Journal of Advances and Scholarly Researches in Allied Education

Vol. V, Issue IX, January-2013, ISSN 2230-7540

REVIEW ARTICLE

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www.ignited.in

Journal of Advances and Scholarly Researches in Allied Education
Vol. V, Issue IX, January-2013, ISSN 2230-7540

Freedom of Speech and Contempt of Court in United Kingdom: An Analysis

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INTRODUCTION

Unlike India where Article 19(1)(a) of the constitution ensures freedom of speech to all citizens, in England freedom of speech including freedom of press has been guaranteed by the court decisions and various legislations from time to time.

The first important decision involving freedom of speech and contempt of court is In the matter of special reference from Bahamas Island.[1] It was a special reference on a case by the Secretary of State for the Colonies and was heard by Board consisting of 11 members of the Privy Council. The facts of the case in brief are that the Chief Justice of a colony had returned letters to a newspaper and in reply, a man had, in a letter published in a newspapers, held up the Chief Justice.

"... to public ridicule in the grossed manner, representing him as an utterly incompetent Judge and a shirker of his work and suggesting that it would be a providential thing if he were to die."

The Board did not give a formal judgment but reported that the letter complained of, though it might have been made this subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of Justice or the due administrations of the law, and therefore did not constitute a contempt of Court (emphasis supplied).

This case is important in the sense that with this was put an end to theory that the judge has an integrated personality, and any attack on a judge which reduces the prople's confidence in him as a judge is contempt.[2]

IMPORTANT CASES

The decision of the Privy Council, in McLeod v. St. Aubyn[3] is also important. In this case the Privy Council reversed the findings of the lower Court and held that where the appellant was neither printer nor publisher nor writer of such scandalous matter, he was neither constructively nor necessarily guilty of contempt of Court and held that the Judge who committed the appellant must pay the cost of appeal to Her Majesty in Council.

The next important case which left an indelible mark on the law of contempt is Ambard v. Att.-Gen. of Trinidad and Tobago[4] which contains Lord Atkin's classic statements of the law of contempt. In this case an article entitled "The Human Element" appeared in a newspaper wherein the article pointed out the different sentences awarded in two cases which appeared to the writer to be similar. In one of which he considered that the sentence was too light and in the other that the sentence was not heavy enough. He was held guilty of contempt. Special leave was given to appeal to the Privy Council. After observing that the Privy Council found no evidence to justify the findings that the article was written with the intention of lowering the dignity of the Court, or had that effect, Lord Atkin said:

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of Justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputting improper motives to those taking part in the administration of Justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of Justice, they are immune, Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and

[1] (1893)A.C.138(P.C.), hereinafter referred to as the 'Bahamas case'

[2] H.M.Seervai, Constitutional Law of India, vol.1, 4th edition, pp.724-736, Universal Book Traders, Delhi, Hereinafter referred to as Seervai's Constitutional Law.

[3] (1899) A.C. 549

[4] (1936) A.C.322(P.C.)

respectful, even though outspoken, comments of ordinary men.[5]

The observations made by Lord Atkin in the above said case wayback in 1936 still hold the ground and have been quoted with approval by our Supreme Court in almost all the cases dealing with the freedom of speech and contempt of Court.

Greater emphasis was laid on freedom of speech by Lord Denning, Lord Salmon and Lord Davies in R. V. Commr, of Police Ex p. Blackburn[6], wherein Mr. Quintin Hogg, Q.C. wrote an article in "Punch", in which among other things, he aid "The recent judgement of Court of Appeal is a strange example of blindness which sometimes descents on the best of judges... it is to be hoped that the Courts will remembers the golden rule of judges in the matter of obiter dicta, Silence is always an option."[7]

It was admitted at the hearing of the contempt proceedings that the reference to the Court of Appeal was a mistake, and the reference should have been to the Division Court. Notwithstanding this, in the separate judgments, the Appeal Court held that there was no contempt and in this case, even greater emphasis was laid on freedom of speech that had been by Lord Atkin.

LORD DENNING SAID:

Let me say at once that we will never use this Jurisdiction as a means to uphold our own dignity. That must res on surer foundation. Now, it will use to suppress those who speak against us. We do not fear criticism, nor do we resent it.

It is less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment even outspoken comment, on matters of public interest...

Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error no doubt, but errors do not make it a contempt of court, we must uphold his right to the uttermost... All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy, still less into political controversy.[8](emphasis supplied)

SALMON L.J. SAID:

It is the inalienable right of everyone to comment fairly upon any matter of public importance. This right is one of the pillars of individual libery - freedom of speech, which our courts have always unfailingly upheld... The criticism here complained of, however, rumbustious, however wide of the mark, whether expressed in good taste or in bad taste seems to me to be well within the limits of reasonable courtesy and good faith.[9]

EDMUND DAVIES L.J. SAID:

The right to fair criticsm is part of the birth-right of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse, and its curtailment must be jealously guarded against. It applies to the judgments of the courts as to all other topics of public importance.[10]

The court in all the cases discussed has upheld the right of an individual to criticise even if it is not in good taste all the time. It clearly shows a clear understanding of the law of contempt jurisprudence and the importance of the right to freedom of speech.

In the next few pages we will discuss some cases which played very important role in further expanding the ambit of freedom of speech and instrumental in evolving the law of contempt and finally culminated in the enactment of Contempt of Court Act, 1981.

The importance of the freedom of speech which was emphasized by Lord Denning M.R. and Salmon and Edmond-Davis L.JJ. in the case discussed in the preceding paragraph received further support, and the law of Contempt of Court was further developed, as a result of A.G. v. Times Newspapers[11] and A.G. v. B.B.C.[12] Those decisions led to judicial and legislative changes in the law of contempt of court designed to increase the freedom of speech and the press. It would be convenient to set out the various proceedings which culminated in the enactment of the Contempt of Court Act, 1981. In this background I would first discuss the events which finally led to the case of A.G. v. Times Newspapers[13]

Mothers when pregnant had taken the drug thalidomide. Their children had been born deformed. That was in 1962. Actions were started at once for damages. Distillers, who distributed the drug, tried to settle the actions. All parents agreed to a settlement except five and the settlement went on.

In the mean time the editor of the Sunday Times wrote an article on 24 September 1972 to draw attention to the plight of the thalidomide children which was looked upon as a notional tragedy and it raised a great public outcry. Distillers pointed out to the Att.-Gen. that the article was a Contempt of Court because legal actions by parents of some of the children were still pending. The Att.-Gen. took no

5 Id.at p.335
6 (1968) 2 Q.B. 150, hereinafter referred to as 'Blackburn's case'.
7 Id.at p.154
8 Id. at p.155
9 Id. at pp.155-6
10 Id. at p.156
11 (1973) 1 Q.B.710; (1974) A.C. 273 (H.L.)
12 (1981) A.C. 303
13 (1973) 1 Q.B. 710; (1974) A.C. 273 (H.L.)

action after receiving the editor's explanation. However, the editor sent to the Att.-Gen. a draft article for which he claimed factual accuracy on the testing manufacture and marketing of the drug. The Att.-Gen. took the view that the proposed article would involve a Contempt of Court as it would create serious risk of interference with Distillers' freedom of action in the litigation. The matter came before the Div. Court in A.-G. v. Times Newspapers Ltd[14] was argued for the Time Newspaper that whatever may have been the law in the past, the time had come to perform a balancing exercise between the public interest in free discussion and debate on the matter of public importance on the one hand, and the public interest in the unimpeded trial or settlement of disputes according to law on the other. It was further submitted that the existing rules should be relaxed, and in cases like the one before the Court, there were really two competing public interests - one in protection of the administration of justice and another in the right of the public to be informed on the grave and weighty issues of the day, and that the latter interest was more important in the circumstances of this case.

Accordingly, they granted an injunction, "restraining the respondents, their servants or agents or others from publishing or causing or authorising to be published, or printed an dealing with the distribution and use of the drug thalidomide."[15]

On appeal, this injunction was vacated by Lord Denning, M.R.Philmore and Scarman L.JJ. The judgments of the Appeal Court repay study. Lord Denning, after stating that the Court would not allow "trial by newspapers" or "trial by television" or "trial by medium" other than courts of law, said that :

In so stating the law, I would emphasize that it applies only 'when litigation is pending and is actively in suit before the Court'. To which add that there must appear to be 'a real and substantial danger of prejudice', the trial of the case or to the settlement of it. And when considering the question, it must always be remembered that besides the interest of the parties in a fair trial or a fair settlement of the case there is another important interest to be considered. It is interest of the public in matters of national concern, and the freedom of the press to make fair comment on such matters. The one interest must be balanced against the other.[16](italics supplied)

The need for a litigation being active was also emphasized by Philmore L.J.[17] and Scarman J.[18]This emphasis on the need for a litigation being "active" if an article like the present one was to be treated as Contempt of Court had important consequences, as will appear when we deal briefly with the Contempt of Court Act, 1981, passed by the British Parliament.

Emphasising the importance of the freedom of speech, Scarman L.J. observed:

Further, these writs are only a minor feature in a situation which deeply disturbs the nation, and in which the public have a very great interest in freedom of discussion.[19]

He cited with approval the following passage from the judgment of OwenJ. in Ex Parte Dawson[20]:

... if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a lawsuit, it does not follow that a contempt has been committed. And then, a little latter : The discussion of public affairs ... cannot be required to be suspended merely because the discussion...may, as an incidental but not intended by product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.[21]

The second ground on which the Court of Appeal vacated the injunction was that after the Div. Court had granted the injunction of 29 November 1972, speeches were made in Parliament and reported in the newspapers in which the Distillers were said to be gravely at fault and not have faced up to their moral responsibility. And various newspapers had printed matters of the same nature as that printed by the Sunday Times.

It will be seen that the Appeal Court adopted the test of balancing rival public interests in the administration of justice and in the freedom of speech before deciding whether the act complained of, was a contempt of court.

The Att.-Gen. not satisfied with the outcome in the appellate court appealed to the House of Lords by special leave : A.G. v. Times Newspapers.[22] The views propounded by JordanC.J. in Ex-P. Bread Manufactures Ltd.[23], that proceedings in contempt require the Court to balance two public interests, namely between freedom of speech and discussion on matters of public concern and interest, on the one hand and the public interest in preventing improper influence being brought to bear on litigants on the other were approved and upheld by the Law Lords.

14 1973) 1 Q.B. 710
15 (1974) A.C. 273 at p.277
16 A.-G. v. Times Newspapers Ltd. (1973) 1 Q.B.710
17 Id. at p.744
18 Id. at p.746
19 Id. at p.746
20 (1961) S.R. (N.S.W.) 573
21 (1973) 1 Q.B. 710
22 (1974) A.C. 273
23 (1937) 37 S.R. (N.S.W.) 242

Lord Reid observed:

Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.

Lord Moris, Lord Diplock, Lord Cross also expressed similar views. It would be pertinent to detail the views of Lord Simon :

Your Lordships then are concerned with two public interests, which are liable to conflict in particular situation - in freedom of discussion on the one hand and in unimpeded settlement of disputes according to laws on the other. I agree with Lord Denning that the law must hold these two interests in balance.

Lord Reid observed that he knew no better statement of law than that contain in the following passage from the judgment of JordenC.J. in Exp. Bread Manufactures Ltd.[24]

... 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 ventilation 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 which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.[25]

However, the Law Lords held that the article amounted to contempt of court and granted a limited injunction restraining the respondents from publishing or causing or authorising or procuring to be published or printed any article or matter which prejudices the issue of negligence, breach of contract or breach of duty. It seems that decision was rested on the narrow ground that it was contempt of court to put in the impunged article, material which prejudged the issue of pending litigation or was likely to cause prejudice and accordingly the publication of the impunged article, which in effect charged the company with negligence, would constitute a contempt since negligence was one of the issues in the litigation.

Another fear of the Law Lords was that this would set in a trend of trial press, or by the radio or by media other than the courts.

However, there was a simple solution to this problem as suggested by Seervai.[26] The House of Lords, like the courts below, had discretion to grant or refuse an injunction against the Times Newspapers. In the case before them, the House clearly decided important questions for the first time, and thereby limited the scope of contempt of court in favour of freedom of speech and the media. Therefore, the house having laid down the law which would necessarily govern all future cases, could have refused an injunction in the exercise of its discretion by observing that on the fact of the case the impugned article could exert no greater pressure on Distillers than they had been subjected to as a result of discussion in Parliament and in similar articles in other newspapers.

The matter did not end here. The Sunday Times took the matter to the European Court of Human Rights.[27]Which upheld the action of Sunday Times and disapproved views of House of Lords of granting a limited injunction.

The respondents referred the decision of the House of Lords to the Europeon Court of Human Rights complaining of a breach of articles of the European Convention.[28] The Court had to consider various competing provisions of the Europen Convention. The Sunday Times claimed that the decision of the House of Lords in Att. - Gen. v. Times Newspapers Ltd. was a breach of certain provisions of the convention and in particular of Article 10 which provides :

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without influence by public authority and regardless of frontiers.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of order, for preventing the

24 (1937) 37 S.R. (N.S.w.) 242,249-250

25 (1974) A.C. p.297 A

26 Seervai's Constitutional Law of India, at p. 731

27 unday Times v. U.K. (1979) 2 E.H.R.R. 245

28 Sunday Times v. U.K. (1979) 2 E.H.R.R. 245

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Court also had to consider the provisions of Article 6(1)

"In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

It was argued for The Sunday Times that the restriction imposed upon them was not "prescribed by law" because the law of contempt of court was too uncertain in its application. Yet, only two of the 20 judges agreed. There was also debate as to how far the wording of Article 10(2), "maintaining the authority and impartiality of the judiciary", actually extended. The Court explained its breadth in the following passage:

Insofar as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase 'maintaining the authority and impartiality of the judiciary': the rights so protected are the rights of individuals in their capacity as litigants, that is, as persons involved in the machinery of justice, and the authority of that machinery will not be maintained unless protection is afforded to all those involved in or having recourse to it.

Nevertheless, on the facts of the particular case before them, a majority of 11 held that the restriction imposed on the Sunday Times by the House of Lords was not necessary in a democratic society for maintaining the authority and impartiality of the judiciary even in this wide sense.

Another important case where the court had to do the balancing act between the public interest involved in free press and fair administration of justice is that of A.G. v. B.B.C. A religious sect sought to stop a television broadcast which was disparaging of them. They failed. After that broadcast a number of action were brought by the Exclusive Brethren. But no action was brought by the Exclusive Brethren against the B.B.C. for libel. (emphasis supplied)

The B.B.C. advertised in the Radio Times their intention to broadcast a repeat of the aforesaid television programme. The Exclusive Brethren demanded that the broadcast should not be made because its contents would prejudice the hearing of the case before the local Valuation Court. The matter was brought to the attention of the Att. Gen. who, two days before the broadcast, issued a writ restraining the B.B.C. from making the television broadcast.

Lord Salmon observed that: "The B.B.C.'s broadcast raised matters of great public importance and, if true, was rendering an important service to the public. The broadcast was indubitably defamatory. But, the Exclusive Brethren brought no action for libel. Had they done so, and the B.B.C. had raised a defence of justification, it is highly unlikely that the Brethren could have obtained an interim injunction... to prevent the B.B.C. from repeating their broadcast of 26 September 1976.

Thus, freedom of press through these two cases got a new lease of life. It came to recognised that the freedom of press can be restrained only if there is a "pressing social need" for such a restraint. In order to warrant a restraint, there must a social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of press.

Contempts of Courts Act, 1981 The Phillimore Committee:

On June 8, 1971Lord HailshanL.C. appointed a committee under the chairmanship of Lord Justice Phillimore to consider whether any changes were required in the law relating to contempt of court. The Committee reported in December 1974 making a number of important recommendations for change. Some of these were to find their way in Contempt of Courts Act, 1981.

CONCLUSION

In 1981, British Parliament enacted the contempt of court act, 1981 which made extensive changes in the prevailing law. The important ones are:

1. That Act narrowed that scope of the 'Strict Liability Rule' which prevailed before it was enacted namely "The rule of law" whereby the conduct may be treated as tending to interfere with the course of justice in particular legal proceedings regardless of intention to do so: section 1 of the Act (emphasis supplied)

The test is now limited to publications which create a substantial risk : section 2(2) of the Act.

2. The scope of the strict liability rule was further narrowed down by Section 2(3) of the act which limited the application of strict liability rule to a publication if the proceedings in question are active. Schedule 1 of the act determines when the proceedings can be termed as active for the purpose of this act. (emphasis supplied)

3. Another important change which was brought in by section 5 of the Act was that public affairs can be discussed even though incidentally some risk or

prejudice is caused to the particular legal proceedings.

To sum up it can be said that the Law of Contempt of Court in England now accepts the need to balance two competing public interests, namely, between "a free Press and a fair trial". It accepts that moral pressure on a party to the litigation expressed in sober and temperate language to forego a party's legal rights in the interest of justice and morality is a legitimate exercise of the right to freedom of speech and the press. The provisions of the Act make it impossible for a party, by merely serving a writ to prevent discussions in the press and other media, of matters of public concern and interest. In short, the area of freedom of speech and the press has been enlarged, and the area within which contempt of court can operate to restrict that freedom has been narrowed.