

## Accountability of the Supreme Court

### Arundhati Roy Case

*Can a citizen of India not criticise the Supreme Court's decisions? Can she not criticise the procedures and management of the court? Is the court not supposed to be accountable? How will its accountability be enforced if it were made absolutely immune from public criticism?*

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Arundhati Roy's conviction and punishment for contempt of court shows that despite its doctrinal activism on human rights, the Supreme Court of India is still way behind the times in balancing freedom of speech and contempt of court. Action against Arundhati must be seen in the context of the decision of the Supreme Court in *NBA vs India* in which the court permitted the concerned state governments to raise the height of the Sardar Sarovar dam up to 90 ft. That decision came in 1998 after the work on the dam had remained stayed on the court's order since 1994. It came as a great disappointment to Narmada Bachao Andolan (NBA) and its sympathisers because a rise in the height of the dam meant submergence of more villages and displacement of thousands of more people from their homes. Since even those displaced earlier had not been adequately rehabilitated, what would be the fate of such additional displaced persons? The decision was severely criticised and NBA undertook campaigns to educate the people about the harmful effects of the court's decision. Medha Patkar, the leader and Arundhati Roy, a Booker Award winner and sympathiser of NBA, criticised the judgment. They were served a notice for contempt. The judges were doubtless offended by Roy's sarcastic references to them in her article in a news magazine but decided to drop the matter after giving an admonition.

NBA organised a 'dharna' in front of the Supreme Court and in a meeting held there

the decision of the court was severely criticised. A complaint was made against Medha Patkar, advocate Prashant Bhushan and Arundhati Roy by some lawyers alleging contempt of court and the court issued a notice asking why they should not be punished. All the three respondents denied that they had committed any contempt and asserted that they had a right to criticise the judiciary and its decisions in exercise of their freedom of speech guaranteed by the Constitution. When that matter was heard, it was revealed that the petitions were frivolous, they suffered from various procedural flaws, and none of the charges made against any of the three respondents could be proved. The court had to concede that had its registry carefully scrutinised the petition, perhaps even a notice might not have been issued. The three persons were therefore acquitted. But the court took *suo motu* notice of the contemptuous statements contained in Arundhati Roy's affidavit and issued a fresh notice of contempt (see S P Sathe, 'NBA Contempt of Court Case', *EPW*, November 24, 2001, p 4338).

Arundhati appeared and defended what she said in her affidavit. She asserted that as a citizen of India she had a right to criticise the decision of the Supreme Court, this being part of her fundamental right to freedom of speech. She had absolutely no intention to commit contempt of the court and what she said did not amount to contempt. The court held her guilty of contempt and sentenced her to one day's imprisonment and a fine of Rs 2,000, failing to pay which she would have to

undergo three months' imprisonment. Arundhati Roy was sent to Tihar jail. She spent a day there and came out after paying Rs 2,000.

The ground of contempt that is known as scandalising the court has fallen in disuse in most of the advanced countries and it has not been used in England during the entire 20th century. In all democratic countries, the space of judicial review has expanded and it has acquired a political dimension. Criticism of judicial decisions and of the judicial system is necessary to reinforce its accountability to the people.

What did Arundhati Roy say which infuriated the court? In her affidavit she said:

On the grounds that judges of the Supreme Court are too busy, the chief justice of India refused to allow a sitting judge to head the judicial enquiry into the Tehelka scandal, even though it involves matters of national security and corruption in the highest places. Yet when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people who have publicly – though in markedly different ways – questioned the policies of the government and severely criticised a recent judgment of the Supreme Court, the court displays a disturbing willingness to issue notice.

It indicates a disquieting inclination on the part of the court to silence criticism and muzzle dissent to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm.

Arundhati had said that for "the petitioners to attempt to misuse the Contempt of Court Act and the good offices of the Supreme Court to stifle criticism and stamp out dissent, strikes at the very roots of the notion of democracy". This should make it clear that her complaint was not that the court was motivated but that the court allowed itself to be used by those motivated to stifle criticism and suppress dissent. The conclusion of the court that she had imputed motives to the court was therefore rather hasty. She honestly believed that the decision of the Supreme Court in the NBA case had done a great harm to the displaced people. She pointed

out various examples of judicial decisions which, according to her, had “materially affected, for better or for worse, the lives and livelihoods of millions of Indian citizens”. She then says that:

An activist judiciary, that intervenes in public matters to provide corrective to a corrupt, dysfunctional executive, surely has to be more, not less accountable. To a society that is already convulsed by political bankruptcy, economic distress and religious and cultural intolerance, any form of judicial intolerance will come as a crippling blow. If the judiciary removes itself from public scrutiny and accountability, and severs its links with the society that it was set up to serve in the first place, it would mean that yet another pillar of Indian democracy will crumble. A judicial dictatorship is as fearsome a prospect as a military dictatorship or any other form of totalitarian rule.

What was contemptuous in this? Did she say that the Supreme Court was motivated with the desire to harass her and suppress her dissent? If her entire statement is read, it is clear that her statement was made in the context of the petition that had earlier been dismissed by the court for being frivolous. Did the court, though inadvertently, not allow itself to be used by the petitioners for their nefarious purpose of suppressing criticism and repressing dissent? Can a citizen of India not criticise the court’s decisions? Can she not criticise the procedures and management of the court? Is the court not supposed to be accountable? How will its accountability be enforced if it were made absolutely immune from public criticism? Even what she said regarding Tehelka was a mere criticism of the priorities of the court. How does such criticism erode the reputation of the court? Is the reputation of the court so fragile that it would be lost by mere criticism of its working? Despite criticism of several judgments in the past (the most significant being the emergency decision in *A D M Jabalpure v Shukla*), the court’s reputation has not been affected. People still have faith in the judiciary which is obvious from the fact that whenever any scam takes place or a mayhem occurs, people ask for an enquiry by a judge. Reputation of the Indian judiciary is certainly high in comparison with the reputation of the other organs of government. But it can remain so only if it is constantly subjected to people’s ombudsmanning. If the courts adopt an attitude of being a holy cow, they will not know how they are evaluated by the people. Arundhati Roy

did not say that there was judicial dictatorship. She only said that if the courts became immune from public criticism, they could usher into a dictatorship and since any dictatorship is bad, judicial dictatorship would also be bad.

While surveying the previous decisions, the court distinguished *Shivshankar’s* case in which harsh criticism of the judiciary was held not to be contemptuous. In *Namboodripad’s* case, he had been convicted for contempt for a speech which was a pure theoretical statement on the role of the judiciary from a Marxist perspective. It appears that the fact that Shivshankar was a former judge of a high court and later a minister in the central government made his case different from that of *Namboodripad*. Freedom of speech cannot be greater for one who has been a judge than for one who is a citizen

Arundhati Roy had no personal axe to grind. She spoke for a cause which she thought was important and needed her support. Should these things not count while trying a person for contempt? If Shivshankar’s judicial belonging elicited greater tolerance of his views, Arundhati Roy’s altruistic intentions also deserved such tolerance. Moreover, the court was rather patriarchal in condescendingly referring to her as a ‘woman’ whom they treated leniently by giving one day’s punishment. Could they not have made it more symbolic by sentencing her to imprisonment till the rising of the court while simultaneously declaring that the court had risen? By convicting her and sentencing her, the court has certainly not covered itself with glory. A more tolerant and more sensitive but not sentimental court would doubtless earn greater public admiration. [E]