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Contempt - Anachronistic? *

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Thomas Paine said that in absolute states the king was the law; in free states the law must be, and is, the king. That is the desideratum of the rule of law which is the tribute paid by power to reason.

Freedom of thought and expression including dissent is an important constitutional value which underpins a free and harmonious society. Justice Cardozo observed that freedom of speech is the matrix, the indispensible condition of nearly every other form of freedom. It is the wellspring of civilization. Without it liberty of thought would shrivel. The end result would be that the spirit of man would be mutilated and become enslaved. Discussion, debate and dissent are the very lifeblood of a democracy.

Public criticism is essential to the working of democracy and this includes criticism of every institution and organ of the State. This freedom certainly takes within it the right to comment upon and criticise judgments as also the conduct and behaviour of judges. This is an indispensible part of the accountability process and is basic to our system. It is too sacrosanct to be stifled or interfered with. It is neither dangerous nor undesirable. The benefits of freedom of expression are strong in this context also, as David Pannick opines. Fair and robust criticism should not only be not unwelcome, but should be considered necessary, healthy and welcome.

In his Lincoln Day Address in 1898, Justice Brewer perceptively said, “It is a mistake to suppose that the Supreme Court is either honoured or

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helped by being spoken of as beyond criticism. On the contrary, the life and character of the justices should be the object of constant watchfulness by all and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms maybe, like their authors devoid of good taste; but better all sorts of criticism than no criticism at all. The moving waters are full of life and health, only in the still waters is stagnation and death." [1]

The concept of independence of the judiciary takes queer forms. Judicial independence cannot be an alibi for stifling any talk or effort for setting the judicial house in order or to require people not to speak out against flagrant violation of judicial norms and behaviour. Much worse and more dangerous than any other form of arbitrariness is judicial arbitrariness. Justice Holmes refused to look upon any institution, including the Supreme Court as a Grand Lama and believed that every institution should earn respect through the test of truth.

Justice Khanna observed with insight, "The strongest weapon in the armoury of the judiciary is its unsullied image, the esteem it evokes and the confidence it enjoys. Reference is sometimes made to the contempt of court power of the judges to command respect. This, perhaps, is not correct and is apt to mislead. Contempt of court, as observed by a great jurist (Lord Denning), 'should not be used as a means to uphold our own dignity. This must rest on surer foundations. .....We must rely on our conduct itself to be its own vindication." [2]

The power to punish for contempt is a safeguard not for judges as persons but for the functions they exercise. How relevant is the contempt

[1] Government by Injunction, 15, Nat. Corp. Rep. 848, 849
[2] Reform of the Judiciary, A.D. Shroff Memorial Lecture, 1980, Forum of Free Enterprise, p.18

law today in a free country where criticism of the judiciary is inevitable! Judges have vast powers. People cannot and will not remain silent or mute spectators about the exercise of such powers. Just as decisions of other branches incur criticism, judicial decisions and behaviour would also be amenable to the same.

One fails to understand as to what can be wrong or objectionable in discussing, commenting on and assessing a judge's ability, performance and reputation. Unless and until this is done all talk about a great and independent judiciary is meaningless. If the conduct, behaviour and performance of Presidents and Prime Ministers and a whole host of persons at different levels in various fields can be commented on and criticized there is no reason whatsoever why the performance of judges and their conduct on and off the Bench cannot be. It ill befits anyone functioning under the Constitution and the law to claim any such immunity. Such claim is totally untenable. The judges are as human as anyone else under the sun. Indeed at the very beginning, in 1952, the Supreme Court had rightly and wisely cautioned judges never to be over sensitive to public criticism.

We recall Seervai's biting criticism of the majority opinion in the *UP Assembly case*[3] concluding that his discussion of the case showed it as "the most one-sided opinion and for the 6 judges to say that they would decide the matter 'in a spirit of detached objective enquiry' must appear hypocritical to the reader." It was not frowned upon. Professor Glanville Williams' criticism of a House of Lords judgment in language which was far from moderate was not only not penalised but was acknowledged and accepted and the earlier view changed in the later judgment. [4] One cannot

[3] AIR 1965 SC 745
[4] see, R v. Shivpuri, 1987 AC 1

but refer to the Templeman approach. When the three Law Lords who delivered the majority judgment in the *Spycatcher* case[5] were portrayed in a cartoon in a newspaper with the caption 'Three Old Fools', the Court took no notice or offence. Lord Templeman one of the majority judges remarked that they were three in the majority which was absolutely correct; they were not young by any standard and whether they were fools or otherwise was a matter of opinion or perception and that there was no contempt. Following the judgment in *Bush vs. Gore*[6], the American Supreme Court judges were severely criticised in the strongest and vilest terms by leading academicians in law journals. But no offence was taken or contempt initiated. Very recently, the Daily Mail published the photo of the three judges who issued the Brexit ruling[7] captioned 'Enemies of the People'. No notice was taken of it.

The legendary Lord Denning, when something was thrown at him in court, did not take offence, leave alone action for contempt. Nearer home in the 1950s it would appear a shoe was flung at the dais in Justice Mahajan's court in the Supreme Court. Justice Mahajan graciously said that he could understand the plight and agony of a losing litigant in the last court, but judges decide according to their light and one party has to win and the other lose. The judge asked the court master to ensure that no one left the court room bare footed. What grace and wisdom!

Contempt of court has been described as 'The Proteus of the Legal World assuming an almost infinite diversity of forms.'[8] The dilemma of the law of contempt arises because of the constitutional need to balance

[5] Att. Gen v. Guardian Newspaper, (1987) 3 All ER 316
[6] 531 US 98 (2000)
[7] see, 2018 AC 61
[8] Joseph Moskovitz, Contempt of Injunctions Civil and Criminal, 43 Columbia Law Review 780 (1943)

two great but occasionally conflicting principles-freedom of expression and fair and fearless justice. The key word is 'justice', not 'judge'; the keynote thought is unobstructed public justice. Criticism, far from undermining public confidence in courts, would really enhance it. [9]

The insightful observations of Justice Frankfurter in *Bridges* v. *California*[10] require to be always remembered: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. … Therefore judges must be kept mindful of their limitations and their ultimate responsibility by a vigorous stream of criticism expressed with candour however blunt. … Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint and by good taste. … Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered. … Since courts, although representing the law, are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt….it is always better to err on the side of tolerance and even disdainful indifference."

"Even if criticism of the court would have an effect on a judge's action, the offence of scandalizing the judiciary must be abolished. …. Like other public servants judges should accept criticism as an occupational hazard. …. Because the judiciary enjoys a security of tenure rightly denied to politicians and unique to public servants, it is especially important that the judges should be subject to free and open criticism of

[9] Baradakanta Mishra v. Registrar AIR 1974 SC 710
[10] 314 US 252 (1941)

the performance of their duties." [11] "In theoretical terms criticism of the judiciary should almost certainly be treated as a form of political speech, and therefore enjoy the highest degree of legal protection." [12]

One can do no better than refer to David Pannick and Judge Jerome Frank.

> "The judiciary is not the 'least dangerous branch' of government. Judges are not mere 'lions under the throne.' They send people to the prison and decide the scope and application of all manner of rights and duties with important consequences for individuals and for society. Because the judiciary has such a central role in the government of society, we should (in the words of Justice Oliver Wendell Holmes) 'wash …. with cynical acid' this aspect of public life. Unless and until we treat judges as fallible human beings whose official conduct is subject to the same critical analysis as that of other organs of government, judges will remain members of a priesthood who have great powers over the rest of the community, but who are otherwise isolated from them and misunderstood by them, to their mutual disadvantage.
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> Some politicians, and a few jurists, urge that it is unwise or even dangerous to tell the truth about the judiciary. Judge Jerome Frank of the US Court of Appeals sensibly explained that he had
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> > "little patience with, or respect for, that suggestion. I am unable to conceive… that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic

[11] Judges, David Pannick
[12] Eric Barendt, Freedom of Speech

> to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions. … The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

This was said over 70 years ago. How much more relevant it is today!

The 'dubious and controversial' *scandalizing the Court* of illegitimate ancestry[13] and the Judges (Protection) Act, 1985 should be done away with. The entire law of criminal contempt is shrouded in uncertainty, its definition itself being vague. While one can accept the constraints imposed by the rule of law it is difficult to appreciate and accept ad hoc rules imposed as per the idiosyncrasies of individual judges. That is the very antithesis of the rule of law. All this is anachronistic and out of tune

[13] It has been described as dubious and controversial in *Law of Contempt* by Gordon Borie and Nigel Lowe, 3rd edition, Butterworths, Oxford (UK), 1996 p 331.
It is dubious because it originates from a dictum of one judge, Justice J .E. Wilmot in John Wilkes case, ie, R vs Almon long ago in 1765 and controversial as the dictum was recorded in a judgment that was never delivered, but was published by the judge's son after his father died. The judgment had been reserved after argument and when it was ready to be delivered it was found that the case against Wilkes was incorrectly titled and since the then procedural law did not permit an amendment unless agreed to by both parties, the entire case had to be abandoned. Thus, it is based on a judgment never delivered in court in a case that had already abated!
See also (1999) 250 A.R. 157 (CA); See generally, Douglas Hay" Contempt by Scandalizing the Court: A Political History of the First Hundred Years" Osgoode Hall Law Journal 25.3 (1987)

with the constitutional democratic ethos. The law regarding the *scandalizing the Court* was got from England. In 2012 the Law Commission in UK found that there was a lot of abusive material directed against judges particularly online, much of it being too silly to be taken seriously. It was noted that the judges successfully used civil defamation law to penalize wrong doers. The contempt jurisdiction was not invoked. And it is significant that in 2013 England abolished the offence of *scandalizing the Court* altogether.

In many countries contempt jurisdiction is regarded as antiquated and is sparingly exercised. It is not used to silence comments on judges or legal matters. To speak of the judges' ignorance of the law or of any improper conduct may be intemperate criticism, it cannot be contempt. That respect for the judiciary can be won by shielding judges from criticism is a misconception. Muzzling criticism against judges and judgments will not preserve public confidence in courts. That is preserved and enhanced by the work the court does- by its professional competence and moral integrity- and does not depend on what people are publicly allowed to say about it.

It is, of course, needless to say that contempt power is absolutely necessary to enforce obedience to court orders and to keep the stream of justice unsullied and pure. The court should, and will, enforce its order for the benefit of the person who got it. But also, it should not, and will not, allow its process to be set at naught and treated with contempt. Thus, not only those who are parties to and bound by the court order, but even those not parties and hence not bound but obstruct the course of justice are liable to be hauled up for contempt. This is totally different from criticism of the judiciary which cannot be stifled by invoking contempt power.

It has been well said that when the Constitution gives the judiciary enormous power and responsibility to ensure that every institution and every citizen must strictly conform to law and to the standards of propriety, it is logical then to expect that the institution of the judiciary itself must be worthy of the full confidence of the people. [14]

As Chief Justice Warren Burger warned, "A Court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self indulge itself and the least likely to engage in dispassionate self analysis.... In a country like ours, no public institution, or the people who operate it, can be above public debate." [15]

Justice Douglas remarked that judges are supposed to be "men of fortitude, able to thrive in a hardy climate, who should be able to shrug off contemptuous statements. [16] Our courts have done so on many occasions. But there have also been instances of courts being over sensitive which is neither necessary nor desirable. That is nothing but contempt powers being designed to try to maintain a good public image for the judiciary. The attitude and ability to shrug off is what is required and commendable.

In saying all this, the idea is only to endeavour to seek improvement. One is fortified by what Justice Holmes said: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism…I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law and especially our system of law, as one of the vastest products of the human mind…But one may criticize even what one reveres. Law is the

[14] Alexander,P.C., 2001. *India in the New Millennium*. Somaiya Publications.
[15] Address to Ohio Judicial Conference on 4.9.1968 when he was Circuit Court of Appeals Judge
[16] Craig v. Harney, 331 US 367, 376

business to which my life is devoted and I should show less than devotion if I did not do what in me lies to improve it." [17]

[17] Oliver Wendell Holmes, Jr., 10 Harvard Law Review 457 (1897) The Path of the Law, Collected Legal Papers, 167,194 (1920)