**Scandalising the court**

BY A S F A N D Y A R W A R R A I C H 2021-02-15

WHENEVER freedom of speech becomes a little too free for the taste of the bench, it summons to its defence a very peculiar and archaic offence that of `scandalising the court`, a specialised breed of the general law of contempt, which allows the superior judiciary to summarily try any statement or published material that may, in their own opinion, bring their institution into disrepute or lower its authority and prestige.

Although it is very much a part of our constitutional framework (courtesy of the poorly conceived Article 204), its historical genesis lies not in any sound democratic principle but in the turbulent internal politics of 18th-century England, a time where only a fraction of people had the right to vote and where judges saw themselves as extensions of the monarch of the day, not merely in theory but also in practice, and thus,felt entitled to a rather regal form of decorum and reverence.

Legal scholarship typically traces the classic formulation of this offence to the 1765 case of R vs Almon, where an anonymous pamphlet accusing the Lord Chief Justice of incompetence and lack of integrity lande d its publisher in hot water. For political reasons, the prosecution was scrapped, but Wilmot J, the presiding judge, retained the undelivered verdict in his personal notes, which ended up being published, causing his opinion to be cited with great relish as an authoritative precedent until 1931, when the offence fell into complete disuse.

Take Wilmot`s founding definition of the offence he states that to scandalise the court is `an impeachment of the [king`s] wisdom and goodness in the choice of his judges, [which] excites in the minds of his people a general dissatisfaction with all judicial examinations, and indisposes their minds to obey them`. Thinly couched within this concern for `law and order` is a paternalistic attitude towards the public at large, one that views them as an untamed and unsophisticated horde, bound to create anarchy if the `royal majesty` of power that binds them is broken.

Little surprise then that in 1899, the Privy Council would plainly claim that while British judges were largely `satisfied to leave to public opinion attacks or comments derogatory or scandalous to them`, in `small colonies, consisting prin-WHENEVER freedom of speech becomes a little too free for the taste of the bench, it summons to its defence a very peculiar and archaic offence that of `scandalising the court`, a specialised breed of the general law of contempt, which allows the superior judiciary to summarily try any statement or published material that may, in their own opinion, bring their institution into disrepute or lower its authority and prestige.

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Little surprise then that in 1899, the Privy Council would plainly claim that while British judges were largely `satisfied to leave to public opinion attacks or comments derogatory or scandalous to them`, in `small colonies, consisting prin-cipally of coloured populations`, the offence may be `absolutely necessary to preserve in such a community the dignity of and respect for the court` Unfortunately, post-colonial judges have blindly parroted this elitist mantra of necessity, albeit without the racist overtones.

The supreme courts of Pakistan, India and Bangladesh have been unanimous in upholding this offence, and to do so, they have employed the same juristic semantics their need to protect the `prestige`, the `respect` and the `dignity` of their court, for unless this is done, all hell shall apparently break loose. Far more forthcoming then is the Nigerian supreme court, which held that the offence was crucial for its country, for `against thebackground of a largely illiterate society, any diminution of the authority and respect of the courts is an invitation to chaos and disorder` Once a prized sword of the king`s fountain of justice, it has since fallen from grace. In the US, the doctrine has long been rubbished as English `foolishness`, with one judge rightly pointing out that `an enforced silence` purely for the sake of `preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect`. In the 1980s, Canadian courts followed suit and declared the contempt through scandalising an impermissible limitation on the freedom of expression. The New Zealand Law Commission has lately come to a similar opinion. And most ironically, in England & Wales, where this sordid idea originated, the offence has been abolished as of 2013.

Since none of these jurisdictions have suddenly collapsed into chaos, it is fairly self-evident that any arguments in favour of the `necessity` of thisoffence have always been drawn from the fanciful imaginations of an elite judicial class, and not upon any actual evidence. Besides, any real danger to the administration of justice can easily be dealt with by penal laws, and any threat to the reputations of judges can simply be catered through defamation proceedings.

On the other hand, there are strong arguments for its abolition: firstly, it has a chilling ef fect on the media, inhibiting critical commentary on the judicial system; secondly, it is often counterproductive, for it usually ends up giving further publicity to the `scandalous` comment that triggers it; and thirdly, it is inherently self-serving, since it allows judges to try their own critics a fundamental breach of the maxim that none may judge their own cause.

Like anyone associated with the state, judges cannot be allowed to hide behind an impervious curtain. The judiciary is accountable to no one other than themselves, meaning that a free press remains the only bulwark against its excesses. On top of this, they remain the highest paid public servants in the country, making it all the more imperative that their conduct be subject to trenchant and forceful criticism.

Citizens already accord the judiciary with the greatest of respect and dignity when they walk into their courts upon being summoned, obey their directions without question and accept their verdicts regardless of how aggrieved they may personally feel. In addition, we even grant them judicial immunity, allowing them to make the gravest of errors in `good faith`. But, this is where our deference must stop. Beyond this lies the realm of public opinion, which all our institutions must be made to suffer, for it is the only way to ensure their transparency and accountability.

It will take nothing less than a constitutional amendment for us to be rid of this colonial yoke, but till then, it may be wise of our judges (and regulatory bodies like Pemra) to simply refrain from the temptation of employing this egotistical relic, this bizarre vestige of kingly rule. True dignity, we must all come to realise, lies in earning respect, not in commanding it.  The writer is a barrister.