

A CHILLING REMARK AND THE 'PRICE TO PAY'

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'The act of questioning the state is not a case of being 'anti-national''' | Photo Credit: Getty Images/iStockphoto

When India's Union [Law Minister describes retired judges in a rather harsh manner](#), it is something that cannot be taken lightly. For the Minister to label retired judges who question "state policies" as being "anti-India" elements is not just a case of a flawed understanding of concepts but also a matter of grave concern for citizens.

The Minister's parting shot, based on the erroneous assumption that certain judges are working against India and "will have to pay the price", was not only intimidatory in its tone and tenor but also portends grave danger for the future. Involving retired judges in the issue was uncalled for. The Minister's statements are defamatory and raise larger issues that touch the core of our polity.

Judges who demit judicial office do not cease to be citizens of this country. They have not bartered away their fundamental rights for the pension they draw. They have a right to free speech and expression and a duty to speak up when they find the legislature, the executive or even the judiciary to be transgressing their limits.

The act of questioning the state is not a case of being "anti-national". It is a case of being a "concerned patriot". In turn, the response of the state has to be to either justify the measures it has adopted, or take the advice offered and course correct. Free speech must result in more speech and not in veiled sweeping statements.

The remarks made will not scare those who are bold and the courageous who will continue to speak their mind. But the "chilling effect" from the remarks made will be felt by the rest of the citizenry.

As a result, the marketplace for ideas will be thinly populated. There will be fewer symposia on issues of seminal importance as there could be a tendency from now on to play it safe (the Minister spoke about a seminar where judges and senior advocates were the participants and where the topic was on 'Accountability in Judges Appointment'; but, according to him, the discussion was about 'how the government was taking over the Indian judiciary'). There could be fear as no less a person than the Minister for Law and Justice has talked about having to "pay the price" if the line (that has embedded in it concepts of government and the nation as one),

drawn by him, is breached.

The deleterious effect of all this will be felt only by the nation. Actions of the state will be unchecked not because these acts are constitutional and valid, but for the reason that the mere act of questioning them will endanger the individual. He or she is held in terrorem, for they have 'been told' that they will have to "pay the price" if their conduct does not meet with the executive's approval.

The powerful words of Justice Louis D. Brandeis that were uttered nearly a century ago, in *Whitney vs California* are apt: "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty...."

Leading jurists have spoken about how the problem was not really about free speech, but freedom after the speech. The Minister's statement only reinforces that theory. If this is the plight of retired judges, one shudders to think what it would be like for the ordinary citizen, namely, 'the baker, the butcher and the candle stick maker'.

In her address to the Supreme Court of India in November 2022, the President of India, Droupadi Murmu, raised the issue of the plight of undertrials in the prisons of India, despite getting bail. The President narrated her experience of meeting undertrial prisoners when she was a Member of the Legislative Assembly in Odisha, and later as the Governor of Jharkhand. It was a speech that moved the Court, which directed jail authorities to submit the details of such prisoners to the State governments concerned which in turn were to forward the documents to the National Legal Services Authority within 15 days. Had the President kept quiet, for fear that she may have to "pay the price", things would never have moved.

It is reasonable to expect that the Prime Minister, a powerful orator and a vocal critic of many of the policies of the previous government, would certainly not want his government to be associated with such a chilling statement made by his Law Minister.

It will also be reasonable to hope and expect that the two high constitutional dignitaries will now discuss this issue and ensure that any further damage to India's constitutional ethos is mitigated. It is only then that the message will be clear: that in India, silence will never be coerced by law. Or by the Law Minister.

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