

## **JUDGES IN THEIR OWN CAUSE**

Contempt of Court  
By Prashant Bhushan

On 15th October 1999, the Supreme Court, without even giving Arundhati Roy a notice or an opportunity to be heard – and therefore in violation of the principles of Natural Justice proceeded to make the following remarks against her:

“Judicial process and institution cannot be permitted to be scandalized or subjected to contumacious violation in such a blatant manner in which it has been done by her. .... Vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice. ... We are unhappy at the way in which the leaders of the NBA and Ms Arundhati Roy have attempted to undermine the dignity of the court. We expected better behaviour from them.”

The provocation for the use of this rather strong language by the court were the following passages in her essay “The greater Common good”, that the court took exception to:

“I Stood on the hill and laughed out loud. I had crossed the Narmada by boat from Jalsindhi and climbed the headland on the opposite bank from where I could see, ranged across the crowns of low bald hills, the tribal hamlets of Sikka, Surung, Neemgavan and Domkhedi. I could see their airy, fragile homes. I could see their fields and the forests behind them. I could see little children with littler goats scuttling across the landscape like motorized peanuts. I knew that I was looking a civilization older than Hinduism, slated – sanctioned (by the highest Court of the land) to be drowned this monsoon when the waters of the Sardar Sarovar reservoir will rise to submerge it”

“Why did I laugh?

“Because I suddenly remembered the tender concern with which the Supreme Court Judges in Delhi (before vacating the legal stay on further construction of the Sardar Sarovar dam) had enquired whether tribal children in the resettlement colonies would have children’s parks to play in. The lawyers representing the government had hastened to assure them that indeed they would and whats more, there were seesaws and slides and swings in every park. I looked up at the endless sky and down at the river rushing past and for a brief, brief moment the absurdity of it all reversed my rage and I laughed. I meant no disrespect.”

“Who owns this land? Who owns its rivers? Its forests? Its fish? These are huge questions. They are being taken hugely seriously by the State. They are being answered in one voice by every institution at its command – the army, the police, the bureaucracy, the courts. And not just answered, but answered unambiguously, in bitter, brutal ways.”

“According to the Land Acquisition Act of 1894 the government is not legally bound to provide a displaced person anything but a cash compensation. Imagine that. A

cash compensation, to be paid by the Indian government official to an illiterate tribal man (the women get nothing) in a land where even the postman demands a tip for a delivery! Most tribal people – or let's say most small farmers – have as little use for money as a Supreme Court judge has for a bag of fertilizer.”

I seriously doubt that any unbiased observer, even one unfamiliar with the controversy surrounding the Sardar Sarovar project, and even one who has not read her entire essay which provides the context and justification for these remarks, would consider them to be “scandalous” or “contumacious violation” or “Vicious stultification” or “Vulgar debunking”, which pollutes the “pure stream of justice” of the Supreme Court. But then, that is the pronouncement of the highest court of the land. Who is to question its wisdom?

A year later, on 18th October 2000 came the final judgement of the Supreme Court on the Sardar Sarovar case by which the Narmada Bachao Andolan's petition was virtually dismissed along with a gratuitous lecture extolling the virtues of Large Dams, while making snide remarks against the NBA as being an organization opposed to the Development of India. On 13th December 2001, the NBA held a demonstration outside the Supreme Court in which the Court's judgement was criticized and denounced. Arundhati Roy attended the Dharna as an observer and supporter of the NBA, though she did not make any speech or raise any slogans.

In February 2001, the Supreme Court issued notice to Roy, Medha Patkar and myself for Criminal Contempt of Court on the basis of a petition filed by 5 lawyers who alleged that she along with Patkar and me had led this demonstration, shouted vulgar slogans against the Court, and had assaulted and threatened the petitioners.

The Petition filed by the Advocates had several fatal defects. Firstly, the petition did not disclose the addresses of the Petitioners or the respondents as required by the Supreme Court Rules. Roy's address was mentioned as “Booker prize winner”, Patkar's as, “Leader NBA”, and mine as “Advocate Supreme Court”. The address of all the petitioners was mentioned as “Bar Library No. 1”. Secondly, the petition was signed by only one of the petitioners though according to the rules it should have been signed by all five of the petitioners. Thirdly, the affidavit in support of the petition was signed by only one of the petitioners though it purports to be on behalf of two of them. Lastly, the petition did not contain the consent of the Attorney General or the Solicitor General of India, which is a mandatory requirement of the Contempt of Court's Act. And that is quite apart from the absurdity of the charges of assault and threats made in the petition against us. Even the local police station had refused to register the FIR of the petitioners on these charges. Despite these defects, the Court entertained the petition and notices were issued, requiring Roy, Patkar and myself to be present in Court in person on every hearing of the case.

In these circumstances, Roy in her affidavit in reply, while asserting her right to be present at the demonstration and setting out the facts of what happened there, also expressed her indignation at such a petition being entertained at all by the Court. Her

affidavit went on to say,

“On the grounds that judges of the Supreme Court were too busy, the Chief Justice of India refused to allow a sitting judge to head the judicial enquiry into the Tehelka scandal, even though it involves matters of national security and corruption in the highest places.”

“Yet when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people who have publicly – though in markedly different ways – questioned the policies of the government and severely criticized a recent judgement of the Supreme Court, the court displays a disturbing willingness to issue notice.”

“It indicates a disquieting inclination on the part of the court to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme court is doing its own reputation considerable harm”

On 28<sup>th</sup> August, the Supreme Court dismissed the contempt petition of the lawyers, holding that the petition was grossly defective and coupled with the fact that even the police which was present at the Dharna had refused to register the FIR of the petitioners and in view of the abominable behaviour of the petitioners in Court, the allegations in the petition did not inspire confidence. However the Court went on to hold that the above paragraphs of Roy’s affidavit themselves amounted to contempt since they imputed improper motives to the Court. The Court has thus directed the issue of a second contempt notice on this basis!

It has always been accepted, even in pronouncements by the Supreme Court that the Court and its judgements can be subjected to strong, even trenchant criticism. Is the same yardstick not available for comments on the use or abuse of the Court’s powers of contempt? In the case of Arundhati Roy, the Court took offence at the fact that in her affidavit she had questioned the discretion of the Court.

In its order directing issue of the second contempt notice of Arundhati Roy for her affidavit, the Supreme Court has said that she has “imputed motives to specific courts for entertaining litigation or passing orders against her”. The Court holds that imputing motives to specific courts or judges or orders is contempt. But it is a social and psychological reality that all actions of all persons are actuated by some motive. And it would be facile to believe that judges are a special species of mankind who are only motivated by a desire to declare the law as it is. That is why judges differ on their interpretation of law. Some are motivated by a desire to mould the law to expand the rights of the downtrodden, while other may be motivated by a desire to maintain the Status Quo. Some may even be motivated by a desire to protect what they perceive to be their class interest. And such motives may not always even be conscious to the judges. But to say that judge only act with a motive to declare and enforce the law as it is, is a fairy tale. And nowadays we do not believe in fairy tales.

Moreover, there may be serious and honest difference of opinion between perfectly reasonable persons as whether a particular motive is laudable or not. There are several cases pending in the Supreme Court where the decision would determine whether India remains in the WTO or not. Such cases would almost inevitably be decided on the personal views and motivations of the judges on this issue. There would be honest difference of opinion on whether such motive one way or the other is laudable or not. But is it impermissible for civil society to discuss such motivations of the Court or its judges. If it is made so by the exercise of the power of contempt, it would stultify all meaningful public discussion and debate on the functioning of one of the most important institutions of the State. Such a state of affairs would discourage any improvement or change in the institution and would be disastrous for democracy. No democratic civil society can afford such a state of affairs for long, even if the judiciary tries to enforce it by using its powers of contempt.

Is it not possible that the Court – even the Supreme Court – can abuse its powers of contempt and use them against persons who criticize the court or its actions? Ironically, the very issue of the second contempt notice to Roy itself validates her criticism of the Court in her affidavit. In fact the Court tacitly accepts the validity of her criticism by itself saying that “almost every one of the rules framed by this Court have been violated”, by the petition. What does a citizen like Roy make of the fact that the Court does not proceed against the petitioners who misled the Court by filing a false and concocted petition and who get up in Court and say without justification that they have lost confidence in the Court and that the case should be transferred to another Court.

There were two main reasons to confer the power on the Courts to punish citizens for contempt. Firstly, that the courts should be armed with the power to enforce their orders. Secondly, they should be able to punish obstruction to the administration of Justice, such as obstruction of and threats to Judges, Jurors, Litigants, Lawyers, and Witnesses etc. However, gradually over a hundred years ago, the courts in Britain, where the law of Contempt was evolved by the judges themselves, expanded their own powers to punish people for acts of what they called “scandalizing the court”. This was interpreted to include any act, which tended to impair the dignity of the court and the judges. This was done on the basis that any act that would injure public confidence in the courts would impair the administration of justice. Any imputation of dishonesty to judges or their judgments then came to be regarded by the courts as contempt. *They even went so far as to hold that even the truth of the imputation could not be pleaded in defence. Thus if one called a judge dishonest or a bribe-taker and had evidence to prove it, the courts would not allow it on the ground that such an imputation even if true would impair public confidence in the administration of justice!* Thus the courts came to regard it their legal duty to punish and deter any attempt by a citizen to expose the rot in the judicial system. Self-interest then came to be sanctified as a sacred legal duty by the judicial expansion of the power of contempt. The Indian courts, which inherited the British or Anglo Saxon Jurisprudence, adopted the same principles for the law on Contempt of Court.

The Contempt of Courts Act of 1971, merely gave legislative sanction to and codified the law of Contempt which had already been evolved by the Courts. Thus contempt came to be defined as:

““Civil contempt” means willful disobedience of any judgement, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court; “Criminal Contempt”, means the publication of any matter or the doing of any other act whatsoever which-  
Scandalizes or tends to scandalize or tends to lower the authority of, any court, or  
Prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding, or  
Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.”

It is the clause of “scandalizing the court” which has been used to punish those who impugn the motives or the integrity of the Courts or judges. It is one jurisdiction where the issue before the court is between the court and the citizen. And where the court sits in judgment over its own cause. Clearly, the power is inherently highly prone to being abused. It would be difficult for anyone to say that it has not been misused.

In recent years, the Law of Contempt has been liberalized in both U.K. and the U.S.A. In U.K. the statute has been amended on the recommendation of the Phillimore Committee to provide for truth as a defence to a charge of Contempt by scandalizing. In the U.S.A. the courts have evolved a more liberal standard of “clear and present danger” to the administration of justice. Thus recently the New York Times characterized the judgement of the U.S. Supreme Court on the recounting of Florida votes in the recent Presidential elections as “corrupt” and one, which “stole the election”. But no action was initiated for Contempt because there was no clear and present danger to the administration of Justice.

For a long time now the power of the courts to punish for contempt in India have deterred free and frank debate and comment on the state of the judicial system. But can it be said that it has really preserved public confidence in the courts? Every citizen who has had the slightest brush with the courts knows of the near complete collapse of the system. The threat of contempt however deters most people from saying so openly. However, every time that the court punishes anyone for “scandalizing the court”, that act does not enhance the dignity or the reputation of the court. In fact, almost always, it has the opposite effect of making people believe that the court has much to hide. Respect and dignity have to be earned by ones behavior and actions. They cannot be enforced by threats of punishment.

Moreover, if such a power were necessary to preserve public confidence in the judiciary, then the same argument would hold good for preserving confidence in the government, its bureaucracy and its police. After all, they too perform public functions, and it is equally important for their efficacy that public confidence in them should also be preserved. But then, it was realized that all such institutions can err and can also be corrupted. That the best check against their degeneration was their accountability to the

people for which it was essential that people should have the right to freely comment on them and criticize them. And on the whole the public respect for such institutions would depend on their behaviour and performance.

Is it really necessary to enforce respect for the judiciary without scrutiny of its performance? Is there something particularly holy about Courts and judges that even a citizen who has proof of the fact and is prepared to face action for civil and criminal defamation cannot accuse them of dishonesty? Why is defamation (which is actionable in both civil and criminal proceedings) not a sufficient safeguard to protect the reputations of judges and Courts, if that is considered sufficient for all other classes or citizens? These are uncomfortable questions, but they need to be answered. They need to be urgently addressed by the Judiciary itself, the government and above all by the citizens. For upon the answer to these questions, depends the future health of our judicial system and indeed of our Republic itself.