LAW *alter views*

Freedom of expression and contempt of court: A critical analysis

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FREEDOM of expression and the free flow of information, including free and open debate regarding matters of public interest, even when this involves criticisms of individuals, are of crucial importance in any democratic society. They are key to personal development, dignity and fulfilment of every individual, as well as for the progress and welfare of society, and the enjoyment and other human rights and fundamental freedoms.

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises a carefully drawn series of restrictions on freedom of expression, taking into account the overreaching values of individual dignity and democracy. Such restrictions include, for example, prevention of obscenity and racial and ethnic hatred, and the protection of personal reputation and public safety. Article 29 of the Universal Declaration of Human Rights specifies: In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Towards International jurisprudence and standards

The major international and regional human rights instruments on civil and political rights--the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and People's Rights (ACHPR) -- all protect both freedom of expression and the administration of justice. Freedom of expression is protected in Article 19 of the ICCPR as follows:

Everyone shall have the right to hold opinions without interference.

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.

The administration of justice, particularly the right to a fair trial and the presumption of innocence, is protected in Article 14 of the ICCPR, which states, in part:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or guardianship of children.

A more precise legal standard is articulated in Article 19(3) of the ICCPR. Under that article, restrictions on freedom of expression may only be legitimate if they are "provided by law and are necessary: (a) For the respect of the rights and reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals"

Permissible interference vis-à-vis contempt of court

Any such interference must be prescribed by law. This implies that the law is accessible and 'formulated with sufficient precision to enable the citizen to regulate his conduct.' Second, the interference must pursue one of the legitimate aims listed in Article 19(3). Third the interference must be necessary. This implies that it serves a pressing social need, that the reasons given to justify it are relevant and sufficient and that the interference is proportionate to the legitimate aim pursued. This is a strict test, which presents a high standard, which any interference must overcome.

Unfortunately, some judicial bodies being the ultimate guarantor of rights fall short in overcoming this test when it comes to offences related to contempt of court. The offence of contempt of court continues to be used by the courts across the world to gag offensive critique. Even in England, where the last successful prosecution for scandalising the court was brought in 1931, as David Pannick asserts, "There can be little doubt the bringing of such prosecutions had an inhibiting effect on newspaper and magazine reporting of judicial affairs generally…the continued existence of the offence, and the memory of successful prosecutions, inhibits journalists, who wrongly suspect that they have a legal obligation to speak respectfully and cautiously when discussing the judiciary"(David Pannick, Judges, Oxford University Press, 1987, p.110.).

Defining contempt of court

Any wilful disobedience to, or disregard of, a court order or any misconduct in the presence of a court; action that interferes with a judge's ability to administer justice or that insults the dignity of the court; punishable by fine or imprisonment or both. There are both civil and criminal contempts; the distinction is often unclear.

A judge who feels someone is improperly challenging or ignoring the court's authority has the power to declare the defiant person (called the contemnor) in contempt of court. There are two types of contempt - criminal

and civil. Criminal contempt occurs when the contemnor actually interferes with the ability of the court to function properly - for example, by yelling at the judge. This is also called direct contempt because it occurs directly in front of the judge. A criminal contemnor may be fined, jailed or both as punishment for his act.

In Attorney- General v. Leveller Magazine Ltd., Lord Diplock identified a common characteristics of different forms of criminal contempt by saying: My Lords, although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it (1979 AC 440, 449).

Civil contempt occurs when the contemnor wilfully disobeys a court order. This is also called indirect contempt because it occurs outside the judge's immediate realm and evidence must be presented to the judge to prove the contempt. A civil contemnor, too, may be fined, jailed or both. The fine or jailing is meant to coerce the contemnor into obeying the court, not to punish him, and the contemnor will be released from jail just as soon as he complies with the court order. In family law, civil contempt is one way a court enforces alimony, child support, custody and visitation orders, which have been violated.

However, many courts have realised that, at least regarding various procedural matters such as appointment of counsel, the distinction between civil and criminal contempt is often blurred and uncertain. It is often said that there is a distinction between 'civil' contempt and 'criminal' contempt, although no one appears able to state the distinction precisely and it is conceded generally that the distinction is of little practical significance. The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the difference between on the one hand contempts such as 'scandalizing the court', physically interfering with the course of justice, or publishing matters likely to prejudice a fair trial, and on those other contempts which arise from non-compliance with an order made, or undertaking required in legal proceedings.

In fact, in many jurisdictions, contempt of court appears to be a strange element of law, which is both unclear and anomalous.

Breadth of contempt

The sheer breadth of contempt contributes greatly to the confusion and non-transparency surrounding this offence. Geoffrey Robertson and Andrew Nicol list five types of contempt: Strict-liability contempt (completely unintentional prejudicing of the legal proceedings by publishing material on an 'active case'), deliberate contempt (directly influencing legal proceedings e.g., by placing unfair pressure on a witness or a party to proceedings), scandalising attacks on the judiciary (making false and 'scurrilous' attacks on the judiciary), jury deliberation (publishing accounts of how jurors reached their verdict), disobedience to and order of the court (disobeying an order of a court to postpone reporting or suppress evidence).

Contempt in the face of the court, which is directed at the judiciary or other personnel and constitutes behaviour other than speech, or speech that has crossed over into overt acts would mostly fall outside the reach of any ordinary doctrine of free speech, irrespective of any other protection to which it may be entitled. This point merits emphasis because the distinction must be drawn between contempt involving and not involving free speech considerations is often blurred. To recognise and evaluate the problem inherent in a system of legal free speech, a strict and almost hermetic distinction must be maintained between speech (whether conveyed by mouth, in writing, or by technological means) and overt action.

The description of 'contempt of court' no doubt has an historical basis but it is nonetheless most misleading and confusing. In fact, the law does not exist, as the phrase 'contempt of court' might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of parties or litigants. Lord President Clyde commented in Johnson v. Grant: The phrase "contempt of court" does not in the least describe the true nature of the class of offence with which we are here concerned …

The offence consists in interfering with the administration of law; in impeding and perverting the course of justice … It is not the dignity of the court which is offended a petty and misleading view of the issue involved it is the fundamental supremacy of the law which is challenged (1923 SC 789 at 790 cited with approval inter alia by Lord Edmund-Davies in A-G v. Leveller Magazine Ltd. 1979 AC 440 at 459).

Contempt of court and free expression

The laws of contempt are primarily designed to balance the freedom of expression with the judiciary's attempt to maintain its authority and safeguard public order. Broadly speaking, contempt of court is of three kinds: I) violation of an order of a court, II) interference in the judicial process and III) criticism of a judge, his judgement, or the institution of the judiciary.

Lord Russell CJ defined the 'offence of contempt of court' as " any act done or writing published calculated to bring a court or a judge of the Court into contempt, or to lower his authority." However, Lord Russell explained, "that description of that class of contempt [scandalising the court] is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of Court." As eloquently pronounced by Lord Atkin, " Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men.(Ambard v. Att.-Gen. for Trinidad and Tobago,1936 AC 322, 355 (PC).)"

In the Anglo-Saxon countries, it is the institution of contempt of court that always been the most important means of protecting the prestige of the administration of justice and the dignity of the personalities involved therein. The protection afforded individual officers, especially judges, is invariably based and justified on the protection of the institutions of the administration of justice. The rationale behind the contempt law is an abiding British fear of 'trial by newspaper' of the sort that often disfigures major trials in America, where the First Amendment (The First Amendment to the US Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.") permits the press to comment directly on matters involved in litigation. American judges also do not accept the argument that public confidence in their authority and in the fair administration of justice will necessarily be shaken by hostile comment. The public interest in freedom of expression has been accorded a clear preference over the public interest in securing fair trials and any constraint on such freedom are permissible only to the extent that they constitute a clear and present danger to the administration of justice (Nebraska Press Association v. Stuart 1976 427 US 539). It is the truth of the comment, not the mere fact that it is made, which may undermine such confidence; and if the remarks are true, the public should certainly be allowed to digest them.

Contemporary jurists, such as Geoffrey Robertson and Andrew Nicol, describe the offence of scandalising the court in England as "…an anachronistic relic of eighteenth-century struggles between partisan judges and their vitriolic critics" Eric Barendt adds that the offence of scandalising the court is "now so unimportant in practice that it may appear fruitless to spend much space in debating its justification."

Given the inherent vagueness and elasticity of almost all formal speech restrictions and especially speech restriction in the legal arena there would, as far as criminal sanctions are concerned, be an obvious temptation to use the sanction against unpopular people with dissenting views. The obvious tendency, in such cases, towards invocation of sanctions, would not be what was said but by whom it was said. Leading contempt cases in the leading contempt jurisdictions of the world reflect this reality heavy stress put on the protection of legal institutions with a corresponding underselling of the interests of the civil libertarian rights of the public and individuals.

Contempt and freedom of discussion

Another aspect of contempt that deserves special mention is that which operates to protect the fairness of trials and to maintain the authority of the courts. Although there is a public interest in doing this, the rules thereby imposed also impede and ultimately conflict with another public interest, namely freedom of discussion. Freedom of discussion is an important public interest for as Lord Simon stated in A-G v Times Newspapers Ltd.: People can not adequately influence the decisions, which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. (1974 AC at 315).

The continuing growth of media and its crucial role in consolidating democracy calls for greater scrutiny of somewhat restrictive nature of contempt laws. This is not to say that the media should interfere an ongoing trial and thereby may cause a potential harm to the fairness of trials. As Lord Denning MR once said: 'the press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above broad ...But the watchdog may sometimes break loose have to be punished for misbehaviour.' (Lord Denning, Road to Justice, 1955, p.78).

The famous formulation by Jordan CJ in Ex parte Bread Manufacturers; Re Truth & Sportsman Limited [29] bears repeating: It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventillation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which, as between competing matters, the public interest in the possibility of prejudice to a litigant may be required to yield to other and superior considerations.

Few critical points to ponder

1.The term 'contempt of court' is misleading and inconsistent with the notion of democracy and human rights.

2. The distinction between civil and criminal contempt is often blurred and uncertain. Given the inherent vagueness and elasticity of almost all formal speech restrictions and especially speech restriction in the legal arena in the form of contempt there would, as far as criminal sanctions are concerned, be an obvious temptation to use the sanction against unpopular people with dissenting views.

3. Heavy stress put on the protection of legal institutions with a corresponding underselling of the interests of people. Clearly this is not consistent with international standards.

4. The concerns for the protection of administration of justice are often vague and overemphasised at the cost of freedom of expression.

5. The offence of scandalising the court continues to be used by some of the the courts across the world to quieten offensive critique. The courts of law, the ultimate guarantor of free expression, have found it difficult to come to terms with free speech critically directed at the courts themselves.

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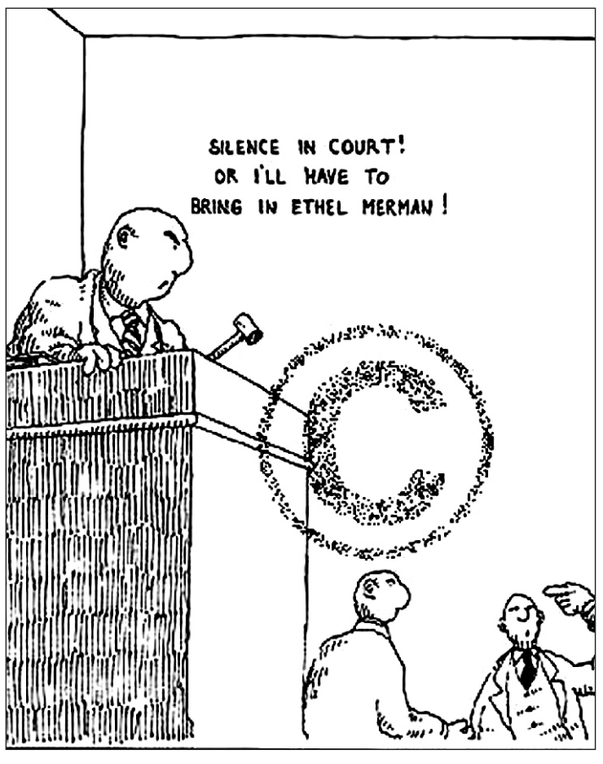

LAW *opinion*

Nationality and citizenship: Some issues

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THE word "nationality" is often loosely used to mean "citizenship" under international law. However there remains a distinction between the two terms.

Many legal authors hold the view that the word "nationality" includes not only citizenship but also a person who, though not a citizen, has permanent connection to the state where that person is born. For example, if an Indian national acquires US citizenship, that person will be considered an Indian national by birth, (US citizen of Indian origin), although under Indian law, the person has to renounce Indian citizenship.

Strictly speaking, citizenship gives a person all political and civic rights, while nationality refers to the country of birth. Because of birth, a deep bond of culture, customs and language remains with the person throughout his whole life. Another difference is that attributes of nationality cannot be renounced because by birth the person acquires certain characteristics, say language, while citizenship can be lost or renounced.

For a Bangladeshi national, double citizenship has been allowed by amending the law (1951 Citizenship Act) in case of commonwealth countries since 1980 and a gazette notification lists the countries in which a Bangladesh national by birth can acquire foreign citizenship, without losing Bangladeshi citizenship. In other words a Bangladeshi- born British citizen may have two passports-one British and the other Bangladeshi. It is up to the person concerned to choose one of the passports for travel.

A person who acquires double citizenship, cannot, under the Bangladesh Constitution, become a MP or Adviser of the Caretaker government. (Articles 58C and 66 of the Constitution).

Citizenship of married women

Traditional laws provide automatic acquisition of husband's citizenship for married women. However the 1957 UN Convention on the Nationality of Married Women provides that state- parties to the Convention shall not deprive of the citizenship of birth or acquired citizenship otherwise of a state of married women. They are entitled to retain their citizenship of birth but may acquire husband's nationality if they choose to do so. This right of women to retain citizenship after marriage has been further strengthened by Article 9 of the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women.

Statelessness of a person impermissible under international law

Under certain circumstances a person may lose citizenship. For example, citizenship can be lost by renunciation or by expiry of conditions of citizenship. However a person born in a country cannot be denied citizenship unless that person acquires citizenship of another state. This is because no person should become stateless. If that person commits treason or crimes, that person should face the court but must not be deprived of citizenship of the country of birth.

Under international law, this is not permissible because stateless persons have no protection from their states of birth in case of their need or security. The Hague Convention of 1930 adopted a special protocol concerning statelessness. It states that " if a person after entering a foreign territory loses the citizenship without acquiring another citizenship, the state whose citizenship the person last possessed is bound to admit that person at the request of the state in whose territory the person is".

The United Nations took also further initiative to codify the avoidance of statelessness of a person. There are two Conventionsone is the 1954 Convention Relating To the Status of Stateless Persons and the other is the 1961 Convention on the Reduction of Statelessness.

The 1954 UN Convention defines the term stateless person as " a person who is not considered as a citizen by any state under the operation of its law" And Article 12 of the Convention states that "the personal status shall be governed by the law of the country of his domicile or if he has no domicile, by the law of the country of his residence."

The 1961 Convention states that a contracting state shall grant its citizenship to a person born in its territory who would otherwise be stateless. Article 8 of the 1961 Convention states that a contracting state shall not deprive a person its citizenship, if such deprivation would render him stateless. Furthermore the 1951 Convention on Refugees also does not approve a person being stateless.

Conclusion

Although grant of citizenship is regulated by domestic laws, the 1954 and the 1961 UN Conventions demonstrate that statelessness is a matter of international concern and lay down the norms of international law. Responsible states in international community cannot deprive of their citizens by birth stateless.

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