

## **The Hindu**

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### **CONTEMPT POWER AND SOME QUESTIONS**

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*Justice V.R. Krishna Iyer*

**T**he stature of the judicature is so high and its powers so wide that any action designed to debunk, defile or denigrate the great dignity and impartial integrity of the institution is regarded as an invasion on the people's faith in the court's fearless, bias-free, favour-free functionalism and its solemn credibility as a constitutional instrumentality of justice. But what happens if judges themselves commit, or the judiciary as an institution commits, what is extravagantly excessive, arbitrary, authoritarian, *mala fide* or corrupt?

The fundamental right of free speech of a free people comes into operation at that stage, and informed public criticism of judicial misconduct and incompetence or institutional turpitude or dysfunctionism creates corrective public opinion through vigilant scrutiny and media publicity. Speech is duty and silence cowardice, since information, accountability and transparency of the judiciary are inalienable attributes of any democratic institution. The judicature is a democratic sentinel of people's rights, never an impregnable fortress of authoritarianism enjoying immunity from people's speech, with fair behaviour, high integrity and great competency incorruptibly above suspicion.

Indeed, contempt law must doctrinally accept the proposition that truth of adverse allegation is a valid justification.

The great jurist Seervai observed thus:

*"This raises the question whether truth is a defence to an alleged contempt of court if a person, or the Press allege and publish proof of the misbehaviour of a judge. The judgments of the Supreme Court are not in a tidy state. But a careful analysis of our Supreme Court judgments, and judgments of English and Australian Courts, shows that truth is, and must be a complete defence to allegations of bribery, corruption, bias and other misbehaviour of a Judge. To hold otherwise would be to nullify the provisions of Articles 124(4) and (5) in a practical sense, for few people would expose themselves to being committed for contempt in order to bring a corrupt judge to book. Secondly, to hold so is to put the judges above the Constitution which expressly provides for the removal of a judge for proved misbehaviour."*

Judge Jerome Frank of the U.S. Court of Appeals sensibly explained that he had little patience with, or respect for, that suggestion.

*"I am unable to conceive ... that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who*

*are unable to accept the inescapable shortcomings of man-made institutions ... The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."*

*"We need judges who are trained for the job, whose conduct can be freely criticised and is subject to investigation by a Judicial Performance Commission; judges who abandon wigs, gowns, and unnecessary linguistic legalisms; judges who welcome rather than shun publicity for their activities."*

*"Contempt of court is the Proteus of the legal world, assuming an almost infinite diversity of forms." Indeed, says Ronald L. Goldfarb: "Neither Latin American nor European civil law legal systems use any device of the nature or proportions of our contempt power. While critics of these systems may make preferential comparisons, so long as these countries keep well within anarchy on the one hand and totalitarianism on the other, there is room to question whether indeed this power is as necessary and essential as our decision-makers suggest."*

In sum, contempt power is a case of survival after death; a vague, vagarious and jejune branch of jurisprudence, which is of ancient British vintage. It has colonially incarnated as part of the *corpus juris* of the Indian Republic. My separate opinion in Mulgaokar's case (1978 SC 727) has been referred to approvingly in Shiv Shanker's case (1988 SC 1208). Chief Justice Sabyasachi Mukherjee observed:

*"Krishna Iyer, J. in his judgment observed that the Court should act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack was calculated to obstruct or destroy the judicial process. The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the judge. To criticise a Judge fairly albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it. The Court must avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt but latter is, although overlapping spaces abound. The fourth functional canon is that the Fourth Estate should be given free play within responsible limits even when the focus of its critical attention is the Court, including the Higher Courts. The fifth normative guideline for the Judges to observe is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, and the sixth consideration is that if the court considers the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its sources and stream."*

The dauntless and celebrated Lord Denning observed in an illustrious passage:

*"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we*

*use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.*

*It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”*

These great observations were made on a case where a politician as eminent as Michael Foot said: “Denning is an ass.” And *The Observer* gave the headline, “Why Denning is an ass.”

In a similar strain, Chief Justice P.B. Gajendragadkar (1965 SC 745) expressed a liberal view, quotationally approved by Justice Savyasachi Mukherjee:

*“We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.”*

Notice the further emphasis which is law binding on all courts.

*“It has been well said that if judges decay, the Contempt Power will not save them and so the other side of the coin is that judges, like Caesar’s wife must be above suspicion per Krishna Iyer, J. in Baradakanta Mishra v. Registrar of Orissa High Court, (1974) 1 SCC 374: (AIR 1974 SC 710). It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the Judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done.”*

Lord Atkin is a marvel of illumination of the law. He wrote:

*“Whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path*

*of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”*