

JUDICIARY HAS GREAT POWER, INCLUDING POWER TO PUNISH FOR CONTEMPT. IT MUST USE IT SPARINGLY, SOFTLY.

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

The “strong arm of the law must strike a blow”. With these words, in a judgment by Justices Arun Mishra, B R Gavai, and Krishna Murari, two tweets by senior counsel Prashant Bhushan, a veteran social action jurisprudence exponent, were found to be based on “distorted facts”, and making “undoubtedly false, malicious and scandalous” allegations. Counsel was bound, as a “responsible officer of the court”, to protect “the majesty of law”, not to indulge in an act that “tends to bring disrepute to the institution of administration of justice.”

In the first tweet, which included a photograph of the chief justice on a motorcycle, Bhushan is held guilty of making a knowingly “false statement” about the denial of the citizens’ right to access justice, which obscured the fact that the court in trying times had conducted “a total of 879 sittings and heard over 12,700 matters” (in some of which Bhushan had vigorously participated). The second tweet was critical of the role allegedly played by the judiciary and the last four chief justices in weakening democracy. The court found that these tweets undermine the “dignity and authority of the institution of the Supreme Court and the CJI” and the statement “directly affronts the majesty of law”.

A further ground is now added. Contempt proceedings must also consider the “effects upon national honour and prestige in the comity of nations”. This enhancement of the chilling effect is worrisome as any and every call for judicial accountability may be thus indicted. Will the stock-in-trade predictions of judicial outcome, an aspect of practising appellate law and doing legal science, now constitute a criminal contempt? Did the then incumbent four senior justices — Justices Jasti Chelameswar, [Ranjan Gogoi](#), Madan Lokur and Kurian Joseph — lower the “majesty of law” by holding the press conference on January 13, 2018, commonly called a “judicial revolt”?

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Many people believe that the right to free speech is near-absolute, accountability of justices is sacrosanct and even that the offence of criminal contempt should be banished. Many others believe that such a power should exist and be fully exercised in apt cases. India-wide empirical studies are indispensable to prove/disprove these views; but available only are the judicial statements about the tendency to lower the image of the judiciary in the public mind or activist assumptions of the “chilling effect”. The 274th report of the Law Commission (2018) recommended continuance of the offence, but all it cited was the high incidence of 586 pending cases between July 1, 2016 and June 30, 2017. Certainly, amidst divided public opinion, the apex court was right in 1974: “Contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.”

No doubt, many ironies lurk in the judicial discourse which endorses “gainfully... the observations of Justice Wilmot... made as early as in 1765.” He stressed a need for “a more rapid and immediate redress” whenever “men’s allegiance to the law is... fundamentally shaken”; because justices are “the channels by which the King’s justice is conveyed to the

people.”

The country of origin of these words was then on the verge of becoming a world empire, and yet a leading postcolonial court invokes these in 2020. While furthering the swadeshi jurisprudence, the court evokes phrases from 1765 on the eve of the 74th Indian Independence Day! However, students of the judicial process know that the courts regard the loom of law as a seamless web and the stern message of criminal scandalisation does not worry too much about the sun setting on the British Empire and law reform altogether abolishing the offences.

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The swadeshi jurisprudence, the court says, is clear and compelling. Did not Chief Justice Mohammad Hidayatullah (1970) convict the then chief minister of Kerala for making derogatory remarks on justices and overrule the decision of the Kerala High Court? Did it not convict even the Chairperson of the Bar Council of India (1975), awarding him a jail sentence for six weeks and incapacity to practise law for a period of three years? Did it not then say that the “right to continue to practise is subject to the law of contempt” and ask: “Can the legal profession be practised by committing the contempt of courts”?

Further, Article 129 declares the Supreme Court to be a “court of record” and bestows upon it “all the powers... including the power to punish for contempt of itself.” But if the “power to punish for contempt... itself” is a “constitutional power which cannot be taken away or... abridged by statute”, even the constituent power or the judiciary itself may not do so lest the basic structure be offended.

Only judicial wisdom may determine the quantum of punishment. The court normally imposes the most minimal sentences — such as a small fine (slashed, in the Namboodiripad case by the apex court to Rs 50 from the Kerala High Court award of Rs 1,000), a minimal sentence of incarceration till the rising of the court, or minor prison sentence now subject to bail in the [COVID-19](#) situation as so ordered suo motu by the court itself. It has yet to decide an appeal by Yatin Oza, against the Gujarat High Court sentence depriving him of the status of a “senior” counsel.

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Do the tasks of magnanimous justice end or begin when conviction has been recorded, is a difficult question that the court will now have to consider. However, a mere recall of Shakespeare may not cause any interference with the course of justice: “O, it is excellent/ To have a giant’s strength, but it is tyrannous to use it like a giant.”

This article first appeared in the print edition on August 18, 2020 under the title ‘State and temple’. The writer is professor of law, University of Warwick, and former vice chancellor of Universities of South Gujarat and Delhi

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