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IT'S THE RIGHT OF EVERY MAN TO MAKE FAIR COMMENT

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A recent judgment of the high court of Delhi summarily committing to prison the editor, publisher, resident editor and cartoonist of Mid-Day for scandalising the court, has evoked strong, almost defiant, responses. Let us take stock. The origin of this branch of contempt law (known as "scandalising the court") emanates from a much quoted dictum of Justice Wilmot in his judgment in Wilkes Case — of 1765 vintage: a judgment that was never delivered! Judgment had been reserved in the case and when it was ready to be announced it was discovered that the writ against Mr Wilkes was incorrectly titled, and under the strict procedural rules of the time had to be dismissed. The judgment was later published by the judge's son when his father died: and it was then eagerly seized upon by judges in England and in the Commonwealth as laying down "law."

But then it was soon realised in the country where the doctrine first originated that this "law" was unprincipled, and tended to be heavy handed. It soon became obsolete in the UK itself — which prompted the Privy Council to say (back in the year 1899) that courts in England "are satisfied to leave to public opinion, attacks or comments derogatory or scandalous" of their judges and their courts. But since the Privy Council was dealing with a small island called St. Aubyn in the Caribbean, the judges added a rider to their opinion: acknowledging that "in small colonies consisting principally of coloured populations the enforcement in proper cases for committal of contempt of court for attacks on courts may be absolutely necessary to preserve in such a community dignity and respect for the court."

The three facets of "criminal contempt" in Indian statute law are: any publication whatsoever (i) which scandalises or tends to scandalise or lowers or tends to lower the authority of any court; or (ii) which prejudices or interferes or tends to interfere with the due course of any judicial proceeding, or (iii) which interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice in any other manner. All three items are compendiously described in the Contempt of Courts Act 1971 as "criminal contempt." Items (ii) and (iii) are necessary; they are also more than sufficient to prevent obstructions to the due administration of justice. Item (i) is wholly dispensable for the following reasons:

First, because the Law of Contempt is an exception to the fundamental right of free speech and expression guaranteed under Article 19(1)(a) of the Constitution. It must then be justified on the ground that it is a "reasonable restriction" under Article 19(2); otherwise it would be unconstitutional. This principle was never better put than in a judgment of a division bench of the Calcutta high court delivered some years ago. It correctly appreciated and applied an important Constitutional principle. In that case the court was called upon to decide whether an article in a Kolkata daily, which had condemned a prior judgment of the Calcutta high court, unread and by distorting facts, was contemptuous.

The article had the disquieting heading "Let the High Court save itself from Ignominy." A suo motu rule was issued by the judges. When it came up for hearing — no apology

was called for or tendered. But the newspaper was exonerated: and the contempt notice was discharged. The judges said, "None of the articles can be defended as fair comment made in temperate language about a court case. In fact the distorted version of the judgment given and the language employed in the articles may have the effect of shaking the confidence of the people in the judiciary and thereby lowering the dignity and majesty of the law."

And yet, upholding the prime importance of freedom of speech, the Calcutta high court held that the publication was not contempt, though the judges did say that the language used could have been more polite, more sober. Freedom to criticise the judiciary (even wrongly and obtusely) was upheld as part of the cherished right of freedom of speech. And what happened? As a result of this decision heavens did not fall. The proverbial flood-gates did not open. Journalists did not go on a maligning spree: simply because restraint and wisdom on the part of the judges got a like response — restraint on the part of the press.

The judgment of the Calcutta high court makes one recall what was said by Lord Denning in a now infamous contempt case: it involved Quinton Hogg, son of a Lord Chancellor and himself a future Lord Chancellor of England. He had written an article in very critical and caustic tones, and in intemperate language about the conduct of Lord Denning in a gaming case. The litigant, one Blackburn, moved for contempt and this is what Lord Denning said, whilst dismissing the application: "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."

Secondly, ours is not a small country — and we have long ceased to be a "colony" for many years. Although India is inhabited with a "coloured population" (of which we are justly proud), our jurisprudence has shown that coloured people are not less respectful of the law and of the courts, than white peoples around the world.

Our judges and our courts command respect, not because of the law of contempt, but because of their bold and independent decisions. Our judges do not need the prop that "small colonies" had needed to preserve their dignity. The dignity of the judges of our courts, "rests on surer foundation."