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Headline: Tempting To Contempt – Authentic Or Anathematic?

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Scandalising the court

Lord Atkin, the famous British Judge while dealing with a contempt case in 1936, observed: "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

As per the law of contempt, if a person or media makes any allegation against judges or justice system which brings them in disrepute, he can be punished for scandalising the judiciary.

"Scandalising the Court" is a form of contempt that has its roots in the United Kingdom, although this offence is no longer in force in the UK. In an 1899 Privy Council case, English judges said this offence was "obsolete" for England, but may be relevant in "small colonies consisting principally of the coloured population". In 2013, the United Kingdom had abolished the offence of scandalising the judiciary as a form of contempt of court on UK Law Commission's recommendation that the law was vague and not compatible with freedom of speech.

In many other countries also, contempt jurisdiction is regarded as archaic and exercised sparingly. In the US, courts no longer use contempt to silence comments on judges or legal matters. The First Amendment to the US Constitution forbids imposition of contempt sanctions on a newspaper.

It is interesting to note that in 1987, after the Spycatcher judgment, when the Daily Mirror called British Judges "You Old Fools", no contempt was initiated because the Judges in the United Kingdom did not take notice of personal insults. In fact, Lord Templeton commented, "I can't deny that I'm old; it's true. Whether I am a fool or not is a matter of personal opinion... I do not need to invoke the power of contempt".

This means that contempt has never been used to elevate the dignity of the court which must remain on well-established grounds rather than oppress those who speak ill of it.

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Indian scenario

But in India, judiciary vigorously uses the power of contempt to punish the offences against criticism of the judiciary. It even uses its contemptuous powers to punish attacks on the personal identities of judges, even though that is outside the ambit of the contempt of court.

The Contempt of Court powers is given to the judiciary to prevent obstacles in the administration of justice. However, what we are seeing is that this power is often misused by the courts to protect the status of individual judges.

Dealing with a contempt case initiated against 12 advocates, recently, the Allahabad High Court (Lucknow Bench)W observed that it is painful for the Court to deal with the contempt proceedings drawn against the lawyers who are supposed to be the officers of the Court. The Bench observed that the conduct of the lawyers has the potential of eroding the faith and trust of the public in the judicial system.

In the recent years, we have seen many such instances where the Supreme Court of India or the various High Courts have initiated proceedings under Criminal Contempt against persons on the allegation of scandalising the courts or judges. But why do lawyers or people interested in the administration of justice or value the rule of law criticize the judiciary? Are these comments made just for the fun of maligning the image of judiciary or is it made out of pain of seeing the corrosion of value in the system and intended as a correctional method?

We need to analyse whether the people who criticize judiciary actually scandalise the courts, or on the other hand, the judges who attempt to silence these criticism showing the sword of contempt, actually scandalise the courts, causing the erosion of faith and trust of the public in the system.

Role of Judges

The 14th Report of the Law Commission (1958), stated that the Supreme Court was called upon to stand as a protector of the fundamental rights of the citizen against executive and legislative action. The importance of the Court as the upholder of the rule of law and as the bulwark of the citizen's rights in a democratic constitution containing a bill of rights was emphasised by Chief Justice Kania at its inaugural sitting. The Court must consist of Judges who taken as a body are, as lawyers and men of vision, superior to the body of Judges manning the High Courts. Such a result can be achieved and maintained only by the exercise of courage, vision and imagination in the selection of Judges made with an eye solely to their efficiency and capacity.

Many eminent and visionary judges and jurists of our country have also reflected the role that the Court or the Judges should play.

Justice M.N. Venkatachaliah, one of the finest Chief Justices of India, in his inaugural address of the National Judicial Academy^{IA} narrated the definition of a judge, "If a man is not a respected human being - respected by the members of his family, by his friends, by his colleagues, and thought very highly of in a matter of his moral attainments, it is very unlikely that he will become a good judge. Judicial qualities are entirely, different from those that pass off today as attainments. A purely intellectual mind, a purely logical mind or a mind capable of legal certainties will not answer my definition and conception of a judicial personality. I believe that my respect for a judge would be to the measure in which he answers the requirements of judicial restraint, judicial sobriety, judicial circumspection and ability to know, far ahead of the events, what an undesirable or unpremeditated quirk in the direction of the law he produced". Justice V R. Krishna Iyer, a leading crusader of social justice, made no secret of the fact that a judge must have a social philosophy and a humane approach to legal problems.

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According to him, "a person who is not able to weep at the sight of human suffering and respond with quick compassionate action should not be chosen as a judge."

When expectations fail!

The expression "respect for law" is a "complex one". It is based on the belief that the law is democratic and fair and that it contributes to social progress or that it protects individual rights. Judges have vast powers and people will not remain silent if the exercise of such powers is not done properly. Just as decisions of other branches of government attract criticism, judicial decisions would also invite the same. What excites general dissatisfaction with the judicial determinations of the Court also indisposes the minds of litigants to obey them shaking men's allegiance to law.

The assumption that respect for the judiciary can be won by shielding judges from criticism misjudges public opinion. Surely an enforced silence, in the name of preserving the dignity of the judiciary, would cause resentment, suspicion and contempt, more than it would enhance respect.

In this context, it is worthy to remember the words of Lord Atkin, "Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness and fairness of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct".

But, in reality what do we see? Justice Ruma Pal, a former Judge of the Supreme Court, flayed the use of contempt, where she said, "Judges are fierce in using the word ["independence"] as a sword to take action in contempt against critics. But the word is also used as a shield to cover a multitude of sins, some venial and others not so venial." She pointed out some of the sins, which included the sin of "brushing under the carpet", or turning a Nelsonian eye, where many judges who are aware of injudicious conduct of a colleague have either ignored it or refused to confront the judge concerned, and suppressed any public discussion on the issue, often through the great silencer - the law of contempt. The next sin is nepotism or what the oath of office calls "favour" and "affection". What is required of a judge is a degree of aloofness and reclusiveness not only vis-a-vis litigants but also vis-a-vis lawyers. Litigants include the executive. Injudicious conduct includes known examples such as judges using a guesthouse of a private company or a public sector undertaking for a holiday or accepting benefits like the allocation of land from the discretionary quota of a chief minister. Nothing destroys a judge's credibility more than a perception that he/she decides according to closeness to one of the parties to the litigation or what has come to be described in the corridors of courts as "face value". The quality of justice should not be determined by the race, colour, wealth, power and status of the litigant.

We have seen how some of the top judges, while in office, blatantly violate natural justice and equality before law, where they decide matters in their own whims and fancies and sit on judging their own cause, as if no other person can judge their cause better than themselves. We have also seen how top judges, use their official position to influence setting up of institutions of their own choice and force parties to use such facilities and building up post-retirement jobs or businesses in their own state or appoint their own nominees to oversee inquiries or commissions, just for the purpose of burying it under the carpet for pleasing the executive. These actions are not only scandalising the judiciary, but also step into the zone of corruption. Section 7A of the Prevention of Corruption Act states that whoever accepts or obtains or attempts to obtain for himself or for any other person any undue advantage as a motive or reward by exercise of his personal influence, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

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The contempt power will not help to stop eroding the faith and trust of the public in the judicial system, but on the other side, like Caesar's wife, the judges must behave above suspicion.

In this context, it is also worthwhile to look into a recent study titled, "Jobs for Justice(s): Corruption in the Supreme Court of India"^M, authored by Madhav S Aney and Giovanni Ko from Singapore Management University and Shubhankar Dam from the University of Portsmouth, which highlighted the relationship between post-retirement jobs and pre-retirement judgments. As per the study, they concluded that "authoring judgments in important cases decided in favour of the government is positively associated with securing a post-Supreme Court job and the government holds the post-retirement position as an incentive for a judge while hearing cases involving the government. Authoring the judgment in one important case decided in favour of the government increases the likelihood of being appointed to a post-SC job by 13-17 percent. A study by Vidhi Centre for Legal Policy in 2016 found that out of a sample of 100 retired Supreme Court judges, as many as 70 had taken government-appointed positions.

A former Chief Justice of India, Ranjan Gogoi very candidly admitted that "Corruption has become an acceptable way of life, and judges do not drop from heaven"!

We have seen many circumstances, where Judges because of their actions or inactions have scandalised the courts and brought disrepute to the judiciary. As per the Contempt of Courts Act, a Judge of a subordinate court could be punished for committing contempt of his own court. But unfortunately this provision does not apply to Judges of the High Court and Supreme Court.

Criticism to improve is not scandalising

The above facts underscore that judges are not infallible both legally as well as ethically, and when they do so, it needs to be pointed out, so that it does not harm or bring down the institution as a whole, rather it helps in strengthening people's belief in the system. In a democracy, public perception matters, one must not only be honest but also must be seen to be honest. When the people find that the judiciary is showing a tendency to fall in line with the decisions of the Executive, whatever these decisions are, doubts are bound to occur on the independence and fear-free functioning of the judiciary.

Here we also need to differentiate the words "justice" and "judge". The rationale for the provision of contempt is that courts must be protected from motivated and tendentious attacks and unwarranted criticisms that lower its authority, defame its public image and make the public lose faith in its impartiality. We need to avoid the confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound. Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such. As Professor Goodhart has put it, "Scandalising the court means any hostile criticism of the "judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel."

But, we have seen that the contempt powers are used to punish attacks on criticisms on the personal identities of judges, even though that is outside the ambit of the contempt of court. The concept of public accountability of the judicial system is, indeed, a matter of vital public-concern for debate and evaluation. All social and political institutions face massive challenges and are under the pressure of re-assessment of their relevance and utility. Judicial institutions are no exception. In a democracy, no institution of the State - the judiciary included - can or should be above public scrutiny and criticism.

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One of the most renowned lawyers of our time, Mr. Fali S. Nariman had said about the allegations of corruption in the higher judiciary, "do you keep everything under the carpet until all that is under the carpet suddenly blows up on your face? We have excellent, honest and upright judges in the High Courts and Supreme Court of India. But there are a group that are not honourable. Perception of the public is very important. The more one tries to bury or hide them, the worse the situation becomes and it corrodes the entire judicial system".

Justice Venkatachaliah while dealing with a contempt matter^N said that it is the privileged right of the Indian citizen to believe what he considers to be true and to speak-out his mind, though not, perhaps, always with the best of tastes; and speak perhaps, with greater courage than care for exactitude. Judiciary is not exempt from such criticism. Judicial institution should be made of stronger stuff intended to endure and thrive even in such hardy climate.

Justice Hidayatullah in a judgment clarified that there is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. The Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error!⁷¹.

Justice Krishna Iyer, while referring to the Privy Council's observation that proper enforcement on contempt for attacks on the Court may be necessary in small colonies, consisting principally of coloured populations, for maintaining the dignity and respect for the Court, strongly condemned it saying that we are equally cultured people with traditions and canons and may at least be equated in these matters with English men.

Even though Justice Krishna Iyer has made his comment as early as in 1978, it looks like the people of India are still considered to be a bunch of uncultured coloured population of a colony, where strict restrictive punishments have to be given on comments against judges so as to preserve the dignity and respect for the Court.

In a democracy, the people should have the right to criticize judges. The purpose of the contempt power should not be to uphold the majesty and dignity of the court but only to enable it to function. Unfortunately, the trend in Indian contempt cases seems to be getting more and more intolerant.

We have to understand that the cornerstone of the contempt law is the accommodation of two constitutional values - the right of free speech and the right to independent justice. The right of the citizens to free speech and expression under Article 19(1)(a) should be treated as primary, and the power of contempt should be subordinate. A reverse trend is not in consonance with the constitutional scheme of India. The basic principle in a democracy is that the people are supreme. Once this concept of popular sovereignty is kept firmly in mind, it becomes obvious that the people of India are the masters and all authorities (including the courts) are their servants. Sir Edward Coke, considered to be one of the greatest English jurists, had said that the wisdom of law is wiser than any man's wisdom and justice represents wisdom of the community. Therefore, the judicial system should work to serve and protect the wisdom of the community and not that of individuals.

Justice Krishna Iyer, had again given us a guideline as to how a Judge should respond. He said, "Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unvarnished provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court.

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I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge" KA.

This is the classic example of judicial restraint, judicial sobriety, judicial circumspection and ability to know, far ahead of the events, which Justice Venkatachaliah had mentioned about the quality of a judge!

The eminent jurist had said, "You may have a constitutional document with very lofty expressions and words. If you don't have the constitutional culture, that is a mere piece of paper. This constitutional culture comes out of the spirit of liberty that lives in the hearts of men. If it dies there, nobody can replace it; no document can replace it. If it is alive, it is only then a constitutional document means something" M.

The Court as the upholder of the rule of law and as the bulwark of the citizen's rights in a democratic constitution, should maintain the dignity and status of their office by the quality of their judgments, the fearlessness and fairness of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct and not by shielding themselves from criticism and silencing public opinion, causing resentment, suspicion and contempt.

I am tempted to again rely on the visionary and prophetic opinion of Justice Krishna Iyer[A, which is relevant even today, where he said, "we have been passing through a period of exceptional strain and stress and excitement in this country in which unusual remarks made have not been confined to what appears in newspapers. Indeed, extraordinary and surprisingly erroneous statements, which could not be there if rules of judicial ethics were formulated and strictly adhered to, have found place even in solemn pronouncements of this Court on rare occasions. However, I do not want to expatiate on that theme here. All I can say is that, if this is a correct observation, it would also disclose a need for rules of judicial ethics or propriety for judges of even this august Court"

A mature and "broad-shouldered" approach to criticism can only inspire public confidence, not denigrate the judiciary, for justice, as Lord Atkin said, is "no cloistered virtue".

For maintaining the concept of rule of law and for firmly instilling the faith and trust of the public in the judicial system, we have to voice our opinions and concerns. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardised by an undefined apprehension of contempt action. Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been, impossible without freedom of speech and expression.

I would like to conclude, quoting Lord Denning, "If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."

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