A RESEARCH PAPER ON PASSIVE COMMENTS OF JUDGES

‘Jurisdiction, Right and Moral Aspects of Such Comments in Indian Perspective’

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List of abbreviations

- Supreme Court – S.C.
- High Court – H.C
- Article – Art.
- Section – Sec.
- Volume – vol.
- Number – No.
- Versus – V.
- Union of India – U.O.I

List of Cases Referred

- Paley v. Superior Court, 137 Cal. App. 2d 450
- Muhammed Saleem V. U.O.I
- Estate of Hilton (1996), 44 Cal. App. 4th 890

- S.P. Gupta vs. U.O.I, AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

INTRODUCTION

Over ages, the S.C of India is seen as the supreme most law authority in India. Adding to its supremacy in judicial powers, the power to legislate in the form of precedents provides it with extra power. S.C is also the highest court of appeal. Obiter dicta of the S.C are often taken as a law reference by the lower court. Art. 141 of the Indian Constitution, states that the law declared by the S.C is binding on all the lower courts, within the territory of India.[1] It is therefore very much obvious that every word uttered by an official in such position would be weighed with paramount importance. This would indeed point to the fact that an official of this position should censure his words with utmost concern taking into account all the plausible interpretations it could possibly be consigned with and effects of the same therewith. There have been numerous instances where a simple passive comment of a judicial officer, often meant in good faith was misplaced in order to cause malice. There are many other occasions were innuendos were assigned to the words spoken causing a nationwide agitation. There has been many a controversial dicta from the most honourable court, that one is tempted to examine the legality of such passive comments. Is a judge in such position is safeguarded from the legal actions that would befall a common citizen, occupying a position of similar significance, had he communicated the same to the general public? While it is a fact that the judge should not make

certain comments, that any prudent citizen is excused of making, would it not be right to assume that there are certain occasions where the right to speech and expression of a judge is being marred? The bone of contention of this project is to enquire the above mentioned two questions and to find out a pinpoint provision in law that would essentially enable a judicial officer to pass an oral remark without any sort of restraint or to find out the particular provisions that prevents him from doing so. This project also aims to distinguish the factors which would separate obiter dicta from oral remarks, hence altogether changing its precendential and referential value.

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[1] Art 141, The Constitution of India

HYPOTHESIS

1) Obiter Dicta is essentially different from oral remarks and observations in the aspect that oral remarks and observations of a S.C justice, while pronouncing the verdict of any particular case, have no persuasive and referential value whatsoever in any court in India. The executive is not at the least bound to follow the oral remarks and observations and is fully discretional in obeying or disobeying it, while obiter dicta is often taken as reference of referential value in a lower court.

2) A judge is well within his rights, conferred to him by his authority to pass indiscriminate oral remarks, irrespective of its plausible effects on the society.

3) A judge is not bound by the demand of his position to restrain from making certain opinions or remarks which he bonafide deems to be appropriate for the case at hand, to the best of his knowledge.

4) A judge is immune from all possible judicial actions that a common, prudent citizen is bound to face, had he said the same in a public function.

Controversial comments of S.C of India

There has been more than a few instances where the highest judicial body of our land has passed controversial comments that have often ruffled many feathers and which have been subjected to a detailed autopsy by every media of the land, to extract the implications and applications of the same. The range of such comments vary from the much annoyed retort of S.C asking not to bother the court with a particular kind of case, to calling every bearded Muslim a terrorist. Though most judgments of the courts may be subjected to many criticisms owing from people with diverse views, but more often than not such oral remarks prima facie appear to violate every possible code, both moral and legal, to be followed while passing oral remarks. A few of the instances, which are often deemed unforgivable, are mentioned below.

Beards not allowed because of Taliban

One of the most interesting and to put in it subtle terms, 'hilarious' oral remark by a judicial officer of S.C was by Justice Markandeya Katju in a much hyped up case of Muhammed Saleem V. U.O.I.[2] This case came up in the Madhya Pradesh H.C, when Muhammed Saleem, a student of Nirmala Convent Higher Secondary School, of Bidisha district in M.P filed a petition in the H.C seeking to sport a beard, which was in contrary to the school rules. To quote Justice Markandeya Katju who was speaking on behalf of the entire division bench, "We should strike a balance between rights and personal beliefs. We cannot overstretch secularism. We don't want to have Talibans in the country. Tomorrow a girl student may come and say that she wants to wear a burqa, can we allow it?"[3]

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[2] Muhammed Saleem V. U.O.I, available at http://www.indiankanoon.org/doc/1191614/?type=print, last seen on 03/03/2014.

[3] SC rejects Muslim's plea to sport beard, says no 'Talibanisation of India',The Times of India, 30/03/2009, available at http://timesofindia.indiatimes.com/india/SC-rejects-Muslims-plea-to-sport-beard-says-no-Talibanisation-of-India/Art.show/4336636.cms, last seen on 03/03/2014.

Quit eating onions – solution to price hike of onions

Perhaps another hilarious and most recent oral remark made by the S.C was regarding the price hike of vegetables, most specifically onions. On January 10th 2014, S.C of India declined a Public Interest Litigation (PIL) filed by Vishnu Pratap Singh Langawat,[4] based on the Essential Commodities Act, 1955 which was to control the production, supply and distribution of commodities which are specified in the legislation as the essential commodities.[5] The court has reportedly asked the petitioner not to burden the court with such PIL suits and said that if one is to stop eating onions for two months, prices will come to Rs.15 per kg. To quote the honourable bench of Justice B.S. Chauhan and Justice J. Chelameswar, "Now we have no other business. We have to arrange cheap onions and potatoes."[4]

Sexism in the third pillar

Of all the random and reckless oral remarks passed by the judges, worst are those pertaining to gender equality and religion. Advocate General (AG) of W.B, Bimal Chatterjee sparked up a huge controversy by likening State Election Commission (SEC) to a 'beautiful lady'. In response to demanding extra state security for the upcoming panchayat polls by Commissioner Meera Pandey, Mr. Chatterjee retorted , "Every day, new demands are being made one after another like a beautiful lady." And he further went on to clarify, "Arbitrary, whimsical desires are being expressed like a beautiful lady."[6] Whether if the sarcasm was on SEC or on the beautiful lady, remains unexplained.

Another interesting comment was passed by none other than Karnataka H.C Chief Justice Bhaktavatsala. On hearing a domestic violence case, he replied that all women suffer in marriages and that she had to adjust to her husband. 'Your husband is doing good business. He will take care of you. Why are you still whining about his beatings?', he said. While women pleaded not to be taken back to her husband's place, Mr. Bhaktvatsala suggested that the husband should take his wife and son out for dinner. Exceeding his limit further he commented to the unmarried female advocate that family matters should be argued by married people and

not by spinsters.[7] Whether the same law should be applied to rape cases and corruption cases also remains to be clarified by the honourable justice himself.

Listed above are but few incidents where the whole prestige and credibility of the judiciary was burned at stake due to reckless remarks of very few. There are about several hundreds of such instances from very minor to major allegations and controversies, over decades. The above mentioned instances makes one question as to the extend and limit of judges in their dictum and in judgment. While there are precise rules set forth to be followed while writing a judgment, what has to be said and what not to be said is still left to the discretion of the judge himself.

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[4] Don't eat onions, prices will dip, SC tells petitioners; The Deccan herald; 10/01/2014; available at http://www.deccanherald.com/content/379733/don039t-eat-onions-prices-dip.html; last seen on 03/03/2014

[5] sec. 3, Essential Commodities Act, 1955.

[6]Banerji, Monideepa; 'Advocate General's sexist remarks in Calcutta H.C sparks outrage, NDTV News, 05/06/2013, available at http://www.ndtv.com/Art./india/advocate-general-s-sexist-remarks-in-calcutta-high-court-sparks-outrage-375424, last seen on 03/03/2014

[7]Bond, Anthony; Is this the most sexist judge in history? Outrage in India over 'justice' who ordered woman to stop whining about violent husband; Daily Mail; 10/09/2012; available at http://www.dailymail.co.uk/news/Art.-

2199924/Outrage-India-justice-ordered-woman-stop-whining-violent-husband.html?openGraphAuthor=%2Fhome%2Fsearch.html%3Fs%3D%26authornamef%3DAnthony%2BBond%2B>; last seen on 03/03/2014

Oral remarks, Strictures and Obiter Dicta

After going through all the above mentioned incidence of 'oral outrage' one would be facing with a number of ponderings. Not considering the importance society gives upon every word said by a judge, especially of the H.C and the S.C, arises the most important question – If even the auxiliary citing of a random act or fact of a S.C has persuasive value, would it not be, that even the so said, random and careless remarks end up being repeated univocally by all lower courts too? If the answer is not affirmative, then what is that differentiates an oral remark from obiter dicta? In order to answer that question, we would first need to define, in precision and clarity, what is an obiter dictum.

Strictures and Outbursts

Lord Alfred Dennings said 'Judicial strictures figure in considered judgments, while outbursts are sheer lapses in manners and are soon forgotten.' The essential difference between a stricture and an outburst is the same as that of dictum and oral remarks. While stricture is a strong criticism that creeps into the judgment, outbursts are often uncontrolled expulsion of emotion of a judge, during an argument. This mostly happens due to emotional, anger or egoistic factors. They are viewed as sheer lapses in manner and forgotten soon. What exactly distinguishes between an oral remark and an outburst? Strictures are often passed in a dysphemistic way rather than being euphemistic. They are often court's way of keeping an eye on the executive.

Obiter Dicta

Obiter Dicta in simple words can be described as 'by the way' statements.[8] They are often statements, references, or sometimes even some remarks that are made by the judge during the process of pronouncing a judgment. They are often used as supporting elements to the final judgment. Since not much of ponderings would have been given on the obiter dicta, they do not contain much precedential value and therefore there is no harm in not considering an obiter

dictum in a case. It has much of it importance due to a different reason. It comprehensively discusses the legality of issues at hand. Obiter dictum is often mistaken with judicial dictum.

Oral remarks

Oral remarks can be defined as less of a law and more of an opinion. It is a less important, more ambiguous, more to the satirical or sarcastic statement which by convention cannot be treated as obiter dictum. Oral remark is a well formed and well intended criticism which is delivered in specific purpose in order to bring about a change. Oral remarks are different from strictures as these well intended comments do not creep in to judgments where as strictures have a good role to play in a well formed judgment. There is no hard and fast definition of an oral remark nor is there a precise distinctive factor to determine which could be treated as obiter dictum and which could not be. Most of the time, it is the discretion of the law reporters to include parts of a particular ruling as a dictum while ignoring others in the name of passive oral remarks. Following things maybe be considered while passing down certain points of the ruling as a dictum and while ignoring others as oral remarks and passive commentaries.

- Statements that have more referential value in future cases are treated as dicta
- Statements that are closely related law and legal terminologies are treated as dicta
- Any criticism in stronger words against the government and any statement that in first appearance seeming to question the basics of the legislature and its intentions, are often avoided as oral remarks.
- Any comments, which are not a part of ruling, which refers to an individual, his demeanor or attire, and who is not very relevant to be mentioned for the case at hand are often taken as oral remarks.
- Any words spoken with attempt of use of Atticism, satire, sarcasm or language which are considered to be not sober are often taken as oral remarks.

Legal purview of obiter dicta

While obiter dicta of a H.C has nothing more than persuasive value, by the virtue of Art. 141[1], even the obiter dicta of S.C is binding on all it lower court. This is not often the reality as many a

times S.C dicta are often ignored, if not forthrightly then with the aid of the fact that non two cases are 100% similar. There have been many instances where the S.C, by itself admitted its mistake in giving a particular dictum and correcting the statements so said. But more often than not, such corrections are not seen in the case of oral remarks. Even when the statement so said is controversial, since there is no hard and fast rules that would limit a judge's passing of an obiter dictum, such controversial statements are often left uncorrected and soon forgotten.

Oral remarks always bad?

Now we come to the question that if the above situations are the only instances of oral remarks, aren't oral remarks always passed with a malice? Would it not be a complete generalization and in a way, wrong to say that every judge would misuse his liberty of judicial expression to cause malice to a particular group of society? This is indeed not true. There are many instances where the oral remarks did more public good than public malice. In fact, more often than not, it is this aspect of oral remarks which are more pronounced. In most cases, the oral remarks of courts have played significant roles in the correct judgment. On bench questioning of certain facts have led to remarkable quality of investigations. For example court remarks credibility of a testimony based on the appearance of a witness, remarks on his behavioral aspects. Court has often questioned the investigating officer as to why a particular aspect was included or excluded from the report or as to why a particular detail was overlooked or looked into in a particular case. The court is known to warn government of certain problems by mere oral remarks and rectification of such in correct time has avoided many a disasters. One of the famous instances is where the S.C asked the CBI not to share their information with the government pertaining to the Coalgate scams.[11] There has also been instances where the S.C has orally warned the government to refrain from doing something or to do something, like in the case where the S.C warned the states from playing politics in the corporative society elections.[12] There are such hundreds of instances across decades where the S.C has exercised its power of its oral remarks to direct the state to do certain things, which are not strictly within the purview of a court proceeding but which are deemed necessary by the courts for the society.

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[8] Available at <http://thehqbooks.com/b/2039884>, last seen on 03/03/2014

[9] A, Vaidyanathan; ‘Coalgate: don't share information with government, S.C warns CBI’;NDTV News; 17/07/2013; available at http://www.ndtv.com/Art./india/coalgate-don-t-share-information-with-government-supreme-court-warns-cbi-393370; last seen on 03/03/2014

[10] ‘Don’t play politics with cooperative societies, S.C warns States’, The Hindu, 17/05/2013, available at http://www.thehindu.com/news/national/dont-play-politics-with-cooperative-societies-supreme-court-warns-states/Art.4725088.ece, last seen on 03/03/2014

Limitations and liberty of judicial expression

A free and liberal judicial system is a quintessence of a smooth functioning democracy. In order for a judicial system to be impartial, it needs to be independent from the other three pillars of democracy. It needs to be free of the opinionated media, corrupted executive and confused legislature. The most important factor for the existence of a democracy is the faith of its citizens in it. This can be assured only by giving the judiciary maximum freedom it may have. In the light of this very fact, let us define what judicial independence is.

“ The capacity of courts to perform their constitutional function free from actual or apparent interference by, and to the extent that is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular the executive form of government, over which they do not exercise direct control.” [13]

With the change of time, with sovereignty of a nation being marred by many external as well as internal factors like international organizations and communal pressures, it is essential to draw a line to and till the judicial independence and liberty lies.

Generalizations

Though the very judiciary is filled with the essence of judicial liberty, but there are a few catches with it. There are a few cardinal sins which must be kept away while pronouncing a judgment. Most important of them are generalizations. A judge is prohibited from passing a comment that would derogate a person or a community as a whole and should essentially limit his criticism to the purview of the case at hand. No stranger to the case at hand must be dragged unnecessarily to the criticism unless it is essential to elucidate on the facts at hand. Sweeping generalizations cause commotion and tumult in the society. In cases where generalizations pertain to the

legislature, it is seen as an intrusion of judiciary in the affairs of the legislation which could cause unrest and displeasure. Therefore generalization is the most usual and injurious part of an oral remark which the courts should abstain from as much as possible.

Abuse of judicial processes and Expunction of strictures

Though the judge enjoys absolute freedom of speech inside the court and is immune from all the possible judicial actions that follow. But, there are a few things that if, done would amount to abuse of judicial process and finally result in expunction of unhealthy remarks. There are a few things that would enable one to seek legal remedies for abuse of judicial process. There are a set of tests called expunction tests which, if proved to the favor of the plaintiff would result in legal action against the very judicial officer. Expunction tests include whether the statement under question has any sweeping generalizations, derogatory statements against a particular individual which is not necessary for the case at hand or a particular statement which could cause a possible communal unrest. If the court doesn't give the opportunity of explanation to the party whose conduct is in question, if there is a lack of evidence proving the righteousness of the remark or if the remark by itself presents unnecessary for the case at hand, it can be expunged. The outcomes would be that the remark passed maybe expunged or overruled. The higher court may also order the lower court for an apology or any other remedy deemed suitable.

The judicial expressions should be free and without bias. But in saying so, we give judiciary some sort of absolute power and freedom which cannot be allowed in a perfect democracy. In a perfect democracy every office of power must be kept in check by the other offices of power. Thus a perfect democracy presents itself a system of checks and balances. Therefore we cannot allow absolute freedom to the judiciary. There are a few checks to the things that can be said in a court by a judge. Academic questions, questions which would require a philosophical approach or questions which require controversial or debatable answers need to avoided as much as possible and should be only asked if and only if it is unavoidable for the case at hand. Contextual references and throw away lines are good as when it helps in clarifying and elaborating some complicated aspects of the case. But in doing so, it is a cardinal sin of the judge to forget the basic code of decorum and divert from the path of sobriety. Any statement which is passed

wavering from this path would be seen wrong, even if it is for the case at hand. Usage of similes is not advisable unless it is perfectly akin to the used. Every court has the right to give fair and rational criticism on other court's judgments. But it has to be fair and reasonable. Those terms are debatable to this date.

A judge's freedom of speech and liberty – A detailed study of the Judicial Standards and Accountability bill 2010

What is actually the judicial accountabilities bill of 2010 and why is it in traduced will be the main focus given below. First let us what the bill is about. The bill has seven chapters and 59 clauses which deals with Judicial standards to be followed by the judges, declaration of assets by judges, making of complaints, scrutiny panel, its constitution, function and procedure, judicial oversight committee, its powers, functions, procedures, penalties of inquiry, confidentiality in complaint procedure, provision for removal of a judge and most importantly, it lists a set of offenses that the judges must refrain from and penalties for it.

The bill was first introduced in 2010. It was the successor of Judicial Enquiry bill of 2006. The bill seeks to repeal the Judges (Inquiry) Act, 1968, which prescribes the procedure for removal of a judge currently. It also appoints two panels for the investigation of complaints – The Scrutiny Panel and the Judicial Oversight Committee. The bill lays down several basic checks to make sure judicial independence is not mistaken for judicial impertinence. The bill was rejected twice in the parliament. The reasons were that the oversight committee would have non- judicial members. This would be an intrusion of non- judicial powers of democracy on the judiciary. Moreover, the bill is quiet vague about the right of appeal of a judge after the president has sanctioned the impeachment. Giving the crux of discretion as to whether a judge should be there to the Scrutiny Panel and Judicial Oversight Committee seems to hurt the ego of the judges in a detrimental way, which could affect the impartiality and independence they ought to have while pronouncing the judgment.

The new system gives any person the right to file a complaint while the older system requires only a member of the parliament to file a complaint which will be initiated as a motion in the parliament which later will be voted upon and sent to the president for approval. It requires 100

members of the Lok Sabha or 50 members of the Rajya Sabha to approve it before it is to be sent to the president of India. This might seem a bit more ‘democratic in first glance. But on closer inspection it is seen that it is a major weapon in disguise. A weapon which is potent enough to threaten every judge in censuring his words to fit the preformed, dogmatized standards of speech that is now inflicted upon the judges, presenting itself as a hideous scar on the face of beautiful judicial independence. There are also exclusive provisions which imposes frivolous restrictions on the judges including a prohibition from taking part is business or in stock dealings. Judge has to submit list of his assets and liabilities to the office which will be published in the website for the public. A judge has to withhold from public debates and comments on controversial issues. These can be said as the ultimate intrusion of the legislation not into judiciary but into the privacy of the judicial officer. The bill has been passed in Lok Sabha but failed in Rajya Sabha. The bill was reintroduced in 2012 after amendment but again failed in Rajya Sabha. This is due to the fact that that judiciary would not favour this bill so much that Rajya Sabha is forced to hold it back.

Conclusion

In S.P. Gupta vs. U.O.I, 1981 Suppl. 87, this Court has held that :-

“The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution; it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective.”

Judiciary is the most important for all the pillars of democracy. It is in fact vested with far more powers than the legislature and the executive themselves. Judicial independence is the one of the most essential elements of the democracy. In United Kingdom, from where we got the basic structure of our very constitution, there has been a century long strife for judicial independence from the monarchy and the parliament. In our country, we provided judiciary with maximum freedom it could have, from the very beginning and it indeed had a very positive impact on the

world's largest democracy. Therefore, it would be foolhardy to introduce a new bill that would keep a check on judicial independence. However, it is not to be forgotten than judicial independences does not mean judicial autonomy in the country. It is essential that there should be a code of unwritten decorum inside the court room and between the judges, so as to ensure free and fair decisions. It is the judges among themselves who have to see to it that they adhere to the code and it is not the business of the legislature to ensure so. In a country where judicial reciprocity is allowed and where there is a provision for overruling of judgments, repeal of orders and right to appeal against unfair judgments, judicial independence without the checks of legislature should not be much of problem.

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