

CRITICISM, THE JUDICIARY AND A WORD OF ADVICE

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

The fires created and stoked by Justice Arun Mishra using the power of contempt to convict Prashant Bhushan for free speech still rage. While so, here comes another contempt action, by a Madras High Court Judge. The Tamil actor, Suriya, who supports public causes, had issued a statement highlighting what he felt was differential treatment, viz. that when due to fear of the novel coronavirus, the court is delivering justice through video conferencing, it is asking students to go and write the National Eligibility cum Entrance Test (for admission to medical courses) without fear. The judge, Justice S.M. Subramaniam, in a letter, has requested the Chief Justice of the Madras High Court to initiate proceedings for contempt.

The judge is well-esteemed, and was in the news recently for a generous donation to support young lawyers in these difficult times. So for court watchers, this was a bit of a surprise. One other matter for surprise was that this letter was given by an undisclosed source to the media; this is hardly proper, it is a letter of importance addressed to the head of the judiciary in the State, and if the confidential nature had been maintained, the Chief Justice could have dealt with it in a variety of ways — discussed it quietly with the judge, perhaps bring about a softening of view, involving other senior members of the Court for a considered decision, etc. A simple solution would have been for the court's Registry to issue a statement explaining how the factual position is obviously different, and that while online court hearings are a viable alternative, none such exists for NEET. Now, the harsh glare of publicity, with strong voices weighing in advocating actions of extreme ends (throw the letter out/throw the actor in) only makes things more difficult for the Chief Justice.

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Freedom of speech is not just Article 19(1)(a) of the Constitution; it is an article of faith for courts and judges, because they, above all, know that it is essential for the functioning and survival of a democracy, and for making government accountable to the people. The courts are constitutionally cast as Defenders and Protectors of the public right to free speech and expression. It is a tragic inversion to see judges being cast as the ones who want to limit and abridge it. This is not for the well-being of the institution and those who man it and depend on it, and that means a great many of us.

Judges know that much depends on the factual setting of the case. Now, if only some quiet deliberation had taken place, could not the senior judges have considered if it was rational, wise and prudent to pitch their tent opposing a sea of anxious parents who are quite justifiably petrified about the prospect of their child catching this dreaded infection? God forbid, if such were to happen, we know it is human nature to look elsewhere to blame, and the courts closeted in closed rooms hearings are easy objects to blame. To go in for contempt on this issue will invite and exacerbate this. And the actor seems to have a favourable public image, especially among the youth. Why do we want to go looking for trouble, could have been the question very easily asked; not so easy to answer, and that would have ended the matter.

Somewhere here one also gets the feeling that the place of criticism and critiquing in a democracy is not being properly understood. As George Orwell said, freedom is the right to tell people what they do not want to hear. And the response of authority to criticism should echo the words popularly attributed to Voltaire — I disagree with everything you say, but I shall defend to the death your right to say it. Judges are holders of high public office and are not immune from

being criticised. They must bear it and carry on, safe in the knowledge that their rightful actions and their garnered reputations are their ultimate shield, and that ill-mannered and ill-meant speech will be recognised for what it is and shunned by people. We want our judges to have broad shoulders with the ability to shrug off such comments, and focus on the matters that matter.

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There are multiple voices in the current narrative on this subject; lawyers objecting to their criticism of judges' acts of commission and omission being proscribed, journalists' fear of chilling effect on free speech, and public bewilderment at what is going on. But there is another set of voices we need to pay close attention to — and these are of judges who have passed strong judgments in seminal cases in favour of free speech and expression, who now can be heard saying that some things have gone too far. And so there is need for introspection, communication and understanding on all sides.

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We also need a forum for moderating dialogue between leaders of these three communities, where concerns and apprehensions can be discussed between them, all of whom want the best for the country and its institutions and people. What could then emerge is a clear set of guidelines, of what is acceptable and what is not. And one can then be sure that the latter category are acts so undefendable that no supporter of free speech will support them, for rights are indeed subject to restrictions; the latter must be reasonable and minimal, but must be obeyed for the former to have full play.

Sriram Panchu is a Senior Advocate at the Madras High Court, and the President of the national association Mediators India. E-mail: srirampanchu@gmail.com

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