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CONSTITUTIONAL VALIDITY OF SECTION 2(c)(i), CONTEMPT OF COURTS ACT, 1971: A CRITICAL ANALYSIS

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ABSTRACT

It is a well-known fact that the freedom of speech and expression is an important facet of any democratic nation. The Constitution of India recognises the freedom of speech and expression as a fundamental right under Art. 19(1)(a). However, it is also crucial to ensure this freedom is not absolute in nature to preserve sovereignty, public order, decency and morality in the nation. The freedom of speech and expression has been restricted in various platforms, and the Constitution provides that the same includes in matters of contempt of court to preserve the administration of justice, and the sanctity of the courts. The Contempt of Courts Act, 1971 was enacted to define and limit the powers of certain courts in punishing contempt of courts and the procedures involved therein. However, a particular provision of the law has led to the rise in various debates regarding its scope, extent and limitations due to its apparent vague phrasing. Sec. 2(c)(i) of the Act has been critically analysed in the paper by incorporating the test of reasonability under the right to equality as well as the freedom of speech and expression. The paper focuses on the scope of Art. 14 and the impugned section by critically analysing the judicial approach of the Supreme Court in situations regarding the arbitrariness, and the discretion to determine the meaning of the phrase 'tendency to scandalise'. The paper further critically analyses the scope of Art. 19(1)(a) and the reasonable restrictions laid down under Art. 19(2) to determine the validity of the clauses mentioned in the impugned section. The paper has also referred to the certain judicial approaches in similar circumstances in the USA and UK to critically analyse the ambit of Sec. 2(c)(i). The paper concludes by providing an understanding of the test of due process of law involved in determining the constitutional validity of any statute to determine the constitutional validity of the impugned provision.

1. INTRODUCTION

"Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."- Lord Atkin[2392]

Section 2(c)(i) of the *Contempt of Courts Act, 1971* (the Act) puts forth the grounds for criminal contempt.

The sub-section reads as follows:

> *(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—*
>
> *(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court;*

In the case of ***DC Saxena v. Chief Justice of India***[2393] it was stated that this definition under this impugned section not only guides *suo motu* proceedings allowed under *Article 129* as well as *Article 215*, but also guides the proceedings for contempt under the Act itself.

2. ARTICLE 14- RIGHT TO EQUALITY & RULE OF LAW AND ARBITRARINESS

[2392] Ambard v. Attorney-General for Trinidad and Tobago, [1936] AC 322 at 335.

[2393] (1996) 5 SCC 216.

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The various kinds of protection granted under Article 14 have been enumerated to include protection against arbitrariness and unfettered discretion and the implementation of principles of natural justice. Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.[2394] Equality is antithetic to arbitrariness.[2395] The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades *Article 14* like a brooding omnipresence.[2396] Any unreasonable or arbitrary exercise of discretion violates *Article 14*.[2397] It has been reiterated that "*Article 14* strikes at arbitrariness because any action that is arbitrary must necessarily involve a negation of equality.[2398]

The apex court has held that rule of law means, no one, howsoever high or low, is above the law.[2399] Rule of Law has been recognised as a basic structure of the Constitution by the Hon'ble Court.[2400] Rule of law which permeates the entire fabric of the Constitution excludes arbitrariness.

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The Supreme Court has explained that *Article 14* prohibits class legislation; it does not prohibit reasonable classification of persons, objects and transactions. Classification should fulfil the following two tests[2402]:

a) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

b) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question

Thus, it may be argued that there may exist reasonable classification herein. The Act provides for that innocent and fair publications do not amount to contempt. The test for reasonableness of the act has already been put forth under the freedom of speech.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades *Article 14* like a brooding omnipresence....[2403]. Equality is antithetic to arbitrariness.[2404] In fact, equality and arbitrariness are sworn enemies. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and therefore it is violative of *Article 14.*[2405]

2.1- VAGUE, AMBIGUOUS AND ARBITRARINESS OF THE IMPUGNED LAW

"We cannot countenance a situation where citizen's live in fear of the Court's arbitrary power for words of criticism on the conduct of judges, in or out of court."[2406]

[2394] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613.
[2395] EP Royappa v. State of Tamil Nadu, AIR 1974 SC 555.
[2396] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[2397] Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212.
[2398] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722.
[2399] In Re: Ramlila Maidan Incident v. Home Secretary, Union of India & Ors., (2012) 5 SCC 1.
[2400] Indira Gandhi v. Raj Narain, AIR1975 SC 229.
[2401] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613.
[2402] Javed v. State of Haryana, (2003) 8 SCC 369.
[2403] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[2404] EP Royappa v. State of Tamil Nadu, AIR 1974 SC 555.
[2405] Indira Gandhi v. Raj Narain, AIR 1975 SC 229.
[2406] Vinod A. Bobde, Scandals and Scandalising, (2003) 8 SCC Journal 321.

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Basic principles of legal jurisprudence render any vague enactment void if prohibitions are not specifically mentioned or defined.[2407] The existence of vague laws prevents persons of ordinary intelligence from reasonably knowing what is prohibited and fails to provide a fair warning, trapping the innocent. This has further led to inconsistency in various decisions relating to conviction and sentence due to vagueness. Further, the imposition or threat of a criminal sanction on the basis of arbitrary and vague possibilities would deter legitimate criticism of the judiciary.

In ***Kameshwar Prasad v. State of Bihar***[2408] validity of the rule in question was not upheld since it imposed a blanket ban on all demonstrations of any type, whether innocent or otherwise. Similarly, this impugned sub-section is incapable of being interpreted objectively and has an enormously wide import. The wide and vague ambit of this sub-section attracts punishment for publication merely on the tendency of swaying the sentiments of the public against the court._Consequently, since there is no scope of such parts of the offence to be severable, the whole offence is liable to be struck down as ultra vires of the constitution.[2409]

It has also been reiterated that conviction under this section must be handled with care and sparingly.[2410]

However, having said that, it is not within the realm of the legislature to strictly define contempt of court, but is exclusively within the Court's power[2411]. Further, any and every criticism does not amount to contempt. This is subject to various limitations including to that there is no imposition of unreasonable restrictions on the freedom of speech and expression of citizens.[2412]

Another limitation is the test of whether the criticism is calculated to interfere with the proper administration of law and whether it tends to create distrust in the popular mind and impair confidence of people in the Courts.[2413]

The object of the legislation is to define, regulate and limit the powers of the Court in punishing contempt of court.[2414] It is the Hon'ble Court that ultimately decides whether an act has scandalised or lowered the authority of the court. If facts and circumstances, timing of the statement etc affects mind of the judge, then the person is guilty for contempt.[2415]

The *Contempt of Court Act, 1971* itself was enacted to limit and define the powers of the court and it further provides for multiple defences such as innocent publication and distribution[2416], fair criticism of judicial act[2417] and of truth.[2418] Further, acts which do not interfere or tend to interfere with the due course of justice are not punishable for contempt. Lastly, a distinction is made between vilification of a judge and of the court where only the latter would amount to an offence.

Furthermore, in ***Rustom Cowasjee Cooper v. Union of India***[2419], the Supreme Court emphasised:

a) There is no doubt that the court like any other institution does not enjoy immunity from fair criticism.
b) The supremacy of the Legislature under a written Constitution is only within what is in its powers. But what is within its powers and what is not, when any specific Act is challenged, it is for the court to say.
c) While fair and temperate criticism of the court or any other court, even if strong, may not be actionable, attributing improper motives or tending to bring Judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning

[2407] Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
[2408] AIR 1959 Pat 187.
[2409] Shreya Singhal v. Union of India, (2013) 12 SCC 73.
[2410] Baradakanta Mishra v. Registrar of Orissa High Court & Anr., (1974) 1 SCC 374.
[2411] State v. Padma Kant Malviya & Anr., AIR 1954 All 52.
[2412] *Id.*
[2413] Brahma Prakash Sharma v. State of UP, AIR 1954 SC 10.
[2414] Contempt of Court Act, No. 70 of 1971, Statement and Objectives.
[2415] Re Hira Lal Dixit & Ors, (1955) 1 SCR 677.
[2416] Contempt of Court Act, No. 70 of 1971, Section 3.
[2417] Contempt of Court Act, No. 70 of 1971, Section 5.
[2418] Contempt of Court Act, No. 70 of 1971, Section 13.
[2419] AIR 1970 SC 1318.

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of courts is serious contempt of which notice must and will be taken.

2.2- SCANDALISING THE COURT

Judiciary is not a "frail flower' and that the public in democracies must be trusted not to take scurrilous comments seriously- Cory J.

As stated in ***Re: S. Mulgaokar***[2420], court should be willing to ignore, by a majestic liberalism, trifling and venial offences. Therefore, there can exist a school of thought wherein the Court cannot be prompted to act as a result of an easy irritability. Rather, it shall take a noetic look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt.

The root grounds of this school of thought can be on not the validity of other *sub-sections (ii)* and *(iii),* but that the ground of "scandalising the court" is questionable as redundant and rooted in colonial assumptions, without giving due regard to the basic structure of democracy, right to equality and freedom of speech. Such offences have been held obsolete and unconstitutional in various jurisdictions like England and Canada. In Canada, it was stated that this offence not only fails the proportionality test but also casts a heavy burden on the freedom of speech and expression.[2421] This offence had also been abolished in the United Kingdom despite its disuse, based on the recommendations of the UK Law Commissions[2422] by passing the *Crime and Courts Act, 2013*[2423].

On the other hand, in India, there has been a history of misusing this ground of the impugned section to convict a person for contempt. For example, A traffic constable who questioned whether the red beacon on the hood of a judge's car was authorised,[2424] was punished for contempt of court under this ground. Allowing this as a ground for criminal contempt fails to achieve the objective of the Contempt of Courts Act of creating a balance between the protection of fundamental right of speech and expression and the dignity of the court and interests of administration of justice. Unnecessary, uncertain, colonial and ambiguous, this ground for criminalisation of contempt must be struck down.

3. ARTICLE 19- REASONABLE RESTRICTION AND THE TEST OF PROPORTIONALITY

Article 19(1)(a) provides the fundamental right of freedom of speech and expression limited by reasonable restrictions imposed under *Article 19(2).* Although the right is not absolute, the restrictions on it must be interpreted in the narrowest possible terms without casting a 'wide net'.[2425] Such restrictions are subject to the test of proportionality which must fulfil the following conditions:

a. Legitimate state aim
b. Existence of a rational nexus between such aim and the infringement of the right
c. That the infringement is the least restrictive measure available for the fulfilment of the aim
d. That a balance is struck between the extent of the restriction and the benefit that the state seeks to achieve through such imposition

Although not absolute, this right of freedom of speech and expression cannot be restricted without the existence of an actual and immediate harm. Restricting freedom of speech based on a vague and arbitrary possibility or consequence of an action with a "tendency" to scandalise or lower the court's authority is impermissible and unconstitutional. Freedom of expression must not be supressed unless there is an existence of actual and tangible harm

[2420] P.N. Duda v P. Shiv Shankar, (1978) 3 SCC 339.
[2421] R. v. Kopyto, (1987) 62 O.R. (2d) 449 (C.A.)
[2422] Contempt of Court: Scandalising the Court, Law Commission Report, United Kingdom, 2012.
[2423] Crime and Courts Act, No. 22 of 2013, Section 33.
[2424] Suo Motu Action by High Court of Allahabad v. State of U.P., AIR 1993 All 211.
[2425] Shreya Singhal v Union of India, (2013) 12 SCC 73.

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caused that is not remote, based on conjecture or far-fetched and unless this endangers the interest of the community. There must exist a direct nexus between the expression and the threat to public interest, inseparably related like a "*spark in a powder keg*". Unless there is certainty of a nexus or actual harm caused by act, criminalisation of such actions does not fall within the ambit of a "reasonable restriction" envisaged under *Article 19(2)*.[2426]

In the case of ***Bridges v California***[2427], US Supreme Court in a contempt case, applied the 'clear and present danger test', which states that "*the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished*". Restriction of contempt actions by criminalising them in absolute and sweeping terms as envisaged in *Section 2(c)(i)* would tantamount to a "prior restriction" and any system imposing prior restraints comes with a "heavy presumption against its constitutional validity" and it is the burden of the state to justify the imposition of such restraints.[2428]

Even if the restriction is based on the threat to public order under *Article 19(2),* this threat must be real, immediate and arising out of the publication that is sought to be punished.[2429] By basing the punishment on a "tendency" or possibility to scandalise or lower the court's authority, it fails the proximate cause test and does not amount to a reasonable restriction. This in turn would threaten to suppress dissenters and critics by creating a fear of criminal penalty on such flimsy grounds, which amounts to an "*impermissible chilling effect"* on the freedom of speech and expression, deteriorating the existence and subsequent health of a democratic system.

Thus, the term "reasonable" must be tested on the anvil of the test of proportionality and should be used in a qualitative and relative sense.[2430] The Court has further stated that the test of reasonableness should focus on each individual impugned statute and cannot provide for an abstract, general meaning to the term.[2431] Additionally, court has provided certain principles that can be followed as guidelines for *Article 19(2)* such as: the restriction must not be arbitrary or excessive, there must exist a rational nexus and that there must not exist an abstract notion of the same.[2432]

Free speech or expression cannot be associated or confused with a licence to make unfolded or reckless allegations against the judiciary.[2433] Further, the Hon'ble Court has previously laid down that *Article 19(1)(a)* does not apply with respect to cases in relation to Contempt of Court and that *Article 129* states that the Supreme Court is a court of record and shall have the power to punish for contempt of itself.[2434]

The test of reasonable restrictions has to take into account the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent of evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time etc.[2435] The Hon'ble Court has previously laid down that it is idle to contend that a connotation on contempt imports any unreasonable restriction on freedom of speech and expression.[2436] Furthermore, the Constitution empowers the Court to be a guardian of fundamental rights and hence, it would not desire to enforce laws that would actually impose unreasonable restrictions on the right to freedom of Speech and expression guaranteed by that very constitution.[2437]

[2426] S Rangarajan v. P Jagjivan Ram, (1989) 2 SCC 574.
[2427] 341 US 242 (1941).
[2428] New York Times v. US, 403 U.S. 713 (1971).
[2429] Ram Manohar Lohia v. State of Bihar, (1996) 1 SCR 709; Kameshwar Prasad v. State of Bihar, AIR 1959 Pat 187 & Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[2430] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[2431] State of Madras v. VG Row, AIR 1952 SC 196.
[2432] Papanasam Labour Union v. Madura Coats Ltd., AIR 1995 SC 2200.
[2433] Radha Mohan Lal v. Rajasthan High Court, AIR 2003 SC 1467.
[2434] CK Daphtary Sr. Advocate & Ors v. OP Gupta & Ors, AIR 1971 SC 1132.
[2435] State of Madras v. VG Row, AIR 1952 SC 196.
[2436] CK Daphtary Sr. Advocate & Ors v. OP Gupta & Ors, AIR 1971 SC 1132.
[2437] *Id.*

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4. CONCLUSION

The context of the concept of the procedure established by law under Art. 21 has evolved through time and it is essential that no person shall be deprived of their life or personal liberty except when that procedure established by law is just, fair and reasonable.[2438] The essence of the 'procedure established by law' has now evolved into the due process of law.[2439] It is therefore important to note that the evolution has led to a shift from justice according to law, to law according to justice. The essence of contempt of court was first incorporated in a legislative form through the Constitution as per Art. 19(2) which provides for reasonable restrictions to curb contempt of court[2440], that disrespects the sanctity of the court. Thus, the legislation as a whole may not be violative of the Constitution, as the legislature derives its validity from an express provision of the Constitution itself. However, certain terms and phrases mentioned in the legislation has the scope of being interpreted differently by different individuals, namely, the judges and the parties involved therein. While the scope of the law has been interpreted by the Supreme Court in various cases, in order to avoid further confusion, and conflicts.

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[2438] CONST. INDIA, art. 21.
[2439] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[2440] CONST. INDIA, art. 19(2)

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