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MODEL FAIR COMMENT

By

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Whether Fair Comment Amounts to Contempt

The Hon'ble Supreme Court held *In Perspective Publications v. State of Maharashtra*, AIR 1971 SC 222, and many subsequent judgements, (recent judgement pertaining to *Kapil Sibal*)

"It is open to any one to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though out spoken comments by ordinary men".

Necessity of Fair Comment

When the remedy of an appeal or revision is available where is the need for a fair comment?

The answer is, appeals are intended to take care of bona fide errors of judgement. More over, about four decades ago appeals and revisions were decided by Superior Courts in six months or one year and when the judgements of the lower courts were found to be demonstrably wrong, the appellate courts, while reversing them, used to mark copies of such judgements to the lower courts so that judges in the lower courts could get opportunities to learn from their mistakes. Nowadays, the lower courts are deprived of such opportunities on account of inordinate delays in the appellate courts. **Moreover, if parties choose not to file appeals, either due to their financial incapacity or on account of their disillusionment with the judicial system, the judge in the lower court will never get the chance to correct himself and will repeat the same wrong in future, causing injustice to the parties and the aggrieved advocates also will continue to suffer from loss of professional satisfaction, self esteem and credibility with the litigant public, though they are not at fault.**

Earlier judges used to freely put questions to advocates and clarify their doubts, during the course of arguments, and chances of their committing errors were few. Now-a-days the judges in the lower courts are rarely participating in the debate, probably for fear of inviting unfair comments, and this is further aggravating the problem.

The task of judges is difficult as they are always caught between two opposing contentions. When they accept one contention they would naturally hurt the other party whose contention was negatived. Advocates representing the parties, who have lost the case, usually make unfair comments on the judgements, but only in the secrecy of their chambers, which will only damage the image of the judiciary and will not serve any socially useful purpose. The judges never get to know the reasons for the criticism. When the criticism itself is wrong, the judges do not get an opportunity to defend their judgements and correct the perception of advocates, so that the advocates may avoid giving wrong advice to their clients in other cases. In advanced countries, advocates are sued for giving wrong advice. In India advocates are viewed as mere priests in a temple, without power and responsibility,(as judges rarely enforce the law faithfully) and the judge, a God, not answerable to any one for the most erroneous judgements, until he is caught red handed, demanding or accepting bribes.

Advocates sometimes rashly and some times justifiably, come to the conclusion that the judges are prejudiced against them or that the judges are showing undue favours to one or some parties or advocates. Once seeds of suspicion are sown in their minds, **in the absence of an immediate safety valve to release the pressure**, they start adopting dilatory tactics in other cases or file transfer petitions, thus contributing to delay in disposal of cases. Some times the advocates hastily exercise the privilege conferred upon them by Rule 1 of the code of conduct appended to the Advocates Act and send petitions, mostly anonymous, against judges. **Once the Judicial Commission is constituted, even the judges of the High Court and the Supreme Court will have to face the consequences of such petitions**. The litigant public will be dismayed to find that the black robed professionals (judges and lawyers) are busy fighting among themselves, instead of resolving the disputes of litigants, with a professional and detached approach. Thus the credibility and utility of the judiciary suffers.

Harmful effect of frivolous petitions

If frivolous petitions against judges are sent, it will overburden the supervisory authorities in the judiciary and genuine complaints get delayed response. It will also encourage 'bossism' in the judiciary and the judicial officers have to live under constant threat of facing enquiries, and to avoid it, they try be in the good books of the higher ups, by adopting servile attitude, not befitting a judicial officer. (The anxiety displayed by them in making arrangements for stay and food, when High Court judges visit nearby places even on pilgrimage or as a personal visit, proves this. Former C.J of India Sri *M.N. Venkatkachalaiah* used to discourage this, but such judges are rarely seen) They will show over caution in disposing off the cases, tending to slow down the disposal.

Even upright judges face the risk of inviting petitions from disgruntled advocates who prefer to get rid of honest judges, so that if approachable judges are posted, their trade in the name of judges goes on unhindered. Such disgruntled advocates are now a days behaving rudely with the judges in open court and the judges are hesitating to initiate contempt -action fearing that such advocates may have the right connections at the right places. In this process, the dignity of the Bench is being undermined.

Instead of sending petitions against judges, by adopting a hostile attitude, the fair comment technique will help the judge and the advocate to sort out differences and mistrusts at the local level in a friendly atmosphere. The Bar has a duty not only to fight corrupt judges, but also to protect honest judges, who

may commit *bona fide* errors, by correcting them in a courteous manner. If they refuse to learn, the extreme step of sending petitions or file contempt cases, may be resorted to. The Hon'ble Supreme Court even went to the extent of laying down in *C. Ravichandran Iyer v. Justice A.M. Battacharjee and others*, WP No.162/1995 civil-reported in 1995 (3) ALD 25 (SCSN), that responsible officers of the Bar can enquire the judge in his chambers about doubts regarding his honesty.

Advocates as Social Engineers

The society has a right to expect a fairly clear cut opinion from a lawyer about any case just as it expects a clear-cut opinion from other professionals like engineers (on the question whether a building or a bridge or a dam could be safely built on a particular soil and if so what the probable cost would be) and doctors (as to whether a particular disease is treatable and if so in which hospital and at what cost). A lawyer should be able to say **even before filing the case into court** whether the case is a good one or a bad one or an arguable one to enable his client to decide whether to file the case, or avoid it or file it by facing the risk of failure. In the United States defence lawyers are able to predict even in criminal cases whether the case will end in a conviction or acquittal and thereby are helping the accused in 98% of the cases to admit the offense and go in for a plea bargain. Less than two percent of criminal cases actually go for trial there, thereby saving a lot of precious time of the court.

According to Justice Oliver Wendell Holmes, "***Law is a prediction of what courts will decide". Lawyers read law books not for pleasure but for the power they get to predict the outcome of disputes in advance***. Just as an electrical engineer designs electrical circuits in gadgets on the basis of predictable behaviour of electric power and there by ensures that the equipment designed by him, when predictably energised by electric power, gives the desired result to the society, an advocate, as a social engineer, is expected to design (draft) his plaint, written statement or complaint based on law which is the **predictable exercise of judicial power vested with judges.** When a judge accepts the contention of a counsel, he is merely energizing the circuit drawn by the social engineer, after being satisfied that the legal '***thought circuit***' drawn by him is real and not imaginary. By the word 'energize' it is meant that when the legal thought circuit gets the acceptance of the judge, the ***coercive power*** of the government, through the police and the armed forces if necessary, will support the successful party to enforce his rights. Judges become predictable only when they have type 'A' attitude. A type `C` judge, though he may be honest in the sense that he may not be amenable to monetary inducements , may take revenge on advocates who do not behave in a servile manner (like the senior most advocate standing up when a junior most judge visits the bar association or greeting the junior most judge 'good morning' in social gatherings)or try to bring socialism among advocates by **deliberately distributing success rates among all advocates, irrespective of the legal merits of the cases** or display casteism from the Bench. Type B judge is likely to lack courage in accepting clear legal positions, against powerful religious institutions or other power centres, or he tends to decide as per his equitable notions instead of the law and **by his unpredictable behaviour, unintentionally causes injustice.** Severe fluctuations in voltage can ruin costly electrical equipment, though the engineer has designed and manufactured it correctly. Erratic exercise of judicial power will harm law abiding litigants though they exercised all reasonable caution before venturing into litigation. Predictability of judgements is a hallmark of a just judicial system. (2002 SCW 1573 also 2533) According to Mr. Justice *Rajendra Babu* of the Supreme Court, impartial, timely and **predictable** judiciaries stimulate investment, efficiency and technological progress (See THE HINDU DT.11-4-04 PAGE 17). The litigant spends his precious time and money on the basis of predictions made by his counsel, which are expected to be based on law**. If judges ignore the law and decide only as per their own notions of justice**

and propriety, litigation becomes a gamble and Mr. *Nani Palkhivala's* remark that ***our courts are casinos and not cathedrals*** rings true.. Advocates will be treated as gamblers instead of social engineers. **The Indian farmer gambles in monsoon; the Indian lawyer gambles on the psychology of the judge.** The younger generation of advocates will be induced to believe that instead of working hard to know the law, it would be profitable to know the judge and advocates will turn into glorified brokers. The rule of law and democracy will vanish and either military rule or anarchy, endangering everyone, **including the judges** will be the result. We should not forget the experiences of Pakisthan where the Chief Justice was imprisoned; High Court Judges were summarily 'dismissed' by a military dictator. If judges, armed with mere **pens** to write judgements, show lawlessness, why not soldiers armed with **guns** do the same?

In his book 'POWER – A NEW SOCIAL ANALYSIS' the eminent philosopher and Nobel laureate Bertrand Russell writes in the chapter, "The taming of power",

"**There *is need of associations...to bring swift criticism to bear upon officials, police, magistrates and judges who exceed their powers*".** Members of the Bar must come forward to make constructive criticism of judgements to elevate the judges to type 'A' level, always bearing in mind the advice of Mr. Justice *Verma*, former Chief Justice of India, (though given in a different context), that professional privilege should be used as a surgeon's scalpel (to cure) and not as Rampuri Knife (to kill). The tumour alone should be skilfully removed, under the anaesthesia of politeness, **without causing collateral damage to the dignity of the judicial office on the one hand and the credibility of the legal profession in the mind of the public, on the other.**

Whether Advocate Whose Client Succeeded in the Case can make Fair Comment

Even the advocate whose argument was accepted by the court also may make a fair comment, if there is no satisfactory discussion of the points raised by him, as it would pose difficulties for him to support the judgement in the appellate court.

When not to make Fair Comment

Fair comment is to be avoided when a review petition under Order 47 or Section 151 C.P.C is filed or contemplated, as it would embarrass the judge when he formally re-decides the very same case. For minor errors of judgement no fair comment is necessary. Again, when the advocates advance hair-splitting arguments, which would be difficult for the judge to accept, it would be unfair to make comments on the judgement. Similarly, when the law on a particular point is not settled, fair comment will not be of much use. **Under the guise of fair comment if the advocate behaves rudely with the judge in the fair comment interactive session, the judge may refuse to participate in it, as the law does not compel him to respond to fair comments.**

In order to filter out impulsive complaints against judges, it may be useful to frame a rule that no complaint against a judge based on prejudice or bias be entertained until the concerned advocate first exhausts the procedure of fair comment and gets the reaction of the judge to it.

What the Learned Judge may do

After reading the below written fair comment, the learned judge may ***at his option*** participate in a friendly discussion in the court hall, on any Saturdays as there would be no judicial work, so that the mis-conceptions may be cleared. Since he has already pronounced the judgement on merits, he has become ***functus officio*** and there is no prohibition in law from discussing the matter out of academic interest. In the discussion that may follow, if the learned judge feels that his judgement was erroneous, he can at least avoid such errors in future, though he cannot alter the judgement then. On the contrary, if the learned advocate who made the fair comment gets enlightened by the learned judge that he was wrong in advising his client to file the suit, or to contest

the suit, he can avoid filing or defending such suits thereafter and **save the public from needless trouble and expenses.**

If the discussion ends in a stalemate, or if the learned judge refuses to read the fair comment and participate in the discussion, the advocate who made the fair comment will be left with no alternative but to come to his **own *ex parte* conclusions** about the judge, and will be **free to pursue his administrative remedies against the judge(depending upon the gravity of the wrong) as mandated by Rule 1 of the Professional Rules of Etiquette prescribed by the Bar Council of India, which says "An advocate shall not be servile…whenever there are grounds for serious complaint against a judicial officer, it shall be the advocate's right and duty to submit his grievance to proper authorities" *in addition*** to the judicial remedy of appeal, which depends upon the willingness of the parties.

The mighty Prime Minister has to answer questions posed by other members of the Parliament. There is no reason why a judge, at his option, should not answer the questions of advocates, who are also officers of the court. This is one of the ways of ***taming the power*** to give the desired results and facilitate legal engineering. It is similar to using a voltage stabilizer which ensures flow of electric power at a steady voltage, by ironing out the fluctuations.

Even in the United States, prejudice or bias is a recognised ground of complaint against judges.

In the enquiry against the judicial officer, if the disciplinary authority concludes that the allegations of bias, prejudice or corruption are established, while initiating action against the delinquent, may observe that this shall not be considered in deciding the case by the appellate court, which is some what like the finding given by even the Supreme court in an interlocutory application being not binding on the judge in deciding the main case. If no appeal is filed by the aggrieved party and it is barred by limitation, the finding of guilt in the enquiry may be used by the aggrieved to file a fresh suit challenging the earlier decision on the ground that it was obtained by playing fraud or undue influence on the judge or extraneous considerations of the judge, on the lines of curative petitions permitted by the Supreme Court against its own judgments.

Fair Comment on Judgement/Order of Learned Junior/Senior Civil Judge/Magistrate of First Class in O.S./A.S./Cc/I.A./Cr.Mp XXXX of the Year XXX

1. Lawyers read law books not for pleasure but for **the power they get to predict the outcome of disputes in advance.** The advocate noticed the following legal track or tunnel to guide or direct the judicial mind, when he advised the plaintiff to file the suit or the defendant to contest the suit (Legal provisions xxx and citations yyy)
2. The learned judge, by completely ignoring them, has not indicated in his judgement whether his judicial mind went through the said legal track and whether there are any loose fishplates or pitfalls in pursuing the said legal track or tunnel to its logical end and why the judge abandoned the said track or tunnel, at the threshold. This has made it difficult for the advocate to advise his client whether to file an appeal or to abandon his legal remedy. "THE SATISFACTION THAT REASONED JUDGMENT GIVES TO THE LOOSING PARTY OR HIS LAWYER IS THE TEST OF A GOOD JUDGMENT -." *Hindustan Times v. Union of India*, (1998) 2 SCC 242 extracted in 2004 AILD 116.
3. The learned Judge has not followed the ratio decidendi laid down by judgement of A.P High Court in xxx and the Supreme court in yyy, It is humbly submitted that not following the ratio decidendi of the Supreme Court or the concerned High Court, could amount to contempt of court as ruled by the Supreme Court in AIR 1972 S.C.2466

4. The learned judge has not discussed the various contradictions in the depositions and documents that were highlighted by the advocate in the argument like, xxxx and yyy. It is respectfully submitted that not discussing all the points raised by counsel in the arguments amounts to misconduct as per the decision of the A.P High Court in 2003 (2) ALD 926. Also 2004 (3) ALD 874
5. The learned Judge has invoked his notions of justice equity and good conscience by over looking the law which appears to be very clear on this point.
6. The learned Judge has applied a provision of law though neither party argued about that provision, without *suo moto* re-opening the case and hearing the advocates on that point. This has caused unpleasant surprise to the advocate whose client lost the case.

ADVOCATE

Results of earlier fair comments

This author tried this technique earlier successfully. Though the learned judges were initially surprised at this unconventional method, they appreciated the frank expression of dissent, and even admitted their errors in the judgements

More importantly, there were no negative after-effects of this approach in other cases argued by this author before the same judges. **This only demonstrates that most judges can be corrected without attributing any corrupt motives, and fairly giving vent to the irritation and frustrations of the advocates, in a polite manner, instead of resorting to unfair comments in canteens and lawyers' chambers or sending anonymous petitions against judicial officers, for real or imaginary grievances.**

THE RULE OF LAW AND THE RULE OF "GOOD" LAW

By

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The rule of law, also called supremacy of law, is a general legal maxim according to which decisions should be made by applying known principles of law without the intervention of discretion in their application. The rule of law, *per se* does not say anything about the **justness of the law**. It only deals with the **enforcement** of the law rather than the principles to be observed while **making the law** at the first instance.

During the heydays of socialism, laws were made abolishing privy purses, levying income tax at 97%, nationalising banks and acquiring lands without providing compensation at market rates, prohibiting recovery of private debts, under the garb of rule of law. Whether such laws were just or not is an altogether different question. Though the West Bengal government run by the communist party, acquired lands by paying compensation which was more than the market value, to encourage industries, to generate employment and thereby serve the public interest, the public found the law to be unjust, ultimately forcing the state government and Tata's NANO Unit to backtrack. However, under the land ceiling laws when land was taken away without paying compensation at market rate, when tenants were declared as owners, without compensating the original owners, there was no such effective protest, only because the landed gentry who were robbed of the land, were numerically few. In this sense, whether a law is just or unjust depends upon popular notions, passions and prejudices of the public rather than any objectively valid considerations.

Mahatma Gandhi was of the opinion that just as there were bad men, there were also bad laws. The individual should have the courage to fight bad laws, he opined. He