

The chilling effect of criminal contempt

It is regrettable that judges believe that silencing criticism will harbour respect for the judiciary

These are strange times we are going through right now. The pandemic has brought all activities to a virtual standstill. Even as workplaces and institutions are slowly and tentatively getting back on their feet, the focus is on ensuring that the more important things get done first. Priorities are being identified accordingly. For the Supreme Court of India, identifying priority cases to take up first (in a pandemic-constricted schedule) ought not to be very difficult: there are dozens of constitutional cases that need to be desperately addressed, such as the constitutionality of the Citizenship (Amendment) Act, the electoral bonds matter, or the issue of *habeas corpus* petitions from Jammu and Kashmir. It is disappointing that instead of taking up matters of absolute urgency in these peculiar times, the Supreme Court chose to take umbrage at two tweets. It said that these tweets “brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the institution... and the office of the Chief Justice of India in particular...” Its response to these two tweets was to initiate *suo motu* proceedings for criminal contempt against the author of those tweets, the lawyer and social activist, Prashant Bhushan.

This need to “respect the authority and dignity of the court” has monarchical origins from when the King of England delivered judgments himself. But over the centuries, with this adjudicatory role now having been handed over to judges, showing extreme deference to judges does not sit well with the idea of a democracy. The U.K. Law Commission in a 2012 report recommending the abolition of the law of contempt said that the law was originally intended to maintain a “blaze of glory” around courts. It said that the purpose of the offence was not “confined to preventing the public from getting the wrong idea about judges... but that where there are shortcomings, it is equally important to prevent the public from getting the right idea”.

A wide field in India

The objective for contempt is stated to be to safeguard the interests of the public, if the authority of the Court is denigrated and public confidence in the administration of justice is weakened or eroded. But the definition of criminal contempt in India is extremely wide, and can be easily invoked. *Suo motu* powers of the Court to initiate such proceedings only serve to complicate matters. And truth and good faith were not recognised as valid defences until 2006, when the Contempt of Courts Act was amended. Nevertheless, the Delhi High Court, despite truth and good faith raised as defences, proceeded to sentence the employees of *Mid-Day* for contempt of court for portraying a retired Chief Justice of India in an unfavourable light.

It comes as no surprise that Justice V.R. Krishna Iyer famously termed the law of contempt as having a vague and wandering jurisdiction, with uncertain boundaries; contempt law, regardless of public good, may unwittingly trample upon civil liberties. It is for us to determine what is the extent of such trampling we are willing to bear. On the face of it, a law for criminal contempt is completely asynchronous with our democratic system which recognises freedom of speech and expression as a fundamental right. An excessively loose use of the test of ‘loss of public confidence’, combined with a liberal exercise of *suo motu* powers, can be dangerous, for it can amount to the Court signalling that it will not suffer any kind of critical commentary about the institution at all, regardless of how evidently problematic its actions may be. In this manner, the judiciary could find itself at an uncanny parallel with the executive, in using laws for chilling effect.

Besides needing to revisit the need for a law on criminal contempt, even the test for contempt needs to be evaluated. If such a test ought to exist at all, it should be whether the contemptuous remarks in question actually obstruct the Court from functioning. It should not be allowed to be used as a means to prevent any and all criticism of an institution.

Obsolete abroad

Already, contempt has practically become obsolete in foreign democracies, with jurisdictions recognising that it is an archaic law, designed for use in a bygone era, whose utility and necessity has long vanished. Canada ties its test for contempt to real, substantial and immediate dangers to the administration, whereas American courts also no longer use the law of contempt in response to comments on judges or legal matters.

In England, too, from where we have inherited the unfortunate legacy of contempt law, the legal position has evolved. After the celebrated *Spycatcher* judgment was delivered in the late 1980s by the House of Lords, the British tabloid, the *Daily Mirror*, published an upside-down photograph of the Law Lords with the caption, “You Old Fools”. Refusing to initiate contempt action against the newspaper, one judge on the Bench, Lord Templeton, reportedly said, “I cannot deny that I am Old; It’s the truth. Whether I am a fool or not is a matter of perception of someone else.. There is no need to invoke the powers of contempt.” Even when, in 2016, the *Daily Mail* ran a photo of the three judges who issued the Brexit ruling with the caption “Enemies of the People”, which many considered excessive, the courts judiciously and sensibly ignored the story, and did not commence contempt proceedings.

But Indian courts have not been inclined — or at least, not always — to display the same maturity and unruffled spirit as their peers elsewhere. An exception lay in Justice S.P. Bharucha’s response to Arundhati Roy’s criticism of the Supreme Court for vacating the stay for constructing a dam: although holding that Ms. Roy had brought disrepute to the Court, nothing further was done, for “the court’s shoulders [were] broad enough to shrug off [these] comments”. But this magnanimity was sadly undone when contempt proceedings were initiated against the author for leading a demonstration outside the court, and filing an affidavit, where she said “it indicates a disquieting inclination on the part of the Court to silence criticism and silence dissent, to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm”. For “scandalising its authority with mala fide intentions”, she was punished for contempt of court, and sentenced to a day’s imprisonment, with fine.

It is regrettable that judges believe that silencing criticism will harbour respect for the judiciary. On the contrary, surely, any efforts to artificially prevent free speech will only exacerbate the situation further. As was pointed out in the landmark U.S. case of *Bridges v. California* (1941), “an enforced silence would probably engender resentment, suspicion, and contempt for the bench, not the respect it seeks”. Surely, this is not what the Court might desire.

Two observations and a link

Simultaneous with the Indian Supreme Court’s decision to commence contempt proceedings against Mr. Bhushan, the Pakistan Supreme Court hinted at banning YouTube and other social media platforms, for hosting what it termed ‘objectionable content’ that ‘incited hatred’ for institutions such as the army, the judiciary, the executive, and so on. The eerie similarity between the two sets of observations raises concerns about which direction the Indian Supreme Court sees itself heading. One can only hope that these fears are unwarranted.

Meanings of Difficult Words:

- ❖ **chilling** (adjective) – frightening, terrifying, disturbing/horrifying.
- ❖ **contempt** (noun) – it refers to the offence of showing disrespect to the dignity or authority of a court (& its officers).
- ❖ **criminal contempt** (noun) – it includes any act or publication which: (i) ‘scandalises’ the court, or (ii) prejudices any judicial proceeding, or (iii) interferes with the administration of justice in any other manner.

- ❖ **civil contempt** (noun) – it refers to the wilful disobedience of an order of any court.
- ❖ **regrettable** (adjective) – undesirable, unfortunate, sad/bad, disappointing/distressing.
- ❖ **silence** (verb) – suppress, quieten, prevent, prohibit.
- ❖ **harbour** (verb) – nurse, nurture, foster, maintain, retain (an ambition/hope in one’s mind).
- ❖ **strange** (adjective) – weird, eccentric, odd, peculiar, funny, bizarre.
- ❖ **go through** (phrasal verb) – undergo, experience, face/endure (a difficulty).
- ❖ **pandemic** (noun) – the worldwide spread of a new disease; The illness spreads around the world and typically affects a large number of people across a wide area.
- ❖ **virtual** (adjective) – effective, practical, implicit, near enough.
- ❖ **standstill** (noun) – halt, stop, impasse, stoppage, stalemate/deadlock.
- ❖ **get back on one’s feet** (phrase) – to be successful again after having problems.
- ❖ **take up** (phrasal verb) – pursue, engage in, become involved in (an activity or course of action).
- ❖ **pandemic-constricted** (adjective) – restricted or inhibited by pandemic.
- ❖ **ought (not) to** (modal verb) – must (not), should (not).
- ❖ **desperately** (adverb) – seriously, urgently, pressingly, intensely.
- ❖ **address** (verb) – tackle, deal with, attend to, try to sort out.
- ❖ **constitutionality** (noun) – the condition of acting in accordance with an applicable constitution.
- ❖ **electoral bond** (noun) – an electoral bond is designed to be a bearer instrument like a Promissory Note — in effect, it will be similar to a bank note that is payable to the bearer on demand and free of interest. It can be purchased by any citizen of India or a body incorporated in India. it allows limitless, secret donations to political parties, including (and especially) by corporations.
- ❖ **habeas corpus** (noun) – Latin phrase meaning literally “that you have the body”. The court order to bring the person (in custody/detention) to the court to decide on the imprisonment is legal or illegal.
- ❖ **peculiar** (adjective) – strange, unusual, unusual, abnormal.
- ❖ **umbrage** (noun) – take offence, be offended, take something personally, be aggrieved, be upset, be angry.
- ❖ **disrepute** (noun) – dishonour, disgrace, ill repute, shame.
- ❖ **undermine** (verb) – reduce, diminish, spoil, damage, weaken.
- ❖ **suo motu** (phrase) – Latin term means “on its own motion”. It is used where a government agency acts on its own knowledge.
- ❖ **proceedings** (noun) – legal action, prosecution.
- ❖ **author** (noun) – creator, initiator, instigator, planner.
- ❖ **activist** (noun) – a person who supports a political or societal change/cause.
- ❖ **monarchical** (adjective) – relating to a monarch (king, queen or emperor).
- ❖ **origins** (noun) – source, roots.
- ❖ **adjudicatory** (adjective) – relating to adjudication (a formal judgement); having the power to adjudicate (judge/arbitrate).
- ❖ **deference** (noun) – regard, respect, consideration, attention, submission, obedience.
- ❖ **sit well with** (phrase) – be agreeable, be suitable, be acceptable to.
- ❖ **abolition** (noun) – termination, elimination, cancellation (of a system).
- ❖ **a blaze of publicity/glor**y (phrase) – a lot of attention (from the public).
- ❖ **offence** (noun) – breach, violation of the law.
- ❖ **shortcoming** (noun) – fault, flaw, imperfection/ defect.
- ❖ **objective** (noun) – aim, intention, purpose.
- ❖ **safeguard** (verb) – protect, shield, secure.
- ❖ **denigrate** (verb) – criticise, attack, insult, devalue, defame.
- ❖ **erode** (verb) – (gradually) deteriorate, destroy, spoil.
- ❖ **invoke** (verb) – cite, refer to, adduce.

- ❖ **nevertheless** (adverb) – notwithstanding, nonetheless, in spite of that, however.
- ❖ **sentence** (verb) – punish, convict.
- ❖ **portray** (verb) – describe, depict, characterize, represent.
- ❖ **in an unfavourable light** (noun) – in order to give a bad impression.
- ❖ **come as no surprise** (phrase) – something which is not surprising someone, but is as expected one.
- ❖ **regardless of** (phrase) – irrespective of, without consideration of, notwithstanding, in spite of.
- ❖ **vague** (adjective) – imprecise, inexact, unclear/ uncertain.
- ❖ **wandering** (adjective) – unsettled, unstable, volatile, transient, drifting.
- ❖ **jurisdiction** (noun) – authority, power.
- ❖ **unwittingly** (adverb) – unintentionally, unknowingly, inadvertently.
- ❖ **trample upon** (verb) – disregard, show no consideration for, treat disrespectfully, treat with contempt; walk over, crush.
- ❖ **liberty** (noun) – freedom, independence.
- ❖ **bear** (verb) – tolerate, put up with, endure.
- ❖ **on the face of it** (phrase) – apparently, seemingly, evidently/ostensibly; at first glance.
- ❖ **asynchronous** (adjective) – not existing at the same time.
- ❖ **amount to** (verb) – be equivalent to, be tantamount to, be equal to, boil down to.
- ❖ **commentary** (noun) – explanation, interpretation, assessment.
- ❖ **evidently** (adverb) – obviously, plainly, clearly, transparently.
- ❖ **uncanny** (adjective) – unnatural, mysterious, strange, abnormal.
- ❖ **parallel** (noun) – similarity, comparison, resemblance.
- ❖ **the executive** (noun) – the executive is a branch of government which enforces the law as written by the legislature and interpreted by the judiciary; government.
- ❖ **besides** (preposition) – apart from, in addition to.
- ❖ **contemptuous** (adjective) – scornful, disdainful, disrespectful, insulting.
- ❖ **means** (noun) – method, way, procedure.
- ❖ **obsolete** (adjective) – out of date, outdated, outmoded, old-fashioned.
- ❖ **abroad** (adverb) – in a foreign country.
- ❖ **archaic** (adjective) – obsolete, old-fashioned, outdated/very old.
- ❖ **bygone** (adjective) – past, out of date, outmoded.
- ❖ **necessity** (noun) – (essential) requirement, prerequisite, indispensable thing.
- ❖ **vanish** (verb) – become obsolete, cease to end, come to an end.
- ❖ **tie** (verb) – link, connect, relate.
- ❖ **substantial** (adjective) – considerable, significant, large.
- ❖ **whereas** (conjunction) – while on the contrary.
- ❖ **inherit** (verb) – assume, take over, receive (from a former user of something).
- ❖ **legacy** (noun) – something received from a predecessor or from the past.
- ❖ **evolve** (verb) – develop, progress, advance.
- ❖ **House of Lords** (noun) – The upper house of the Parliament of the United Kingdom whose members have not been elected. The Lords shares the task of making and shaping laws and checking and challenging the work of the government.
- ❖ **House of Commons** (noun) – The House of Commons is the lower house of the Parliament of the United Kingdom whose members have been elected.
- ❖ **tabloid** (noun) – a newspaper with a compact page (1/2) size smaller than the normal newspaper.
- ❖ **upside-down** (adjective) – inverted, reversed, overturned.
- ❖ **Law Lords** (noun) – the most senior members of the judiciary in the United Kingdom. The Law Lords are the members of the House of Lords sit as the highest court of appeal. The Law Lords carried out the judicial work of the House of Lords until 30 July 2009. Then, the Law Lords were abolished and the Supreme Court of the United Kingdom came into being.
- ❖ **reportedly** (adverb) – supposedly, seemingly, apparently, allegedly.

- ❖ **Brexit** (noun) – a term used for the (supposed) departure of the United Kingdom from the European Union.
- ❖ **judiciously** (adverb) – wisely, sensibly, prudently, thoughtfully, well-advisedly.
- ❖ **commence** (verb) – begin, start, embark on, initiate.
- ❖ **incline** (verb) – tend to have a particular opinion.
- ❖ **unruffled** (adjective) – calm, composed, undisturbed, unagitated, self-controlled.
- ❖ **spirit** (noun) – temperament, disposition, character, nature, personality.
- ❖ **peer** (noun) – person of the same age and/or ability as another; equal, fellow, co-worker.
- ❖ **lay** past of **lie** (verb) – be present, be contained, exist.
- ❖ **hold** (verb) – give (a verdict/judgement).
- ❖ **shrug off** (phrasal verb) – disregard, dismiss, ignore.
- ❖ **magnanimity** (noun) – big-heartedness, generosity, humanity, kindness.
- ❖ **undo** (verb) – nullify, invalidate, cancel, reverse, overturn.
- ❖ **affidavit** (noun) – sworn statement, self attestation, self declaration (of a person).
- ❖ **disquieting** (adjective) – horrible, awful, disgusting/upsetting.
- ❖ **inclination** (noun) – preference, liking, interest, penchant.
- ❖ **dissent** (noun) – disagreement, disapproval, opposition.
- ❖ **intimidate** (verb) – frighten, threaten, harass, scare, overawe.
- ❖ **harass** (verb) – oppress, persecute, attack repeatedly.
- ❖ **entertain** (verb) – consider, take into consideration, give attention to.
- ❖ **scandalise** (verb) – insult, offend, affront. ‘Scandalising the Court’ broadly refers to statements or publications which have the effect of undermining public confidence in the judiciary.
- ❖ **mala fide** (adjective) – Latin phrase meaning “with or in bad faith”; dishonest, illegal.
- ❖ **imprisonment** (noun) – incarceration, custody, confinement.
- ❖ **on the contrary** (phrase) – conversely, just the opposite.
- ❖ **artificially** (adverb) – falsely, unnaturally.
- ❖ **exacerbate** (verb) – aggravate, worsen, compound, intensify, heighten.
- ❖ **point out** (phrasal verb) – identify, mention, indicate, draw attention to.
- ❖ **engender** (verb) – cause, give rise to, bring about.
- ❖ **resentment** (noun) – bitterness, indignation, enmity, hatred/hate.
- ❖ **suspicion** (noun) – misgiving, doubt/qualm, distrust, scepticism.
- ❖ **incite** (verb) – instigate, provoke, stir up/egg on.
- ❖ **hatred** (noun) – hate, hostility, resentment, dislike/bitterness.
- ❖ **eerie** (adjective) – strange, abnormal, unnatural, weird, bizarre.
- ❖ **unwarranted** (adjective) – unjustified, unnecessary, unreasonable, uncalled for, groundless.