P: ISSN No. 0976-8602 RNI No. UPENG/2012/42622 VOL.-10, ISSUE-3, July 2021
E: ISSN No. 2349-9443 Asian Resonance

The Law of Contempt of Court in India and England: An Analysis

Paper Submission:10/07/2021, Date of Acceptance: 23/07/2021, Date of Publication: 24/07/2021

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Abstract

"Justice is no cloistered virtue, she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

The origin of the power to punish for contempt of court is generally traced to England. Contempt is a byproduct of feudalism and Church in England in medieval time. Church established its authority in the king by declaring 'King by the will of God not by the will of people' therefore a king was not subject to any authority on the planet earth, forced this 'established authority' by creating Divine powers in the King. To administer justice in an undefiled manner, judiciary, as the guardian of Rule of Law, is entrusted with the extraordinary power to punish misconduct aimed at undermining its authority or bringing the institution into disrepute, whether outside or inside the courts.

Keywords: Contempt of Court, Freedom of speech, Court of record, Justice, liberty, Fundamental Rights, Administer of Justice

Introduction

Origin of Contempt of Court: an Inquiry into the legal History Contempt is a byproduct of feudalism and Church in England in medieval time. Church established its authority in the king by declaring 'King by the will of God not by the will of people' therefore a king was not subject to any authority on the planet earth, forced this 'established authority' by creating Divine powers in the King. 'Order is Heavens' first law' in England was prevailed in pre- historic to medieval period. The law of contempt of court evolved from the divine law of kings, and its aspects of obedience, co-operation and respect toward government bodies though the king acted through others, in a mystical way he was presumed to be present and subject to being condemned.[1]

The origin of the power to punish for contempt of court is generally traced to England when all the courts were divisions of the Curia Regia, the supreme court of the English sovereign. It is considered a power inherent in all courts of record or general jurisdiction in the United States, whether federal or state. 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 prehistoric divine origin theory, and also the more recent theory of the Social Contract.[2]

The power of courts to punish contempt is one which wends historically back to the early days of England and the crown. A product of the days of kingly rule, it began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign. Viewed as a legal doctrine which was articulated and immersed in the common law, it is generally a product of Anglo-American society.[3]

The foundation of the contempt of court was very first laid down in The *King v. Almon.* Almon's Case is characteristic, Almon published in 1764 a pamphlet whose anonymous author accused the Lord Chief Justice, Lord Mansfield, of acting officiously and arbitrarily.[4] It questioned his honesty, impartiality, and respect for precedent and suggested he was politically biased. The history of the offence before, during, and after this critical case shows it to be closely allied to major constitutional arguments about the free expression of political opinion, including criticisms of the judiciary, and attempts to suppress that free expression. The doctrine was also contentious because many of the constitutional protections of jury trial were (and are) denied the accused. The history of scandalizing the court in the eighteenth century, it is necessary to keep in mind some functional and political inter-relationships of the law of that period respecting jury powers, criminal libel, and contempt. Judges have

always felt a strong need to protect the dignity of their courts and of themselves as the embodiment of the majesty and learning of the law. Many of them have wanted strong coercive weapons to deal with hostile criticism from outside their courtrooms, whether the criticism is of a particular deciion, or in general terms. In the eighteenth century, the general law of seditious libel came to be the principal means of controlling the publication of criticism of those in authority, whether ministers of the Crown, or judges. From the late seventeenth century, governments had successively used licensing of printers, then (after licensing ended) prosecutions for treason, and then (after the Treason Act of 1696), a new doctrine of seditious libel. The new doctrine had been constructed largely by Chief Justice Holt out of a certain amount of precedent and a lot of policy argument. The merit of seditious libel, in the eyes of authority, was that it effected and confirmed the removal of several issues from juries.[5] Sir Eardley Wilmot in the case against J. Almon in 1765 stated :

> *"*Arraignment of the justice of judges is arraigning the king's justice, it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them. To be impartial, and to be universally thought so are both absolutely necessary for justice and which so eminently distinguishes and exalts it above all nations on earth*"*[6]

The first case of the contempt of court was *William de Thorp* v. *Mackerel and Another* [7] provides some insight into these aforestated queries. William Thorp, 'the king's sworn clerk', was walking from the Inns of Court to the Court at Westminster in the company of other 'men of law'. While proceeding along Fleet Street which is in close proximity to the court, William was attacked by some men. While he was on the ground, the accused Mackerel urinated on him, and kicked and trampled him. The writ petition later moved by the plaintiff (a writ of *venire facias*) stated that the defendant was in contempt of the king and his court *(in contemptum domini regis et curiae)* and further that this contempt was committed in the presence of the court *(in presencia curie)*. The judgment in the case accepted the writ as stated and agreed that the contempt, while being committed some mile and a half from the Court at Westminster, was committed in its presence. In this case, it was the geographical proximity to the court that resulted in the offence of 'scandalising the court.' Interestingly, William De Thorpe was viewed as a 'man of law' above any other identity he had. Any disrespect to him, was therefore seen as disrespect to the court and this emerges as the most controversial aspect of this entire episode. Even today, on the pretext of preserving the dignity of the administration of justice, contempt law in practice has been at times reduced to exactly this: preserving nothing more than the reputation and dignity of individual judges.

Review of Literature

Walter Nelles (1927)[8] the antiquities of the contempt of court extraordinary pertinent, a question of debate in US. This research paper is an attempt to find out the legal position of the law of contempt of court in the democratic era where it directly in contradiction with freedom of speech and expression. Edgar Bronson Tolman and James L. Homire (1932)[9] Contempt of court is traditionally regarded as falling into two categories: criminal contempt, consisting of actions or words which obstruct, or tend to obstruct, the administration of justice; and contempt in procedure, consisting of disobedience to orders of the courts. It is with the first of these that this article is concerned. Earl C. Dudley, Jr. (1993)[10] this research work is found out the three predominately objection to the law of contempt of court, *firstly*, the power of courts to impose sanctions for insult or disobedience is not meaningfully constrained. *Secondly,* judges wielding this vast and law is chaotic and confusing, both substantively and procedurally. *Thirdly,* Virtually all indirect contempt today involve disobedience of judicial orders. J. Paul McCutcheon (1988)[11] this reviewed work is an attempt to the preservation of the authority of the courts and the maintenance of public confidence in the administration of justice. Its extraordinary breadth poses especial difficulties for the commentator who seeks to present its myriad forms in a comprehensive and coherent. Ronald Goldfarb (1962)[12] THE contempt power of American courts is as old as our judiciary itself and, while derived from historical common-law practices, is peculiar both to and within American law. Joseph Minattur (1976)[13] This is a commentary on the Contempt of Courts Act, 1971. Unlike the common run of legal commentaries in India, which are, in general, a string of reporter's head notes of judgments, sometimes contradictory, arranged section wise in a haphazard manner, the present one ventures into critical comments, besides giving explanatory notes.

As per the author's knowledge no further latest review of literature on the concerned research topic is available and the author has already reviewed the available literature.

Hypothesis

The existence of the law of Contempt of Courts in democratic countries is anachronistic with the ideals of liberty and freedom enshrined in the constitution of India and U.K.

Research Problem

The tension identified between a 'feudal' and 'democratic' view of the role of officers of the state is, however, present in various judgments in India, United Kingdom and United States of America. While the maintenance of the administration of justice may be the expressed rationale for the law, it will be argued that a closer look suggests the judges may have been more concerned with the protection of reputation and the interests previously served by the law of seditious libel. A review of the real basis for the decisions can help to point the way any reform might take[14].

The question is whether this historical

rationale continues to be relevant today. Some commentators would argue that this 'feudal' conception of the relation of the law to individuals is at the heart of the interpretation and application of contempt law by Australian judges. The concept of contempt, which is rooted in totalitarianism, has seen a fundamental shift in the era of expansion of human rights. Today's main thrust is to adopt a balance between two conflicting principles, i.e. administration of justice and freedom of speech and expression. Democracy demands to do justice with each and every individual.

The contempt power is understandable when seen through the perspectives of its age of inception, an age of alleged divinely-ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God. Under any circumstances resistance to the king was a sin which would bring damnation. Whatever informal groups ruled, the primitive associations of men undoubtedly looked to some pagan, religious, or divine and natural right to enforce their systems. There is some evidence that schemes akin to contempt were at least thought of in more antiquated societies. One author reported that the Theodosian Code considered the subject of contempt of a governmental authority, and concluded that it should not be punishable; "for if it arose from madness, it was to be pitied; if from levity, to be despised; and if from malice, to be forgiven."

Research Methodology

This study is based on the doctrinal research which is based on a legal proposition or propositions by way of analyzing the existing statutory provisions regarding the law of contempt of court in India and U.K. and cases by applying the reasoning power, analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction.

Objective of the Study

Firstly, in today's democratic era, judges are no longer acting on behalf of the king, and the higher authority sought to be protected by contempt law is not clearly described. Indirectly, the judges in fact get their authority from the people, and so it follows that at some level, they must remain answerable to them. This transformation in the political and social structure has given the judiciary an indispensable role: to remain completely independent and unbiased in the administration of justice for all.

Secondly, it appears strange and illogical that the basis of contempt law lies in the fact that it must protect the authority of the courts in the eyes of people. It needs to be understood that in a democracy, the courts derive their ultimate authority from the people, and a law muzzling dissent and criticism from the people defies all logic.

Thirdly, in Indian the purpose of contempt law is to uphold the majesty and dignity of the law courts and the image of such majesty in the eyes of the public cannot be allowed to be distorted. It is clear from this statement that the judiciary has created in its own eyes, a self-satisfied image, and wishes to retain its 'majesty' in the eyes of the people.

Fourthly, this seems to be delusionary when one looks at society today – in this age of information it is no longer necessary to try and create, or recreate the 'majestic image of the court.' Authority cannot come from alienating an institution from the people, but must be secured by instilling faith through its actions.

Significance of the Study

The necessity for this branch of the law of contempt lies in the idea that without well regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect. Public faith in the administration of justice would be undermined and the law itself would fall into disrepute.

With the multi-millenary growth of organized societies, the sophistication of governing systems, and the inter-complexity of the relationships between sovereigns and men, some power force within a rule-of law scheme became necessary to replace the caveman's club as a means of enforcing obedience and respect. These later institutions agreeably accepted it, less as adjuncts of the King than to protect their own dignity and supremacy.

Contempt of Court Practice in England

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Contempt of Court Practice in England

The contempt of court and related matters in England is covered under the Rule of strict liability in the Contempt of Court Act, 1981. Contempt of court is defined as any act which embarrasses, hinders or obstructs a court in the administration of justice, or which lessens its authority or dignity. Contempts of court are classified as direct or indirect. Direct contempts are those which are committed within the immediate view and presence of the court, or so near as to obstruct or interrupt the administration of justice. An example of direct contempt is an insult or profanity directed by a lawyer to a judge during a trial. An indirect or constructive contempt is one committed at a distance from the court in time or location tending to hinder the administration of justice. An

example of indirect contempt is the refusal by a witness to answer questions before a grand jury when directed by court order to answer.[15]

As society became more diverse and extensive, the English kings found it necesary to have their kingly governmental powers exercised by representatives. The courts, then, of early England acted for the king throughout the realm. And their exercise of contempt powers derived from a presumed contempt of the king's authority.[16]

The Contempt of Court Act 1981 in England which makes contempt of court both civil criminal offence under strict liability rule “In this Act " the strict liability rule " means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.” Proceedings for a contempt of court under the strict liability Consent rule (other than Scottish proceedings) shall not be instituted required for except by or with the consent of the Attorney General or on institution of the motion of a court having jurisdiction to deal with it.

Law of Contempt of court in India

Pre-constitutional Period

The roots of contempt law in India can be traced back to the pre-independence period. The East India Company took over the territories in India, which required the King of England to issue the Charter of 1726 that provided for the establishment of a corporation in each Presidency Town. This Charter is considered to be an important landmark in the history of legal system in India as it introduced the English laws in the country. Mayor courts were constituted in each of the Presidency Towns and were made the Courts of Record, and authorised to decide all civil cases within the respective town and subordinate areas.[17]

Subsequently, in the year 1774, the Mayor’s Court at Calcutta was replaced by the Supreme Court of Judicature at Fort William, Calcutta under the Regulating Act 1773. The Mayor’s Courts at Madras and Bombay were superseded by the Recorder’s Courts, which were also later abolished and replaced by the Supreme Courts under the Government of India Act, 1800. While the Supreme Court at Madras came into existence in the year 1801 by the Charter of 1800, the Supreme Court at Bombay came into existence in 1824 by the Charter of 1823. The Recorder’s Courts and Supreme Courts had the same powers in the matters of punishing for contempt as was exercised by the superior courts in England.[18]

Prior to the coming into force of the Contempt of Courts Act, 1926 there was a conflict of opinion among the different High Courts as to their power to punish for contempt of subordinate courts. Madras and Bombay High Courts expressed the view that the High Courts have jurisdiction to deal with contempt of the Mofussil Courts. But the Calcutta High Court expressed the view that the High Courts in India did not possess identical power in matters of contempt of their subordinate courts as possessed by the Court of King’s Bench in England.[19]

The Contempt of Court Act, 1926”) was the first statute in India with relation to law of contempt. Section 2 of this Act recognized the existing jurisdiction in all the High Courts to punish for contempt of themselves and conferred on the High Courts the power to punish for contempt of courts subordinate to it. The Act also specified the upper limit of the punishment that can be imposed for the said contempt.[20]

Post Constitutional Period

The Act of 1926 along with the aforementioned state enactments were repealed and replaced by the Contempt of Courts Act, 1952 which made significant departures from the earlier Act. Firstly, the expression “High Court” was defined to include the Courts of Judicial Commissioner, which were not so included in the purview of the Act 1926; and secondly, the High Courts, which now included the Courts of Judicial Commissioner, were conferred jurisdiction to inquire into and try any contempt of itself or that of any court subordinate to it. This was irrespective of whether the contempt was alleged to have been committed within or outside the local limits of its jurisdiction, and irrespective of whether the alleged contemnor was within or outside such limits.[21]

The Contempt of Courts Act, 1971 (70 of 1971) came to be enacted (hereinafter referred to as the “Act 1971”), which repealed and replaced the Act 1952.

The Section 2(a) of Act 1971 inter alia categorises contempt under two heads i.e. ‘civil contempt’ and ‘criminal contempt’, providing there under specific definitions for both. It also carved out a few exceptions, prescribing guidelines for reporting and commenting on judicial proceedings that would not attract the provisions of the Act. For example, The Section 4 “fair and accurate report of a judicial proceeding” and the Section 5 “fair comment on the merits of any case which has been heard and finally decided” would not give rise to the proceedings under the Act. The Section 13 also categorically provided that an alleged act would not be punishable there under unless it “substantially interferes or tends substantially to interfere with the due course of justice”. The Section 20 also provides for the period of limitation for initiating the contempt proceedings.

Criminal Contempt of court is disobedience of the Court by acting in opposition to the authority, justice and dignity thereof. It can be defined as a “conduct that is directed against the dignity and authority of the Court. Criminal Contempt signifies conduct which tends to bring the authority of the court and administration of law into disrepute.[22]

In Hari Singh Nagra & Ors. v. Kapil Sibbal & Ors[23]., the Supreme Court explained the term ‘scandalising the court’ as under: “Scandalizing in substance is an attack on individual Judges or the Court as a whole with or without referring to particular cases casting unwarranted and defamatory aspersions upon the character or the ability of the Judges. 'Scandalizing the Court' is a convenient way of describing a publication which, although it does not relate to any specific case either post or pending or any specific Judge, is a scurrilous attack on the judiciary as a whole which

is calculated to undermine the authority of the Courts and public confidence in the administration of justice."

Defences in the Law of Contempt of Court

Section 13 of the Act 1971 postulates no punishment for contemptuous conduct in certain cases. As a general guideline, it provides for no punishment unless the court is satisfied that the contempt is of such a nature that "substantially interferes, or tends substantially to interfere with the due course of justice". In fact, Section 13, as amended in 2006, under its sub-section (b) allows for justification by truth to be raised as a valid defence against contempt, if the court is satisfied that it is in public interest and the request for invoking the said defence is bona fide.[24] The object of this amendment was to introduce fairness in procedure and meet the requirements of Article 21 of the Constitution, which guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law.[25]

Constitutional Provisions and the Contempt of Court

It is well established that Rule of Law is a basic feature of the Constitution, and the Rule of Law is postulated in the Constitution in the sense of its supremacy. It entails inter alia the right to obtain judicial redress through administration of justice, which is the function of the Courts, and is imperative for the functioning of a civilised society. To administer justice in an undefiled manner, judiciary, as the guardian of Rule of Law, is entrusted with the extraordinary power to punish misconduct aimed at undermining its authority or bringing the institution into disrepute, whether outside or inside the courts.[26]

In Kapildeo Prasad Sah & Ors. v. State of Bihar & Ors.,[27] the Supreme Court held that disobedience of court's order would be a violation of the principle of Rule of Law. The law of contempt can thus be considered to be the thread which holds together the basic structure of the Constitution. And, the maintenance of dignity of the Court is one of the cardinal principles of Rule of Law. The law of contempt must be judiciously pressed into service, and must not be used as a tool to seek retribution. However, any insinuation to undermine the dignity of the Court under the garb of mere criticism is liable to be punished.[28]

Courts of Record and Power to Punish for Contempt

The Constitution of India designates the Supreme Court and the High Courts as the Courts of Record. It further grants the Supreme Court and every High Court the power to punish for contempt of itself. While Article 129, dealing with the said power of the Supreme Court, provides that "The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself"; Article 215 vests similar power with the High Courts. The High Courts are also entrusted with the supervisory control over the subordinate courts under Article 235 of the Constitution. In this manner, a High Court is the guardian of the subordinate judiciary under its jurisdiction.[29]

While the Constitution does not define the term "court of record", its meaning is well understood across all jurisdictions. In Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat,[30] the Supreme Court applied the term to a court whose acts and proceedings are enrolled for a "perpetual memory and testimony". Once a court has been declared to be a "court of record" by a statute, the power to punish for its own contempt automatically ensues. Such a court also has the power to punish for the contempt of the courts and tribunals subordinate to it. additionally, a court of record has the power to determine the question of its own jurisdiction.[31]

Conclusion

The concept of contempt, which is rooted in totalitarianism, has seen a fundamental shift in the era of expansion of human rights. Today's main thrust is to adopt a balance between two conflicting principles, i.e. administration of justice and freedom of speech and expression. Democracy demands to do justice with each and every individual.[32] Therefore, The Act 1971 is, therefore, not the source of 'power to punish for contempt' but a procedural statute that guides the enforcement and regulation of such power. The reason being that even prior to the commencement of Act 1926 these inherent powers were being exercised by the Superior Courts. Thus, the powers of contempt of the Supreme Court and High Courts are independent of the Act 1971, and, therefore, by making any such amendment, the power of the superior courts to punish for contempt under Articles 129 and 215 of the Constitution cannot be tinkered or abrogated.

In today's democratic era, judges are no longer acting on behalf of the king, and the higher authority sought to be protected by contempt law is not clearly described. Indirectly, the judges in fact get their authority from the people, and so it follows that at some level, they must remain answerable to them. This transformation in the political and social structure has given the judiciary an indispensable role: to remain completely independent and unbiased in the administration of justice for all. Thus, it appears strange and illogical that the basis of contempt law lies in the fact that it must protect the authority of the courts in the eyes of people. It needs to be understood that in a democracy, the courts derive their ultimate authority from the people, and a law muzzling dissent and criticism from the people defies all logic. An Indian case highlighted that the purpose of contempt law is to uphold the majesty and dignity of the law courts and the image of such majesty in the eyes of the public cannot be allowed to be distorted.

It is clear from this statement that the judiciary has created an image, and wishes to retain its 'majesty' in the eyes of the people. However, this seems to be delusionary when one looks at society today – in this age of information it is no longer necessary to try and create, or recreate the 'majestic image of the court.' Authority cannot come from alienating an institution from the people, but

must be secured by instilling faith through its actions. Therefore, the contempt law in India should have been clear defence of the truth. Judges Shall allow the judiciary to grow more in the confidence of the people.

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