

master (the people) from criticizing their servant (the Judges) if the latter do not function properly or commit misconduct.

Article 19(1)(a) of the Constitution gives the right of freedom of speech and expression to all citizens. But Articles 129 and 215 give the power of Contempt of Court to the higher judiciary, and this power limits the freedom granted by Article 19(1)(a). How are these two provisions to be reconciled?

In my opinion once it is accepted that India is a democracy, and that in a democracy the people are supreme, the reconciliation can only be affected by treating the right of the citizens of free speech and expression under Article 19(1)(a) to be primary, and the power of contempt to be subordinate. In other words, the people are free, and have the right to criticize Judges, but they should not go to the extent of making the functioning of the judiciary impossible or extremely difficult.

Thus in my opinion the test to determine whether an act amounts to Contempt of Court or not is this : does it make the functioning of the Judges impossible or extremely difficult? If it does not, then it does not amount to Contempt of Court, even if it is harsh criticism.

Much of our Contempt Law is a hangover from British rule. But under British rule India was not free and democratic, and the people were not supreme, rather it was the British rulers who were supreme. Also there was no Constitution at that time containing provisions like Article 19(1)(a). How then can the law of those days be applicable today?

As a Judge in three High Courts (Allahabad, Madras and Delhi) I would often tell the lawyers in open Court that they could criticize me as much as they liked, inside the Court or outside it, to their heart's content, but I would not initiate proceedings for Contempt of Court. Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it. Some people deliberately try to provoke the Judge to initiate Contempt of Court proceedings, their whole game being to get publicity. The best way to deal with such persons would be to ignore them, and thus deny them the publicity which they are really seeking. I would often say in Court "Contempt power is a 'Brahmastra' to be used only on a 'patra' (deserving person), and I do not regard you as a 'patra'."

I also said that the only situation where I would have to take some action was if my functioning as a Judge was made impossible e.g. if someone jumps up on to the dais of the Court and runs away with the Court file, or keeps shouting and screaming in Court, or threatens a party or a witness. After all I have to function if I wish to justify my salary.

In a speech delivered on 1.12.2001 in Jaipur on the topic "The Law of Contempt – is it being stretched too far?" The doyen of the Indian Bar, Mr. Fali Nariman, said that the offence of 'scandalizing the Court' is a mercurial jurisdiction in which there are no rules and no constraints. I may quote an entire long passage from this speech:

"It was Jeremy Bentham (the theoretical jurist) who characterized the Common Law as "Dog Law."

"When your dog does anything you want to break him off", (he wrote in 1823), "you wait till he does it, and then beat him for it. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

The law of contempt of court in Anglo-Saxon jurisprudence both in England in the past, and in India in the past and present, has been no more, no less than "Dog-Law". There are no rules, no constraints – no precise circumstances when the administration of justice is brought into contempt. The judgments are strewn with pious platitudes that give little guidance to the editor, to the commentator, to lawyers, and to members of the public: this part of the law of contempt though necessary, is a standing threat to free expression. It leaves too much to the discretion of the particular judge (or judges). And at times decisions do give rise to a strange feeling that the status of the person who scandalizes the Court perhaps did affect the ultimate result.

In 1988 a sitting Cabinet Minister made wide and improper remarks against Judges of the Supreme Court. He said :

“Zamindars like Golaknath (he was speaking of the Golaknath Case) evoked a sympathetic cord nowhere in the whole country except the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Cooper’s case (1970). Anti social elements, FERA violators, bride burners and a whole hoard of reactionaries have found their haven in the Supreme Court.”

The minister then went on to say that because the Judges of the highest Court had their “unconcealed sympathy for the haves” (as opposed to the have nots) they had interpreted the expression “compensation” in the manner they did: clearly attributing motives.

And yet a Bench of two Judges (in Duda’s case AIR 1988 SC 1208) exonerated him. Let me read to you what the Bench said :

“Bearing in mind the trend in the law of contempt (they were speaking of the liberal trend)- established by the Judgment of Justice Krishna Iyer in Mulgaokar’s case (AIR 1978 SC 727), the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into disrepute or impair the administration of justice. The Minister is not guilty of contempt of the Court.”

Admirable. Laudable. Free speech upheld. But one cannot help wondering whether their Lordships would have been quite as liberal if the criticism had been made by a less important personage than a Cabinet Minister.

Again when an important personage Mr. Mohd. Yunus, Chairman of the Trade Fair Authority of India known at the time to be very close to the Prime Minister – had criticized a judgment delivered by a Supreme Court Judge in the Jehovah Witness’ case holding that the singing of the National Anthem for a particular sect. of Christians was not compulsory – Mr. Mohd. Yunus said this Judge (Justice Chinnappa Reddy) “has no right to be called either an Indian or a Judge.”

An Association of individuals called the Conscientious Group filed a petition seeking a direction that Mr. Yunus should be hauled up for contempt. But close colleagues of Justice Chinnappa Reddy daily sitting with him suddenly found themselves powerless to even call for an explanation from Mr. Mohd. Yunus – on the technical ground that when the Attorney-General was approached by the petitioners to give his sanction he had declined, and the Solicitor-General had also demurred, vide Conscientious Group vs. Mohammed Yunus and Ors., AIR 1987 SC 1451.

They know that the power to issue notice suo motu for any contempt was plenary (not dependant on the fiat of the Attorney-General or Solicitor-General) – yet they chose not to invoke it even though a Sitting Judge of the Supreme Court had been described as a person not fit to be an Indian, not fit to be a Judge.

Yet in a later case (also reported) a not-so-important litigant was held guilty of contempt for saying that a Judge was anti-national. When a Bench of the Supreme Court of India hearing a miscellaneous application said that it was inclined to think that a particular case should go before a Bench, which had earlier passed some orders, an inconsequential member of the public Mohd. Zahir Khan (the litigant) addressed the Court in a loud tone thus :

“Either he is an anti-national or the Judges are anti-nationals.”

“A notice was issued and the litigant was found guilty of contempt of court and made to suffer imprisonment for one month, vide Mohd. Zahir Khan vs. Vijai Singh & Ors. 1992 Supp.(2) SCC

72. These examples are given not to deride our Judges or criticize previous decisions. It is only to illustrate very graphically – that the true nature of this aspect of contempt jurisdiction : is mercurial, unpredictable – capable of being exercised (and therefore in fact exercised) differently in different cases and by different Judges in the same Court.

And the disturbing trend persist.”

The criticism of Mr. Nariman about the uncertain state of affairs regarding the Law of Contempt appears to be justified.

To give an example, in P.N. Duda vs. P. Shiv Shanker AIR 1988 SC 1208, the speech delivered by the then Union Law Minister Mr. P. Shiv Shanker in substance was similar to the one delivered by the then Chief Minister of Kerala Mr. Nambudiripad. However, Mr. Nambudiripad was held to be guilty of contempt of Court (vide AIR 1970 SC 2015) but Mr. Shiv Shanker was not. Is this not uncertainty in the law?

It may be noted that Mr. Nambudiripad in his speech had accused the Judges of being biased in favour of rich people and against the poor. In substance this was the same allegation which was made by Mr. Shiv Shanker (extract of whose speech is referred to above).

Mr. Nariman and others are perfectly correct in saying that there should be certainty in the law, and not uncertainty. After all, the citizen should know where he stands.

The uncertainty in the Law of Contempt of Court was, in my opinion, for two reasons (1) In the Contempt of Courts Act, 1952 there was no definition of `contempt`, (2) even when a definition was introduced by the Contempt of Courts Act, 1971 (vide Section 2) there was no definition of what constitutes scandalizing the Court, or what prejudices, or interferes with, the course of justice. What could be regarded as scandalous earlier may not be regarded as scandalous today and what could earlier be regarded as prejudicing or interfering with the course of justice may not be so regarded today.

In this paper it is sought to remove this uncertainty in the Law of Contempt, and this calls for a deep analysis of the subject.

The view about the contempt power was first stated in England by Wilmot J. in 1765 in a judgment which was in fact never delivered (R. vs. Almon). In that opinion Wilmot J. observed that this power in the Courts was for vindicating their authority, and it was coeval with their foundation and institution, and was a necessary incident to a Court of Justice. The above dictum was thereafter followed by successive Courts not only in England but also in other countries.

Thus the power of Contempt was said to be required for maintaining the dignity and vindicating the authority of the Court.

But whence comes this authority and dignity of the Court? In England it came from the King. The judicial function is a sovereign function. The King was the fountain of justice, and in earlier times he would himself decide cases. It was only subsequently when the king had many other functions (military, administrative, etc.) that he delegated judicial functions to his delegate, who began to be called Judges.

Thus in a monarchy the Judge really exercises the delegated functions of the King, and for this he requires dignity and majesty as a King must have, to get obedience from his subjects.

The situation becomes totally different in a democracy in which it is the people, and not the King, who are supreme. Here the Judges get authority delegated to them by the people, and not by a king.

We may analyze this a little deeper. In a monarchy it is the King which is the superior entity, while the people, being his subjects, are the inferior entity. Since the Judges are really performing the delegated functions of the King, they need the majesty and aura which the King needed to secure obedience from his subjects.

In a democracy, on the other hand, it is the people who are supreme, and therefore they are the superior entity, while all State authorities (including Judges) are inferior entities, being the servants of the people.

Hence in a democracy there is no need for Judges to vindicate their authority or display majesty or pomp. Their authority will come from the public confidence, and this in turn will be an outcome of their own conduct, their integrity, impartiality, learning and simplicity. No other vindication is required in a democracy by Judges, and there is no need for them to display majesty and authority.

The view expressed above is in fact accepted now even in England. As observed by Lord Salmon in AG vs. BBB (1981) AC 303 = (1980) 3 All ER 161 (170):

“The description ‘Contempt of Court’ no doubt has a historical basis, but it is nonetheless misleading. Its object is not to protect the dignity of the Courts but to protect the administration of justice.”

This is precisely the thesis which is sought to propounded in this paper. The contempt power in a democracy is only to enable the Court to function, and not to vindicate and maintain its authority and dignity.

In Almon’s case, to which we have already referred, the defendant had published a pamphlet accusing Lord Mansfield, the Lord Chief Justice of having acted ‘officiously, arbitrarily and illegally’. Wilmot J. observed that this:

“excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary.”

(Vide Miller’s Contempt of Court 3rd Edition page 568)

Wilmot J’s opinion was expressed in 1765. Can it be said to be the Law of Contempt of Court in England today? Hardly. Even though there is no written Constitution in England and hence no Fundamental Right like Article 19(1)(a), the old view of Contempt of Court is totally changed today even in England, and now the view is that of Lord Salmon, as mentioned above.

Justice is not ‘a cloistered virtue’, said Lord Atkin, and must suffer the scrutiny and outspoken comments of ordinary men. In fact exposure to criticism only strengthens the judiciary, far from weakening it.

As observed by Lord Denning in R vs. Commissioner of Police (1968) 2 QB 150:

“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.

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. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

The best shield and armour of a Judge is his reputation of integrity, impartiality, and learning. An upright Judge will hardly ever need to use the contempt power in his judicial career. It is only in a very rare and extreme case that this power will need to be exercised, and that, too only to enable the Judge to function, not to maintain his dignity or majesty.

Sometimes an honest and learned Judge is unjustifiably criticized. But for one such person criticizing an upright Judge one hundred people will immediately rush to his defence (even without the Judge asking for such defence). Why then, should Judges get upset or be afraid of criticism, particularly when we are living in a democracy? As long as the Judge is allowed to function, the best course for him is to ignore baseless criticism (but pay heed to honest and correct criticism).

I remember when I was Chief Justice of Madras High Court two Hon'ble Judges of the Court (whom I greatly respect) one day came to my chamber during the lunch interval. They were looking very upset and disturbed. Apparently someone in the Court distributed a leaflet making some allegations against them. I went through the leaflet, and then asked them "Is your conscience clear?" They said it was. Then I laughed and told them to just ignore the leaflet, otherwise they would get blood pressure. When I said this they too started laughing, tore up the leaflet and threw it into the waste paper basket. I told them, that this was only an 'occupational hazard' of a Judge, and in a democracy people say all sorts of things, which a Judge should learn to ignore as long as his conscience was clear.

In 'American Jurisprudence' (1964 Second Edition, Vol. 17 page 6) it is stated:

"Contempt of court has been defined as a despising of the authority, justice or dignity of the court. Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, or otherwise tends to impede, embarrass or obstruct the court in discharge of its duties, is guilty of contempt.... Contempt of court has also been described as any conduct that in law constitutes an offence against the authority and dignity of a court or of a judicial officer in the performance of a judicial function."

With due respect this definition is wide off the mark in modern times in a democracy. It is a hangover of the archaic and obsolete British Law of Contempt which originated at a time when the British King was supreme, and the Judges were his agents.

In a democracy it is not criticism by a few persons which brings a Judge into disrepute or shakes his authority, it is his own conduct (or rather misconduct) which can do so. If a Judge is honest and upright (and the people know about the integrity of a Judge very quickly) no amount of misguided and baseless criticism can bring him into disrepute or shake his authority, for such authority comes from the confidence of the public at large.

We may now come back again to the central point in this paper. I submit that the law of contempt of court can be made certain once it is accepted that the purpose of the contempt power is not to vindicate or uphold the majesty and dignity of the court (for it is automatically vindicated and upheld by the proper conduct of the Judge, not by threats of using the contempt power) but only to enable the court to function. The contempt power should only be used in a rare and very exceptional situation where without using it, it becomes impossible or extremely difficult for the court to function. In such rare and exceptional situations, too, the contempt power should not be used if the mere threat to use it suffices.

It has, no doubt, been mentioned in Section 2(c) of the Contempt of Courts Act, 1971 that any act which 'scandalises or tends to scandalize, or lowers or tends to lower the authority of any court is contempt of court.

But what is the meaning of 'scandalising'? The meaning of words, and our notions, change with the passage of time. For instance many things which were regarded obscene earlier are no longer regarded obscene, today (e.g., **D.H. Lawrence's book 'Lady Chatterley's Lover'**).

Does calling a Judge a fool scandalize him? In this connection we may refer to the decision of the House of Lords in the Spycatcher case, vide **Attorney General v. Guardian Newspaper 1987(3) All.E.R. 316 (H.L.)**.

The facts of the case were that a former spy, Peter Wright, wrote a book entitled 'Spycatcher' about his days in the British Intelligence Agency MI5. The British Government filed an injunction suit to restrain publication of the book on the ground that the material in the book was confidential and was prejudicial to national security. By a 3-2 majority the House of Lords granted the injunction.

The Press was outraged. The Daily Mirror, for example, ran a banner headline next day accompanied by upside down photographs of the majority Judges and the caption 'YOU FOOLS'.

Mr.Nariman, who was in England at that time, asked Lord Templeman (the Senior Judge in the majority) why no contempt proceedings were initiated. Lord Templeman smiled, and said that Judges in England did not take notice of personal insults. Though he believed he was not a fool, others were entitled to their opinion.

Thus the concept of 'scandalising' the court has changed. In earlier times a person who called a Judge a fool in England would certainly be hauled up for contempt; today he would not. And the reasons for this change is, as Lord Salmon has pointed out, that today the contempt power is not used for vindicating the authority of the Judge but only for enabling him to function. If for instance, a person keeps shouting or whistling in my court repeatedly, and does not stop despite my repeated requests, obviously I will have to take some action to enable me to function. After all people are paying taxes from which I get my salary and perks, and I have to justify this salary by deciding their disputes. Similarly, if someone threatens a party or witness in a case, I will certainly take action. But if a person calls me a fool, whether inside court or outside it, I for one would not take action as it does not prevent me from functioning, and I would simply ignore the comment, or else say (like Lord Templeman) that everyone is entitled to his opinion. After all, words break no bones.

In **Balogh v. Crown Court at St.Albans (975 QB 373** the defendant told the Judge in Court "You are a humourless automaton. Why don't you self-destruct?" Lord Denning said that such insults are best treated with disdain, and took no action.

There may, of course, be differences of opinion about what acts prevent, or make it very difficult, for a Judge, to function. For instance, do comments by the public (including lawyers, journalists, etc.), or publicity in the media, about a pending case prevent, or make it very difficult, for the Judge to function? I, for one, am inclined to think that it does not. A Judge should have the equanimity and inner strength to remain unperturbed and unruffled in any situation.

In this connection I may refer to the speech delivered on 19.2.1968 by Mr.K.L. Misra, the then Advocate General of U.P. on the demise of my grandfather, Late Dr.K.N. Katju in which he said:

"No leadership of the Bar, at least in those days, was possible without the background of a deep scholarship and learning of law. I remember, very vividly, his coming back to the Bar, after incarceration of about 3 or 4 years, late in 1943, when he sat down, in a corner of the Advocates Association, and then, within a few days, read through cases decided by the British Courts during the time of his absence from the Bar. I went near him. He called me and put before me a judgment of the King's Bench Division, which I read with absorbing interest, the very learned discussion in the judgment on the difference between "value" and "price". Dr.Katju asked me: "what is the significant thing you have noticed about this judgment". I read it again before him and tried to tell him what the gist of the judgment was. He said: "No, no; look at the date of the judgment." He then pointed out to me that the date, on which the judgment was delivered, with that scholarly and cloistered detachment, fell during the days when the German Air Force – its bomber squadron – were spreading widespread devastation and destruction in England. He told me that this detachment makes up the mentality of a true Judge."

Now if even bombs falling near him do not disturb a true Judge, why should mere comments or publicity do so? A Judge's shoulders should be broad enough to shrug off such comments or publicity without getting perturbed or influenced.

In my opinion, therefore, the expression 'preventing or making it extremely difficult, for the Judge to function' should ordinarily be understood with reference to a Judge who has a true Judge's temperament – detached, calm, with equanimity, and with broad enough shoulders to shrug off baseless criticism or attempts to influence him without being perturbed.

In my opinion a fresh and modern, democratic approach, like that in England, USA and commonwealth countries, is now required in India to do away with the old anachronistic view. Contempt jurisdiction is now very sparingly exercised in these western countries. Thus in **Defence Secretary v. Guardian Newspapers (1985) 1 A.C. 339 (347)** Lord Diplock observed that "the species of contempt which consists of 'scandalising the judges' is virtually obsolescent in England and may be ignored".

Moreover, it must always be remembered that contempt jurisdiction is discretionary jurisdiction. A Judge is not bound to take action for contempt even if contempt has in fact been committed.

An interesting example of this is given by Lord Denning in his Book "**The Due Process of Law**" at **Page 6** where he writes:

"On every Monday morning we hear litigants in person. Miss Stone was often there. She made an application before us. We refused it. She was sitting in the front row with a book-case within her reach. She picked up one of Butterworth's 'Workmen's Compensation Cases' and threw it at us. It passed between Lord Justice Diplock and me. She picked up another. That went wide too. She said, 'I am running out of ammunition'. We took little notice. She had hoped we would commit her for contempt of court – just to draw more attention to herself. As we took no notice, she went towards the door. She left saying: 'I congratulate your Lordships on your coolness under fire'."

Before concluding, I may refer to the book on "**Judges**" by David Pannick, in which he states: "Some politicians, and a few jurists, urge that it is unwise or even dangerous to tell the truth about the judiciary. Judge Jerome Frank of the US Court of Appeals sensibly explained that he had little patience with, or respect for, that suggestion. I am unable to conceive.... that, in a democracy, it can never be wise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions... The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

In this connection reference may be made to the recent amendment to the Contempt of Courts Act (the contempt of Courts Amendment Act, 2006) which has introduced a new Section 13(b) which states:

"The courts may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide."

Thus, truth is now a defence in contempt of court proceedings if it is in public interest and is bona fide. This amendment is in the right direction, and was long overdue.
