The law punishing contempt of court leaves ample room for interpretation at the discretion of judges. Such discretion has the potential to be used to curb criticism of the judiciary. On 18 December 2020, the Supreme Court decided to proceed with the criminal contempt of court cases against stand-up comedian Kumal Kamra and cartoonist Rachita Taneja, and issued notices to both.

The contempt proceedings against Kamra and Taneja are based on their tweets about the apex court and its judges, including after the Supreme Court granted interim bail to journalist Arnab Goswami. The Supreme Court's notices come after consent by Attorney General K K Venugopal to initiate contempt action. In this reading list, we explore the contours of criminal contempt of court and its relationship with freedom of speech and expression.

What Is Contempt of Court?

Contempt is the power of the court to protect its own majesty and respect. This power is inherent and the power is recognised in the constitution of the high court and the Supreme Court. The power is regulated but not restricted in the Contempt of Courts Act 1971.

The Contempt of Courts Act, 1971 defines both civil and criminal contempt. Civil contempt refers to wilful disobedience to any judgment of the court, while criminal contempt can be invoked if an act tends to scandalise or lower the authority of the court or tends to interfere with or obstruct the administration of justice. In assessing whether an act constitutes contempt, the test is of the effect on the judicial process and the authority of the courts. S P Sathe (1970) elaborated: The intention of the accused in a contempt case is immaterial. What really matters is the effect or the likely effect of his act on the administration of justice. Any act which causes lack of confidence in the administration of justice, or otherwise interferes or tends to corrupt it, has to be prevented.

P Chandrasekhar (2002) also explained: Actual scandalisation or lowering of authority of the court is not necessary. It is sufficient if it tends to scandalise or tends to lower the authority of the court.

Whether an act tends to lower the authority of the court or not—this is also open to judicial interpretation. Alok Prasanna Kumar (2016) explained: The legal test for what constitutes "criminal contempt" is laid down in Section 2(c) of the Contempt of Courts Act, 1971 as any publication which "scandalises" or lowers the authority of any court. These are broad and general terms, but the Supreme Court has clarified that fair criticism of judgments is always permitted and that the defamation of a judge is different from committing contempt of court. (Brahma Prakash Sharma v State of Uttar Pradesh 1953: paras 12–13)

Section 5 of the Act provides that "fair criticism" or "fair comment" on the merits of a finally decided case would not amount to contempt. But the determination of what is "fair" is left to the interpretation of judges. Prior to 2006, even truth was not allowed as a defence in an action for contempt.

Rahul Donde (2007) wrote:

… with the passage of the Amendment Act of 2006, truth has been included as a defence but with the caveat that it can be used as a defence only if it is in "public interest." What constitutes public interest is again left to the discretion

Truth cannot be used as a defence, unless it is shown that the allegedly contemptuous act was both bona fide and in public interest.

Why Is Discretion a Concern?

The definition of criminal contempt is couched in extremely wide language, facilitating the imposition of greater restraints on free press, at the discretion of the courts. Donde (2007) detailed the problems posed by the discretionary powers in the hands of judges, under the Contempt of Courts Act: Firstly, it is entirely dependent on the opinions and predispositions of the judges. Secondly, the Act does not recognise one of the basic principles of natural justice, viz, nemo debet esse judex in propia causa, i e, no man shall be a judge in his own cause. Thus, in contempt proceedings, the court arrogates to itself the powers of a judge, jury and executioner which often leads to perverse outcomes. Thirdly, Section 14 of the Act empowers the court to summarily punish alleged acts of contempt. In several cases, judges caught in the heat of the moment have used this power to prosecute individuals even though the contemptuous act was of a trifling nature.

He added: Another disturbing trend is the propensity of the court to treat personal attacks on their character as contempt. It is often forgotten that the law of contempt is not meant for protecting the judges, but it is for the protection of the institution of the judiciary from scurrilous, vilificatory and unfounded attacks against the institution as opposed to the persons that form a part of it. According to Donde, the exercise of contempt powers recognised by the Act has been far from satisfactory: The contempt of court in this country, unfortunately, is also subject to the twin evils of favouritism and nepotism. Thus, while the court did not hesitate to imprison a poor Muslim for requesting clemency from a Muslim judge in the name of religion for contempt, it refused to take any action against the Shiv Sena supremo Bal Thackeray in spite of the fact that he had alleged corrupt electoral practice by the judges.

Kumar (2016) echoed such criticisms: I have argued elsewhere that the criminal contempt law has no place under the Constitution of India (Kumar 2015). It is a colonial artefact, which does not, in the least bit, ensure the dignity of our courts. It has unfortunately been used to settle scores and silence the critics of the Court. It has even come in the way of the good faith reportage of corruption in the judiciary (Nair 2007).

Is Contempt Action a Reasonable Restriction on Free Speech?

While Article 19(1)(a) of the Constitution of India recognises the right to freedom of speech and expression, Article 19(2) provides that laws can impose reasonable restrictions on this freedom, on various grounds, including "in relation to contempt of court." Donde (2007) wrote: Even the Constitution of India, the fountainhead of all laws in the country, has recognised contempt as an exception to the freedom of speech. Sathe (2001) explained the historical interrelationship between contempt of court and free speech:

Acrimony between the judicial power to punish for contempt of court and the citizen's fundamental right to freedom of speech has prevailed since the early 1970s, when the Supreme Court held E M S Namboodiripad, Kerala's then chief minister, guilty of contempt of court for his critical comments on the judiciary as an institution. … the court had subordinated the freedom of speech and expression, the most important of the fundamental rights, to the judiciary's power of punishing for contempt of court. A sweeping contour of contempt of court had trivialised the freedom of speech.

Therefore, he prescribed: Freedom of speech is the most fundamental of the fundamental rights and the restrictions thereupon have to be minimal. The law of contempt of court can impose only such restrictions as are needed to sustain the legitimacy of the judicial institutions. The law need not protect the judges. It has to protect only the judiciary.

… A contempt notice issued without proper scrutiny could cause great hardship to people who are engaged in public life. Freedom must be the rule and the restriction must be an exception.

Criticism or Intolerance—What Lowers the Authority of Courts?

According to Sathe (2001): The court's power to punish for contempt is likely to be ineffective against … the moralist Gandhian willingness to suffer the punishment rather than apologise for what according to them is not defiance but exercise of their freedom.

Analysing the contempt proceedings against Prashant Bhushan, Medha Patkar and Arundhati Roy in relation to their opposition to the Supreme Court decision in the Narmada Bachao Andolan case, Sathe wrote: Where fear of punishment goes and one is willing to suffer, the deterrence of the punishment vanishes. Further, when such persons have moral convictions, their suffering enhances their social esteem. If the court had punished them, they would have gone up in public esteem and to that extent the court would have suffered erosion of its public esteem.

This principled refusal to retract or apologise for one's critical statements has continued to be witnessed in a number of cases, including with Bhushan in 2020. Referring to the contempt action against Bhushan's controversial remarks, Justice A P Shah (2020) wrote: The Court generally is becoming pricklier when it comes to issues of free speech, as evidenced in the most recent Prashant Bhushan case. In a display of self-proclaimed "magnanimity," the Court let off Bhushan with a fine of ₹1 for the contempt case against him over two tweets, but not without chastising his conduct. In the entire proceedings, one thing was clear: the Court came across as an intolerant institution. Sathe (2001) explained the paradox of the legitimacy of the judiciary:

The courts have to sustain their social legitimacy through their decisions and through people's belief that they are objective, impartial and principled. Their decisions might be wrong according to some people. Some decisions may be severely criticised … The legitimacy of the court increases by allowing such criticism. Such criticism and dissent forms the basis of a free society. Sathe (1970) emphasised: What distinguishes a free society from a totalitarian one is that there is freedom of speech in the former. This liberty is available not only for the propagation of the common view but necessarily also for views which might be disapproved of.