Contempt of court: need for a second look

In a democracy the people should have the right to criticise judges. The purpose of the contempt power should not be to uphold the majesty and dignity of the court but only to enable it to function.

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THE BASIC principle in a democracy is that the people are supreme. It follows that all authorities — whether judges, legislators, Ministers, bureaucrats — are servants of the people. Once this concept of popular sovereignty is kept firmly in mind, it be-comes obvious that the people of India are the masters and all authorities (including the courts) are their servants. Surely, the master has the right to criticise the servant if the servant does not act or behave properly. It would logically follow that in a democracy the people have the right to criticise judges. Why then should there be a Contempt of Courts Act, which to some extent prevents people from criticising judges or doing other things that are regarded as contempt of court?

In a democracy, the purpose of the contempt power can only be to enable the court to function. The power is not to prevent the master (the people) from criticising the servant (the judge) if the latter does not function properly or commits 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?

Once it is accepted that India is a democracy and that the people are supreme, the reconciliation can only be affected by treating the right of the citizens to 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 criticise judges, but they should not go to the extent of making the functioning of the judiciary impossible or extremely diffic ult.

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. Also, there was no Constitution containing provisions such as Article 19(1)(a). How then can the law of those days be applicable today? The only situation where I would have to take some action was if my functioning as a judge was made impossible. For example, 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 threat-ens a party or a witness.

In a speech delivered on the topic “The Law of Contempt — is it being stretched too far?” the doyen of the Indian Bar Fali Nariman said the offence of scandalising the court is a mercurial jurisdiction in which there are no rules and no constraints.

He and others are perfectly correct in saying there should be certainty in the law, and not uncertainty. After all, the citizen should know where he or she stands. There are two reasons for the uncertainty in the law of contempt of court. In the Contempt of Courts Act, 1952, there was no definition of 'contempt.' Secondly, even when a definition was introduced by the Contempt of Courts Act, 1971 (vide Section 2), there was no definition of what constitutes scandalising 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.

The view about the contempt power was first stated in England by Wilmot J. in 1765 in a judgment that 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. Successive courts not only in England but also in other countries thereafter followed the above dictum.

But from where did this authority and dignity of the court come from? In England, it came from the king who, in earlier times, would decide cases himself. It was only subsequently that the judicial function was delegated to 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; here the judges get their authority delegated to them by 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.

The view expressed above is, in fact, accepted now even in England. As observed by Lord Salmon in AG vs. BBB: "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."

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

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. 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 en-able the court to function. The contempt power should only be used in a rare and exceptional situations where, without using it, it becomes impossible or extremely difficult for the court to function. In such situations, the contempt power should not be used if a mere threat to use it suffices.

There may, of course, be differences of opinion about what acts prevent, or make very difficult, the functioning of a judge. For instance, do comments by the public (including lawyers, journalists, etc.), or publicity in the media about a pending case cause this? I think not. A judge

should have the equanimity and inner strength to remain unperturbed and unruffled in any situation. 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 — one that is detached, calm, with equanimity, and with broad enough shoulders to shrug off baseless criticism or at-tempts to influence him without being perturbed.

A fresh, modern, democratic approach, like that in England, the United States, 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.

Before concluding, I may refer to the book 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 in-formed 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) that 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 the public interest and is bona fide. This amendment is in the right direction, and was long overdue.

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