

Arundhati Roy's Contempt

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Court judgments cannot escape criticism. Nor can they outlaw outspoken words... We need to review the law of contempt.

THE HIGHER Judiciary's powers to punish those who malign it is a moody jurisdiction which is often indifferently and indiscriminately applied. These are few restraints on the exercise of this power. The procedure is arbitrary. The results uneven. Judges throughout the ages have used this power as they have felt — some with statesmanship, others waywardly.

This modern law of contempt was invented to silence criticism of the Judiciary and the judicial process swiftly and effectively by a summary procedure without a real trial. In 1765, Justice Wilmot created the new arbitrary law of contempt to censor the John Wilkes controversy. Not knowing how to cope with the British and colonial media, British courts enlarged the law of contempt. In a 1900 case, the British judges declared that contempt laws to stifle criticism were not to be used in England, but only for the "natives" in the colonies. However, in the turbulent 1930s the British press was punished for calling Justice Swift, a 'bewigged puppet' or, making the cryptic comment in the Marie Stopes birth control case that there were too many '(Justice) Avorys' about'. If Lord Atkin forbore in 1936 to say that "justice was not a cloistered virtue, but must suffer the scrutiny of ordinary persons" he was sending out a signal to virtually abolish that part of the contempt jurisdiction which punishes for scandalising or "lowering the authority of the court". In 1968, Lord Denning wisely took Lord Atkin's advice even though he felt Quintin Hogg Q.C. (later Lord Chancellor) had wrongly and unfairly criticised the judges. The Phillimore Committee (1974) reluctantly preserved this jurisdiction but recommended its disuse. In 1987, after the Spycatcher judgment in England, the Daily Mirror ran a banner headline calling the judges: "You Fools" — with their photographs in wigs upside down. No contempt notices were issued. Simon Lee's "Judging Judges" (1988) reproduces the Daily Mirror's 'You Fools' banner on the front cover. No contempt notice was issued. Elsewhere, this jurisdiction is defunct.

Despite stating high principles of forbearance, the law of contempt has been waywardly used in India. We are not concerned here with the power of the court to maintain discipline or even civil contempt of court to enforce its orders. What is at issue is the power of ordinary people to criticise judges and judgements fairly and fiercely without alleging bias — even if needs be whilst the cases are being heard.

The record of Indian courts is strange and uneven. In Namboodiripad's case (1970), the Chief Minister was found guilty and fined Re. 1 because he alleged that the judges were class biased. It was no comfort for him to know that Justice Hidayatullah claimed to know more marxism. But, the Court refused to punish the Law Minister, Shiv Shankar, who had made stronger comments on class bias partly because the consent of the Law Officers to his prosecution was not taken. In Yunus' case (1987) lack of consent of the Law Officers meant no contempt proceedings against him.

Significantly, in Arundhati Roy's case, the Law Officers had denied consent. In 1958, notices were not issued to Pandit Nehru who unknowingly made comments on a live case. But, in 1969, the

¹ <http://www.hindu.com/thehindu/2002/04/05/stories/2002040501101000.htm>

Supreme Court approved the contempt of Chief Minister P.C. Sen who criticised the `sugar' order pending before the courts. In March 2002, Arun Shourie — a Minister — wrote a strong, inaccurate and disparaging article on the pending "shila daan" case virtually making fun of the judges. Not only had he distorted what the Bench had said but what happened in court — knowing fully well that proceedings were pending. But, no contempt notices were issued. In 1977-78, Chief Justice Beg issued contempt notices to the editors of the Times of India and the Indian Express. Taken to their logical conclusion, these contempt cases would have exposed the record of the Judiciary during the Emergency. The judges backed off — to wisely withdraw the notice. Apart from preaching declarations that judges must be careful, the contempt jurisdiction is generally indisciplined — with the added statutory caveat that punishment should be given only if there is substantial interference with justice. Unfortunately, judges only intuitively understand when a transgression substantially mal-effects justice. The bargaining point — no less consecrated in the law — is the offer of an apology. And, if you do not, you belong to jail. The Arundhati Roy cases are often confusedly presented. The first Narmada case was principally concerned with an undertaking by the Narmada Bachao Andolan (NBA) not to issue statements. It was a technical contempt. Too much was made of it because of Ms. Roy's picturesque presentation of what the Narmada was thinking — perforce of the judges. Perhaps, it is still thinking the same thing. But, we are really concerned with the second Arundhati Roy case. Justice Ruma Pal's judgement of August 28, 2001, is crystal clear that even the application of contempt was legally flawed and had to be rejected. No less, the mandatory requirement of getting the consent of the Attorney-General or Solicitor-General was not complied with. In these circumstances, no notices should have been issued at all. The matter should have ended then and there. But, in the meanwhile, Ms. Roy filed a respectful affidavit expressing anguish and anger as to why she had being inveigled in these bogus proceedings, when even the police station had not filed an FIR, when the Supreme Court had better things to do... It is difficult to see how this cry of anguished concern on the "Court display(ing) a disturbing willingness to issue notice (and) a disquieting inclination on the part of the Court to muzzle dissent, to harass and intimidate those who disagree with it" amounts to a contempt in a misconceived petition which should never have been registered.

Court judgements cannot escape criticism. Nor can they outlaw outspoken words. In using the law of contempt, the Supreme Court has tended to treat politicians with tender care and others harshly. How could it have been wrong for a bewildered Ms. Roy to protest being dragged into a now admittedly illegal case. Her case was passed on from one Division Bench to another. We do not know what the result might have been if the composition were different. Eventually, the judgement was written by Justice Sethi who was not party to the previous proceedings. The judgement is very erudite. Before punishment it has to be shown that there is a substantial interference in justice. In fact, there was a substantial injustice to Ms. Roy. This was not carefully considered by Justice Sethi who preferred to match Ms. Roy's allegorical style to state that the "law punishes the archer as soon as the arrow is shot no matter if it misses to hit the target". So there was no substantial interference with justice. With respect, the target of justice may well have been missed by the learned judge.

The reform of the law of contempt is long overdue despite the long gestation period of 1960-71 leading to the Contempt of Courts Act, 1971. But, during the debate the Law Minister, Gokhale, wrongly stifled discussion on the grounds that defences like truth and other safeguards were unconstitutional. Parliament was misled. But Government majorities prevailed. We need to review the law of contempt.