CONTEMPT OF COURT: A WICKED DILEMMA?

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ABSTRACT:

Originally, the notion of legal contempt comprised of a wrongdoing against the sovereign or his palace, the place of administration of justice. Now the law of contempt may be primeval, but it possesses utmost modern-day significance. As residents of a country we all have recourse to ways of justice if and when another individual or group of individuals attempts to overstep upon our rights and hamper our daily lives. In the same approach it is only reasonable the Court itself has some means to aid when the same thing happens to it. In its very spirit, contempt of Court refers to an act, which threatens to impede, or actually interferes with the administration of justice. It is designed to maintain the pride of the Courts and protect it from hateful attacks. However, so is not the situation in practice. More often this provision has been raised as a penalization for going versus the judiciary, and not for intervention in the due practice of law. What we must understand here is that the court is the ultimate resort for individuals to go and request justice, and it does not assist if the Court itself shows lawless and egocentric behavior. Article 129 and 215 of the Indian Constitution the Supreme Court and the High court respectively have the power to punish for the contempt of itself, which goes against the principle of *nemo judex in causa sua.*

In this paper we shall endeavor to see the concept of contempt of Court as a contradiction to the philosophies of natural justice and freedom of speech and expression (article 19), which eventually defies the rule of law. Moreover, we shall critique the vague procedure followed in such contempt cases. In conclusion we shall seek to recommend some limits, which need to be set on this authority of the Court in order to prevent its widespread abuse.

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Introduction

Law of contempt poses a grave significance in any legal system around the world. To ensure that justice is served and dignity of the courts is maintained, the contempt laws are important. Is judiaciary in need of such kind of a protection?- is a question in fact. Does the law of contempt provide legitimacy to the judiciary? On the contrary,these provisions rob the judiciary of its legitimacy. Ultimately a court of law does not sustain its legitimacy through its power to punish for conempt. Legitimancy is sustained by a feeling among people that it is independent, objective, principled and fearless.[285]

"Power tends to corrupts but absolute power corrupts absolutely"[286] a famous saying by Lord Acton. An ultimate amount of power vested in any indivdual or institution tends to corrupt the holder of the power. The power, which the courts have of vindicating their own authority, is coeval with their first foundation and institution. It is necessary incident of every court of justice to fine and imprison for the contempt of court committed on the face of it.[287] However, the law prevailing has many contadictions within itself.

Origin:

Contempt law has ancient origins and has evolved over time through various phases of the monarchical legal system. Digging further, one can in fact find the genesis of the concept in the pre-historic divine origin theory, and also the more recent theory of the Social Contract.[288] As the primary function of the early Monarch was protection of his subjects and consequently

[285] D.C. Saxena v. Chief Justice of India (1996) 5 SCC 216

[286] Lord Acton letter to a scholar 1887

[287] R. v. Almon (1765) Wilm.243 254

[288] Social Contract describes a broad class of legal and political theories, whose subjects are implied agreements by which people agree to maintain a certain social order. Such social contract implies that the people give up some rights to a government and other authority in order to receive or jointly preserve social order. Its main proponents are Thomas Hobbes, John Locke and Jean-Jacques Rousseau

administration of justice, it was of utmost importance that his position should be beyond question. In its origin, all legal contempt will be found to consist in an offence more or less against the sovereign himself as the fountainhead of law and justice, or against his Palace, where justice is administered.[289] As society evolved, the authority of the king came to be vested in the office of the Judge who performed the functions as per the delegated mandate.[290] If the authority of the king is beyond question, so should be the authority of the Judge who is a direct representative of the king himself. Hence, it is clear that the law of contempt of court has ancient roots and has evolved through the ages. In India, the contempt law is prevelant due to the colonisation. This law in India has essentially English origin. Acivil society is founded on the idea of respect for the law in the land. If each citizen goes on to hamper the functioning of the law and break the rule we wouldn't have a civil society to reside in. It is then the burden of the law enforcing agencies to make sure that the rights are insured. The law of contempt is therefore based to ensure that no one undermines the judiciary and the respect towards the law.

Natural Justice:

India as a country gives a lot of importance to its legal roots. We may advance with changing times, but it is our constant endeavor not to stray too far from our roots, which are essential for immortalizing our legacy. Our legal roots may stem majorly from the British legal system, but after gaining independence and deciding to keep a major portion of English Common law as our own we incorporated their system in our roots thus making it our legacy. Most of our laws are based on principles of natural justice, and it forms the basis of legal system followed in India and many other Common law countries. During the time of great scholars like Aristotle and Plato, in the absence of a codified legal system, natural justice was the *lex loci.* All the cases were decided on the basis of justice, equity and good conscience. Even in the times when law was not codified the judges always strived to protect public order, health and morality

[289] J. F. OSWALD, CONTEMPT OF COURTS 1 (1911).

[290] CONTEMPT OF COURTS 1 (1911).

As the codification movement began many great minds came together and boiled down natural justice to specific principles, which today have become the basis for our law.

One such principle of natural justice is *nemo judex in causa sua,* which when translated means 'no one can be a judge to his cause'. This principle is a safeguard against occurrence of bias in decision-making process. Now when we look at contempt at court it goes against this principle, considering that a judge is a witness as well as a decider in the Court's own cause. Who is to say that a judge can defy human nature and decide a case without a bias, where he himself is involved?

A Constitution Bench of this Court in State of U.P. v. Mohd. Noor[291], rejected a submission made on behalf of the State that there was nothing wrong with the Presiding Officer of a Tribunal appearing as a witness and deciding the same case, observing as under:

"The two roles could not obviously be played by one and the same person…the act of Shri B. N. Bhalla in having his own testimony recorded in the case indubitably evidences a state of mind which clearly discloses considerable bias against the respondent. If it shocks our notions of judicial propriety and fair play, as indeed it does, it was bound to make a deeper impression on the mind of the respondent as to the unreality and futility of the proceedings conducted in this fashion. We find ourselves in agreement with the High Court that the rules of natural justice were completely discarded and all canons of fair play were grievously violated by Shri. B.N. Bhalla continuing to preside over the trial. Decision arrived at by such process and order founded on such decision cannot possibly be regarded as valid or binding. "[292]

In Arjun Chaubey v. Union of India & Ors.,[293] "A Constitution Bench of this Court dealt with an identical case wherein an employee serving in the Northern Railway had been dismissed by the Deputy Chief Commercial Superintendent on a charge of misconduct which concerned himself, after considering by himself, the explanation given by the employee against the charge and after thinking that the employee was not fit to be retained in service. It was also considered whether in such a case, the court should deny the relief to the employee, even if the court comes to the

[291] AIR (1958) SC 86

[292] State of U.P. v. Mohd. Noor AIR (1958) SC 86

[293] AIR (1984) SC 1356

conclusion that order of punishment stood vitiated on the ground that the employee had been guilty of habitual acts of indiscipline/ misconduct. This Court held that the order of dismissal passed against the employee stood vitiated as it was in utter disregard of the principles of natural justice. The main thrust of the charges against the employee related to his conduct qua the disciplinary authority itself, therefore, it was not open to the disciplinary authority to sit in judgment over the explanation furnished by the employee and decides against the delinquent. No person could be a judge in his own cause and no witness could certify that his own testimony was true. Anyone who had a personal stake in an enquiry must have kept himself aloof from the enquiry. The court further held that in such a case it could not be considered that the employee did not deserve any relief from the court since he was habitually guilty of acts subversive of discipline. The illegality from which the order of dismissal passed by the Authority concerned suffered was of a character so grave and fundamental that the alleged habitual misbehavior of the delinquent employee could not cure or condone it."[294]

As established earlier, it is absolutely important to have a concept like contempt of court to protect the power and respect of an institution we consider the most powerful and punish those who attempt to obstruct the path of administration of justice and tarnish its reputation. But what we must also establish here is that India is a democratic nation, and to that extent is the peoples' country, therefore all the decision-making authorities at some level must be answerable and accountable to the people. It is very important to maintain the independence of judiciary to ensure fair delivery of justice, but a limit must be set as to what extent can the judiciary remain unanswerable.

According to "Judex non potest esse testis in propira causa" which stand for "A judge cannot be witness in his own case", it is ethically, morally and legally wrong to let a person decide a case where he himself is a beneficiary, court included. The system right now poses a challenge to rule of law, because practically speaking this practice is an hindrance to the concept of democracy and

[294] Mohd. Yunus Khan v. State of U.P. & Ors., (2010) 10 SCC 539)

since our rule of law is based on democracy it is very important to mete out a solution so as not to endanger the principles our Constitution stands on.

"*Sublato fundamento cadit opus*" which stand for "foundation being removed structure falls" is attracted in such cases. The structure of the constitution is based on the basic understanding of justice, equity and good conscience, which have as earlier explained became the rule of law. The rule of law is what binds this democracy together and confers rights, duties and liabilities upon each individual. If the basic ideology behind rule of law is forgotten and not put to its ample use, the entire legal system of the country will be in shambles. In Kanwar Singh Saini vs High Court Of Delhi [295] "For the survival of the rule of law the orders of the courts have to be obeyed and continue to be obeyed unless overturned, modified or stayed by the appellate or revisional courts. The court does not have any agency of its own to enforce its orders. The executive authority of the State has to come to the aid of the party seeking implementation of the court orders. The might of the State must stand behind the court orders for the survival of the rule of the court in the country. Incidents which undermine the dignity of the courts should be condemned and dealt with swiftly. If the judiciary has to perform its duties and functions in a fair and free manner, the dignity and the authority of the courts has to be respected and maintained at all stages and by all concerned failing which the very constitutional scheme and public faith in the judiciary runs the risk of being lost. "[296]

The punishment for an act of contempt is prima facie similar to that of a criminal act with fines and imprisonment. It is not wrong to say that contempt proceedings are tried similar to the proceedings which are criminal in nature. The alleged contemnor is entitled to the safety of all rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. Here the burden of proof lies upon the accused, which completely disregards the concept of "*Ei incumbit probatio qui dicit, non qui negat"* which stand for "the burden of proof is on the one who declares,

[295] (2012) 4 SCC 307

[296] Kanwar Singh Saini vs High Court Of Delhi (2012) 4 SCC 307

not on one who denies". Lord Denning in In Re Bramblevale Ltd[297] clearly stated that "a contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorilly proved. To use the time – honoured phrase, it must be proved beyond reasonable doubt. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."[298] . Now we shall attempt to understand what can considered as reasonable and what to be classified as criminal under this context.

Freedom of speech and expression:

To understand the gravity of the right to express one's opinion without any paramount restrictions, one must look into the stand of international law on it before analyzing India's stand on the same. When we look into the international aspect of the law of freedom of speech and expression, the Universal Declaration of Human Rights and International Covenant and Civil and Political Rights (herein referred to as ICCPR) play a significant role. Both of these treaties or conventions are duly ratified or acceded by India. International Covenant and Civil and Political Rights was ratified by India in 1979. Since India is a signatory to the convention it has to abide by the rules and guidelines stated in the ICCPR. Article 19 of ICCPR states:

"*1. Everyone shall have the right to hold opinions without interference.*

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

[297] 1969 (3) AII ER 1062 (CA)

[298] In Re Bramblevale Ltd. 1969 (3) AII ER 1062 (CA)

(b) For the protection of national security or of public order (ordre public), or of public health or morals."[299]

The Article 14 of the ICCPR clearly demarcates the right for a fair and just trial and the presumption of innocence of the accused. The "rights of others" referred to in Article 19(3)(a) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence. The right provided under this section is in its pure nature and does not include the restrictions so put by the India, i.e., Contempt of Court. The restrictions which bind the scope of the right are only subjected to reputation or right of others or protection of public order, health and morality and also national security. Contempt of court does not restrict a person's right to freedom of speech and expression under the ICCPR.

The Universal Declaration of Human Rights also under article 19 discusses the right to freedom of expression. The declaration in its Article 19 states that:

"Everyone has the right to freedom of opinion and expression; the rights includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."[300]

The makers of the UDHR understood the need to freedom of opinions and expression; hence they made the rule or guideline for the signatory parties in its unaltered and unrestricted form. The UDHR confers upon the state parties a responsibility to make laws for the freedom of speech and expression in an unsaturated form. The UDHR allows an individual to hold and express their opinions through any means of media. It does not restrict the freedom of speech and expression in any sense and also provides a right to exchange the information through any means regardless of the boundaries, limits or borders in the course of it.

Contempt of court is a concept contemplated by the lawmakers of the country to uphold the dignity of the courts of law and justice and to see that no one demeans the authority of such courts or no

[299] International Covenant and Civil and Political Rights, 1966, pg.11

300 Universal Declaration of Human Rights, 1948, pg.5

one obstructs the right of an individual for a just trial by impeding the due course of justice. Contempt of court is a matter regarding the rational administration of justice, and aims to penalize any act tarnishing the dignity and authority of judicial tribunals.

From the Preamble to the Act of 1971, it is clear that it is not the dignity of individual judges that the Act seeks to protect, but the administration of justice and judicial proceedings

However, this right of the courts to punish an individual for the contempt of itself goes against the fundamental right provided to us by the constitution. This right is a right to Freedom Of Speech And Expression under article 19(1)(a) of the Constitution.

Fundamental rights guaranteed to every person under Article 19 of the Constitution provide for the freedom of speech and expression. Such freedoms are inherent rights in every citizen of the country and cannot be restricted or curtailed by any procedure, except that which is provided for by the law under sub clauses (2) to (6) of the same Article. Such restrictions on the freedom of speech must be reasonable and must not be excessive of what is necessary to curtail the evils, which may be caused. The right of fair criticism stems from the right to freedom of speech and expression and no person must be denied his right to criticize or express his opinions so long as such expression abstains from imputing improper motives to those taking part in the administration of justice and is genuinely restricted to the exercise of his/ her right of criticism. Lord Atkin in the case of Ambard v. Attorney General for Trinidad and Tobago[301] famously quoted that "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though b outspoken, comments of ordinary men".

The Administration of justice and judges are open to public scrutiny. Judges have their accountability to society, however any criticism which about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of judges and brings the administration of justice into ridicule must be prevented. No right can be absolute, and it is a well understood principle that the right of one person ends at the instance where the right of another begins, however the current procedure which vests the power upon judges to condemn any such speech which in their opinion is offensive must be declared to be

[301] Atkin in the case of Ambard v. Attorney General for Trinidad and Tobago AIR 1936 PC 141.

arbitrary as in their opinion any criticism against them would be taken as contempt.[302] Also no person must be a judge of his own cause, but in the current scenario the Act itself provides for the judge to determine what reasonable criticism is.

Based on the above statements one is now forced to think as to what may be fair criticism and not illegitimate insinuation? The right to criticize the opinion of the court, to take issue with it upon its conclusions as to any legal position, or question its conception of the facts, so long as such criticism is made in good faith, are in ordinarily decent and respectful language and are not designed to willfully or maliciously misrepresent the position of the court or threaten to bring it to disrespect cannot be questioned. Also the question as to what would amount to good faith while criticizing the judiciary must also be answered. In the case of Re S.K. Sundaram[303] the court noted that "The expression of good faith in jurisprudence has a definite connotation and is different form saying that a person concerned has honestly believed in the truth of what he said. Nothing in good faith is said to be done which is done without due care and attention.

Now that it is clear as to what is a fair criticism and what would be illegitimate insinuation, and also what would be a statement made in good faith within the reasonable limits prescribed by the law, it is also important to note that the ultimate discretion lies in the hands of the judge. It is for the judge to decide whether such criticism would amount to contempt or not, and when such powers are conferred upon the very same institution against which such speech is uttered, then such a judgment would be violative of the principles of natural justice, equity, and good conscience.

It is also important to note that the freedom of speech and expression shall always prevail except where contempt is manifest, mischievous or substantial. In the case of E. M. Shankaran Namboodripad v T. Narayanan Nambiar[304] the courts have stated "Article 19 (1) (a) guarantees freedom of speech and expression, but it also makes an exception in respect of contempt of courts. The right on which the functioning of democracy rests, is intended to give protection of free

[302]In Re:Arundhati Roy AIR 202 SC 1375

[303] Re S. K. Sundaram (2001) 2 SCC 171.

[304] E. M. Shankaran Namboodripad v T. Narayanan Nambiar AIR 1970 SC 2015.

opinions in order to change political and social conditions and to advance human knowledge. While such a right is essential for a free society, the law is entitled to impose reasonable restrictions vis-à-vis contempt of courts".

One can conclude that though the fundamental right to freedom of speech and expression is essential and must not be subject to the singular test of the discretionary power vested upon the judges, no one can deny the necessity of such a law restricting the freedom, as functioning of courts with utmost precision and in absence of arbitrary criticism is also an absolute necessity. It is recommended that a more firm and clear set of guidelines directing the courts be laid down to such an extent where the freedom of speech flourishes and is free from the arbitrary will of the judge and where democracy can flourish in its true sense without the obstruction of justice.

Proposed Solution:

Now that we have explained the premises we have based our paper on, one thing to clarify here is that we are in no way against existence of the law of contempt of court. In fact we strongly feel that an institution of a prestigious stature as our Court and judicial system must have safeguards against malicious attacks by people who do not support it, as this very important for fair delivery of justice and proper functioning of society. The courts must have autonomy and protection against external influence for it to administer proper justice and thus we have the concept of independence of judiciary. This being said we must not forget that India is the largest democracy in this world, hence even the courts must be accountable to some level, at least when it comes to a court's own cause.

In the light of our preceding discussions have listed down some issues which show contempt of court as a challenge to rule of law and we shall also attempt to find and suggest solutions for rectification:

1. The concept of contempt of court has been defined very vaguely, thus leading to ambiguity in its interpretation.

2. With the current definition and practice we follow it is safe to say that this law goes against the principles of natural justice.

3. This power has a lot of scope of misuse by the judiciary.

4. In present context a lot of elements of this power infringe our fundamental right of freedom of speech and expression.

Keeping all this in mind we must agree that the need here is to establish a neutral party which does not have any interest in case from both the sides. In a mainstream case the judge acts as the neutral third party, but here the judge has an interest in the case thus establishing an inherent bias in his mind, which ultimately is obstruction of justice.

So, what are the options that we have to remove this lacuna?

Jury system

We are well aware of the fact that India has not had a very good experience when it comes to the jury system. With the population of country vulnerable to the emotional appeals of the parties, a bias is bound to creep in according to the portrayal of the victim of the accused in front of the people. In the case K.M. Nanavati v. State of Maharashtra[305] the jury system was abolished in India because the jury acquitted the murderer on the ground that he was cheated on by his wife, which led to provocation and ultimately murder. The Bombay high court did not accept the jury's verdict and convicted the defendant. After this case the government felt that common people were susceptible to getting influenced by the media, which compromises their ability to give rational decision, and thus the jury system was abolished. Considering this it would be very hard to reinstate the jury system again for contempt of court cases because the precedence goes against it. Another problem would be the method as to how the jury must be selected and who must the jury consist of. The idea of laymen comprising the jury is completely out of the window because of the earlier cited precedence. One way is to pick a jury out of members of parliament. The basis for this suggestion is that if the law-makers themselves are a judge to contempt cases the scope of

[305] AIR (1962) 605

ambiguity in the definition decreases along with solving the problem of contradiction to natural justice.

But another issue remains here. Who is to pick members from the legislature? What is the benchmark that must be set in order for a legislator to be member of the jury? And even if we do find a solution to these issues we still face the issue of politicization of judiciary, which could happen due to this step. The legislators are not immune from prosecution, which again would lead to them favoring the Court more that common man.

A case of such significant nature as contempt of court must be tried by people who are learned and well read in the laws of the country and are veterans in their field. One such example of a befitting person is the governor

The main function of the governor is to preserve, protect and defend the Constitution as well as the law, as in his oath of office under Article 159 of the Indian Constitution in the administration of the matters of the State. All his recommendations and supervisory powers (Article 167(c), Article 200, Article 213, Article 355) over the executive and legislative branches of a State shall be used to implement with full force the provisions of the Constitution. In this regard, the governor has many different types of powers:

1. The executive powers which are related to administration, appointments and removals.

2. The legislative powers that are related to lawmaking and the state legislature i.e.; Vidhan Sabha

3. Powers of discretion, which are to be carried out according to the will of the Governor.

Why do we feel that the office of governor is most suited to this task?

The governor of a state is a nominal head appointed by the Prime Minister. A governor would be a person who is a veteran in his field and has appreciable knowledge of law, as it is his duty to defend the constitution and law under his oath. A governor also enjoys certain powers, which are unique to his office. One such power is immunity from prosecution. By the virtue of article 361, while in his office, a governor cannot be summoned for questioning for his controversial deeds. Till date the post of the governor is the most non-political position, and he can be considered the most impartial candidate to preside over the contempt of court cases, reasons for which are:

1. He is the PM's nominee and enjoys power at his pleasure, thus his actions are most likely to be not politically motivated since he is not elected by anyone

2. He enjoys a certain legal immunity, which would make him more able to judge these cases without the fear of prosecution

3. He is well informed in the field of law and so well suited for the job.

When compared to the legislature, the executive branch is more autonomous and non-politically motivated since they all hold independent offices. Therefore, a team of executives hand-picked by the governor would be more likely to give an impartial decision as compared to a jury of members of the legislative assembly whose actions will always be self-interested and politically motivated.

Conclusion:

"There is another kind of case where a Judge acts in accordance with his conscience on the basis of the facts and the law as he bona fide understands them, and yet because of surrounding circumstances it may appear that justice, has not been done even though in fact it may have been done. Where there is a danger that justice will not appear to be done, and the prevailing environment is linked with the person of the Judge, notwithstanding that he may have done nothing to promote it, the injury to the administration of justice can be as serious as a case where the Judge has consciously deviated from the standards of impartial judgment."[306]

We believe, without a doubt, that a judge is the ultimate authority in a matter and wholeheartedly trust in his capability of deciding a matter without any bias. But such cannot be presumed where the judge is one of the interested parties in the case. Thus it is essential, now more than ever, to make amendments in the contempt of court law, alter its definition, set a limit to the law and seek an impartial party to maintain an unbiased administration of justice.

[306] S.P. Gupta v. President Of India And Ors. AIR 1982 SC 149