# DOES CONTEMPT CONVICTION THREATEN FREE SPEECH IN INDIA?

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## ABSTRACT

India is a country which is known for its democratic values. Freedom of speech and expression is a sine qua non for democracy. However, today, there are various tools which are used by the government or other institutions to curtail the use of this right and contempt of court is the foremost among them. It is one of the restrictions that can act as a rider on the fundamental right of people to freely express their views. It is a strange concept where the presiding judge performs the role of the complainant, the prosecutor as well as a judge which is a vestige of feudalism. In India, the origin of this doctrine dates back to the time when India was ruled by the East India Company. Britishers went from India but their effect on the laws and provisions of India are still witnessed today and the provision of contempt of court is an example of that. On one hand where England itself has repealed the law relating to contempt of court in their country, India is following the same even today. Now, it is time for India to revise this law taking into consideration its repercussions on the fundamental rights of people. The courts perform an important role in our country as a custodian of the Constitution. It is not expected from the custodian itself to show its reluctance to the expression of dissents over the verdicts delivered by it. This reluctance will itself amount to depress the dignity of the court and result into an impression that the shoulders of the courts are too fragile to shrug off the dissent.

**What exactly is 'contempt of court'?**

Contempt of Court is a generic term which can be defined as an offence of being defiant or disrespectful to the court of law.

In Attorney-General v. Times Newspapers Ltd.[1], Lord Diplock defined the Contempt of Court as: "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 to inhibit citizens from availing themselves of it for the settlement of their disputes.

**A brief historical account**

The contemporary contempt doctrine has been sprouted from the English Law. In India, the origin of this doctrine dates back to the time when India was ruled by the East India Company. However, Kautilya has also mentioned about the same in his book "Arthshashtra" where he wrote that if any person breaks the decorum of the Court and goes against the king then he/she would be punished.

In India, the first statute related to the Law of Contempt was the Contempt of Courts Act, 1926 which for the first time in British India talked about the power that the Courts possess to punish for Contempt of Court. Section 2 of the Act mentioned that all the High Courts have the jurisdiction to punish for Contempt of themselves and that of the Courts subordinate to it. However, some states like Mysore, Hyderabad, Madhya Pradesh, Pepsu, etc. enacted their own legislation related to this concept. In 1937, this act was amended to clarify the limits of punishments imposed.

**The post-independent entry of 'contempt'**

The Contempt of Court Act, 1926 and all the above-stated State enactments were repealed and replaced by the Contempt of Courts Act, 1952. However, the existing law was found to be uncertain, undefined and unsatisfactory which resulted in an amendment bill being introduced in the Lok Sabha in April, 1960. A special committee was constituted to effectively deal with the bill and Shri H.N. Sanyal, the then Additional Solicitor General of India, was appointed as the Chairman of the committee. After a detailed study and analysis, the Sanyal Committee submitted its report in 1963 which defined and limited the powers of certain courts in punishing

[1] Attorney General v. Times Newspapers Ltd., (1974) AC 273.

for contempt and suggested to regulate the procedure in relation. The report made a specific mention of criminal contempt and also recommended the "procedure (which should be followed) in cases of criminal contempt" specifically.[2] After detailed consultations and deliberations, the Contempt of Courts Act 1952 was finally repealed and replaced by the Contempt of Courts Act, 1971 which duly took into consideration the numerous suggestions given by the Sanyal Committee in its 1963 report.[3]

**Contempt conviction: A roadblock to free speech**

In the powerful words of Lord Atkin "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[4]

The 'contempt of court' in India is one of a kind and originates from the inborn forces of the court that should be conjured in extraordinary conditions to ensure the spirit of justice. Supreme Court's judge, Justice H.R. Khanna once observed "Judges should not silence criticism with threat of Contempt of Court but should remove the weakness and drawback that crept into the judicial system." [5]

India is a constitutional democracy where rule of law is the supreme principle. The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials and judges.[6] The executive is held accountable to the citizens, the laws passed by the legislature are open to the judicial review of courts and the judiciary is kept in check through public criticism; such delicate balance between the three wings of the government ensures its smooth functioning. This balance is shaken to its root when the judiciary is not open to public scrutiny and criticism for it attacks the fundamental right of free speech and expression guaranteed under article 19 of the Indian constitution. Contempt conviction thus not only threatens free speech but also reduces law to mere 'command of the sovereign'. Supreme Court's former Justice V.R. Krishna Iyer, rightly termed contempt law as "having a vague and wandering jurisdiction, with uncertain boundaries; contempt law, regardless of the public good, may unwittingly trample upon civil liberties". Holmes J in

[2] Justice B.S. Chauhan, Review of the Contempt of Courts Act 1971, Law Commission of India, Report No.274 (2018), https://lawcommissionofindia.nic.in/reports/Report274.pdf.
[3] https://indianculture.gov.in/report-committee-contempt-courts-1963.
[4] Al-Rawi and Others v The Security Service and Others, [2011] UKSC 34.
[5] The State Of Bihar vs Contempt Agst. Dr.Suman Lal, 16 February 2009.
[6] Hobson, Charles. The Great Chief Justice: John Marshall and the Rule of Law, p. 57 (University Press of Kansas, 1996).

Regina v. Secretary of State for the Home Department[7] observed that the right to speech and expression includes the right to fairly criticise the court in private or in public and such a right is inseparable in a democratic framework.

However, a citizen's right to free speech does get threatened when the person is convicted for 'criminal contempt' under the 1971 act or under the inherent powers of the court. This essentially takes place due to 2 main reasons; Firstly, the inherent powers of the court in this regard are limitless and have no specified boundary; The onus is on the court to duly exercise judicial restraint which is extremely whimsical and despotic. The contempt law as a result stands out as an oppressive tool to curb civil liberties, especially free speech. Previously, the Supreme Court had exercised its contempt jurisdiction to suspend the license of a practicing advocate convicted for criminal contempt, in Re Vinay Chandra Mishra case.[8] This judgement was subsequently scrutinised and corrected in Supreme Court Bar Association v. Union of India[9] wherein the court observed that the "Supreme Court of India or any High Court in exercise of its inherent jurisdiction has no such original jurisdiction, power or authority to determine whether an advocate is guilty of professional misconduct or not"

Secondly, the Contempt of Courts Act 1971 was amended in 2006 through section 13 which bars contempt conviction "unless the court 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; and when such contempt is backed by justification of truth (to be considered as a valid defence) if the court is satisfied that it is in public interest and the request for invoking the said defence is bona fide."[10] The **reliance** on subjective terms like 'justification' and 'satisfaction' for contempt conviction makes room for blatant discrimination and prejudice at the hands of the judiciary. Section 13 (a) and (b) is impaired with vagueness as it undermines the administration of justice by undervaluing reasonable restriction whereas it is necessary to show 'actual' hinderance or obstruction to resort to grounds of Article 19(2), as held in the landmark judgment of Shreya Singhal v. Union Of India[11]. While international guidelines on judicial accountability make it mandatory for the courts to exercise impartiality in passing judgements,

[7] Regina v Secretary of State for The Home Department, [1963] 1 QB 829.
[8] Re Vinay Chandra Mishra, (1995) 2 SCC 584.
[9] Supreme Court Bar Association v. Union of India, [1998] INSC 225 .
[10] The Contempt of Courts (amendment) act,2006, Section 13, Acts of Parliament, 1949 (India).
[11] Shreya Singhal v. Union Of India, AIR 2015 SC 1523.

the presence of such arbitrariness in criminal contempt laws provides scope for its misuse thereby promoting miscarriage of justice.

According to principle 2 of Bangalore Principles on Judicial Conduct[12], contempt jurisdiction should be exercised only as a last resort and must always comply with 'procedural standards'. But in the preceding years, multiple criminal contempt cases including Prashant Bhushan's case saw no procedural standard being followed by the courts which otherwise is a sine qua non to reasonably restrict freedom of speech and expression under Article 19(2) of the constitution. The measures for the effective implementation of the Bangalore Principles of Judicial Conduct (2002) which reinforces UN Basic Principles on the Independence of the Judiciary reads "since judicial independence does not render a judge free from public accountability, and legitimate public criticism of judicial performance is a means of ensuring accountability subject to law, a judge should generally avoid the use of the criminal law and contempt proceedings to restrict such criticism of the courts." [13]

India is a party to the International Covenant on Civil and Political Rights (ICCPR) which allows for restrictions on free speech in order to maintain 'public order' but only by law and when backed by a reasonable cause. The UNHRC which reviews reports of states on the implementation of ICCPR says that contempt conviction and any punishment or penalty subsequently imposed "must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings."[14]

South Asia director at Human Rights Watch, Meenakshi Ganguly very correctly pointed out that "Like all public figures, judges too are legitimately subject to criticism, but even if they consider it unfair, it shouldn't be treated as an attempt to undermine the judiciary. Ultimately, the judiciary is strengthened by heightened scrutiny, and judges should take the lead to counter any attempt to silence critics."[15]

**The classic case of Prashant Bhushan**

[12] United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct Bangalore Principles on Judicial Conduct.
[13]Measures for the effective implementation of the Bangalore principles of judicial conduct (January 2010) 2002 Bangalore Principles of judicial conduct.
[14]International Covenant on Civil and Political Rights, Human Rights Committee, (2011) General comment No. 34 .
[15] Meenakshi Ganguly, South Asia director, Human Rights Watch https://www.hrw.org/about/people/meenakshi-ganguly .

In the words of Salman Rushdie "What is freedom of expression? Without the freedom to offend, it ceases to exist"

The entire controversy revolving around Prashant Bhushan and the widespread talks of the need to revisit contempt laws in India began with just two tweets. The tweets focused on the degradation of the democratic system of India in the last 6 years and the role of the Supreme Court and last 4 CJIs in that as well as about an incident where the then CJI of India was driving a luxurious bike of BJP leader without following COVID-19 protocols. Following a long tussle between the Supreme Court and Bhushan, the Court held him guilty of Contempt for scandalising the authority of the court and imposed a fine of 1 Rupee on him.

The verdict resulted in widespread criticism across India from lawyers, former judges, journalists and retired bureaucrats and was seen as a staunch blow on the freedom of speech and expression. More than 3000 such people signed a statement describing the judgement as a "disproportionate response" since they feared that it would have a "chilling effect" on the right of people to express their critical views of the judiciary. It was further demanded that the Supreme Court should not give effect to the judgment until a larger bench was able to review criminal contempt standards in open court after pandemic restrictions are lifted.

"India's Supreme Court has jettisoned its long history of protecting free speech by finding Prashant Bhushan guilty of criminal contempt for his social media posts. At a time when the space for peaceful dissent in India is fast shrinking, the Supreme Court is sending absolutely the wrong message about the importance of holding democratic institutions in a free society accountable" said Meenakshi Ganguly.

In a recent judgement, Justice Chandrachud rightly said that "Dissent is the safety valve of a democracy; if you don't allow safety valve, the pressure cooker will burst". This statement triggers us to reflect as to how problematic criminal contempt laws in India are. In a progressive and democratic country like ours, courts should welcome dissents and criticisms open handedly instead of adopting a rigid, insensitive and callous nature.

Justice R V Raveendran in a 2007 contempt case said "It is possible that it is done to uphold the majesty of courts, and to command respect. But judges, like everyone else, will have to earn respect. They cannot demand respect by demonstration of power of contempt".

Time and again, the Apex Court has itself observed that the power of contempt should not be used by the Courts mechanically. The ulterior aim behind the provision of contempt of court is to maintain the trust of people in the judiciary and their ability to deliver justice. However, such acts of the judiciary where mere dissenters of the courts or judges are held guilty under contempt erode the very faith of people in the judiciary rather than creating the same.

Contempt of Court is a strange concept wherein the presiding Judge assumes all the three roles i.e. of a Complainant, of a Prosecutor and of the Judge upon himself. But what needs to be realised is, it's not the contempt proceedings, but pursuing truth which shall ensure respect to the vanguards of democracy i.e. Supreme Court.

In The Sunday Times v. The United Kingdom[16], the European Court of Human Rights established a three-prong test to check whether a restriction on freedom of expression is justified or not.

The first condition mandates that the restriction be provided by law. In Bhushan's case, the court did not pay any heed to Article 142(2) of the Constitution. In addition, the requirements mentioned in Article 13(a) of the Contempt of Court Act, 1971 were not satisfied. Article 13(b) states that truth is a valid defence in such cases but the Court differed from it and in paragraph 71 of the judgement said that "We do not want to go into the truthfulness or otherwise of the first part of the tweet, in as much as we do not want to convert this proceeding into a platform for political debate."

The second one necessitates that the 'intervention' follows legitimate aims which are laid out in Article 19(3) of ICCPR:

(a) "For respect of the rights or reputations of others;
(b) For the protection of national security or of public order or of public health or morals"[17]

Rather than mentioning how the instant case is affecting public order, the Court entirely shifted its focus on "public confidence in the administration of justice or the majesty of justice" which is entirely subjective. There is no certain measure of this criteria.

[16] Sunday Times v. The United Kingdom, [1979] ECHR 1.
[17] ICCPR (1966), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx .

The third condition says that the restriction must be necessary to secure one of those aims. The word "necessary" here means that there must be a "pressing social need" for the restriction. Taking this point into consideration, it can be inferred that the approach of the Court was unnecessary because it is not possible to determine whether these tweets really resulted in undermining public confidence or not.

In this context, Kabir's thoughts hold great significance:

"Nindak niyre raakhie aangan kuti chwaay

Bin paani, saabun bina, nirmal kre subhay"

This essentially means that one should always keep his/her critic close and listen to the criticism without annoyance. This is because critics help one in figuring out his/her own faults and ultimately give a chance to correct them. This will have a positive effect on the life of the person.

**Author's take on the issue**

As of late, criminal laws like sedition, criminal contempt, criminal defamation have been blatantly used against social activists, journalists, peaceful protesters and even students with an attempt to suppress dissent. There has been a significant increase in politically motivated cases which led to arbitrary prosecution and detention. Supreme Court's senior advocate Bhushan's contempt conviction in mid of such an atmosphere makes us to think if every criticism against the judiciary attracts criminal action. Even the 2006 Contempt of Courts Amendment Act which necessitated 'substantial interference' in court procedure to decide contempt liability, leaves us in doubt if it actually brought a change. The 2015 contempt conviction of a Kerala ex-MLA for calling judges 'idiots' hints not.

Today, 'Contempt of court' is looked upon as an archaic law by many and has become obsolete in most foreign democracies. For instance, the United Kingdom in 2013 had abolished the offence of 'scandalising the court', Canadian courts entertain contempt cases only in case of immediate and substantial danger to the administration while in America, offensive comments on judges or on pertinent legal issues no longer attract contempt punishment.

Given the wide definition of 'criminal contempt' in India, there exists a lot of ambiguity and the threat of its punishment further silences opposing voices, decimating the very essence of

free speech. India's subjective approach towards contempt laws is problematic not only because it lowers the scale of accountability but also because such an approach can't be fairly adopted to award punishments. An independent review mechanism within the system of the judiciary to keep a check against contempt cases is undoubtedly the need of the hour. The present times demand dual responsibility from the legislature as well as the executive; the parliament must rise to action in order to amend the Contempt of Courts Act to bring it into line with international human rights standards while the judiciary must take prompt steps to eliminate the uncertainty in contempt laws as well as to dig deeper into the 1971 act.