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CRITICISM IS NOT CONTEMPT

Karan Thapar

Are judges special or is justice special? To put it differently, can you criticise a judge without imperiling the sanctity of justice? This is the core concern at the heart of the debate whether freedom of speech should have primacy over the law on contempt.

My answer is clear and simple: justice is special; judges are only a means to that end. Therefore it follows you can criticise a judge without lowering or degrading the majesty of justice. If a judge feels wronged, he or she, like you or me, can take recourse to the law of libel. But I don't believe there is anything in the character of the office that should protect a judge, any more than you and I, against criticism.

As far back as 1968, Lord Denning, then Master of the Rolls in Britain and perhaps the greatest judge of our time, said of the law of contempt:

"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... we must rely on our own conduct itself to be its own vindication."

To prove he meant what he said, Lord Denning not only accepted harsh criticism but even physical abuse without recourse to contempt. In his book, 'The Due Process of Law', he recounts how a Miss Stone threw books at him and Lord Diplock, a fellow judge, only to be ignored. "We took little notice", he writes. "She had hoped we would commit her for contempt of court – just to draw attention to herself. As we took no notice, she went towards the door. She left saying: 'I congratulate your Lordships on your coolness under fire'."

Our own Justice Markandey Katju, in a lecture delivered this January, has put it pithily. "If a person calls me a fool", he said, "whether inside court or outside it, I for one would not take action as it does not prevent me from functioning, and I would simply ignore the comment, or else say that everyone is entitled to his opinion. After all, words break no bones."

In the same lecture, Justice Katju explained how he would respond to criticism. "Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it... Sometimes an honest and learned judge is unjustifiably criticised. But for one such person criticising an upright judge, one hundred people will immediately rush to his defence ... why then should judges get upset or be afraid of criticism, particularly when we are living in a democracy?"

So, then, is there ground for maintaining the law of contempt? There is, but it should be specifically intended to ensure the efficient administration of justice. As Justice Katju puts it: “The test to determine whether an act amounts to contempt of court or not is this: does it make the functioning of judges impossible or extremely difficult? If it does not, then it does not amount to contempt of court, even if it is harsh criticism... the only situation where I would have to take some action was if my functioning as a judge was made impossible e.g. if someone jumps on to the dais of the court and runs away with the court file, or keeps shouting and screaming in court, or threatens a party or witness. After all I have to function if I wish to justify my salary.”

The time has come for us to redefine contempt. We need to guarantee the protection of justice. We don't need to protect the position or reputation of judges. And we certainly must not shelter them from criticism.