**Of restraint**

[Ummar Ziauddin](https://dailytimes.com.pk/writer/ummar-ziauddin/%22%20%5Co%20%22More%20Articles%20by%20Ummar%20Ziauddin)

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“The dignity of an independent judge nor his or her integrity is so frail and vulnerable so as to be harmed by a tweet on the social media platform” read the order of the Chief Justice Islamabad High Court, as it affirmed the objection qua maintainability of the contempt petition filed to lay before the court a scandalous tweet by a journalist (Objection Case No. 8038 of 2020). The complaint was dismissed.

The approach taken by the Chief Justice has been lauded by the legal fraternity across the spectrum. And it is a break-away from the recent judicial trend. Lately, the use of contempt laws has become infrequent. The courts are indeed within their right to enforce restrictions spelled out in Article 19 of the Constitution on the use of speech, expression or press – especially if it is caught up in the purview of judicial contempt under the contempt law. Must the courts employ contempt as an instrument, or employ it unsparingly, is a separate issue.

Just for context, our Constitution spells out three fundamental rights in Article 19 and then goes onto sanction restrictions that must be “reasonable”, on the use of speech, expression and press. The restrictions, as envisaged, may only be imposed if they have nexus with “glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court or incitement to an offence.” Is the breath of restrictions discontinuously too wide? I will leave it to your judgement. Regardless, contempt of the court is one of several exceptions where speech, expression or press may be regulated. Just to be clear here, restrictions imposed by law do not amount to absolute ban on the use of free speech, expression and press. Just what is reasonable, depends on the circumstances. Again, the final arbiter to adjudicate upon the threshold of reasonableness – remains the judicial branch of the country.

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Our parliament in the primary legislation nor the executive under the delegated legislation define fair comment. For instance, Electronic Media (Programs and Advertisements) Code of Conduct, 2015 framed under the PEMRA Ordinance defines aspersion as “spread false and harmful charges against someone; attack the reputation of a person with harmful allegations.” It then adds “However, a fair comment does not mean aspersion.” In the same vein, our defamation law offers fair comment as one of the defences to slander or libel but again the law does not define it. So, it is the province of the courts, on a case to case basis, to settle the contours of fair comment. Whether it’s a right or a privilege; a restriction or a liberty – the construction, courts put upon it is conclusive upon the other coordinate branches.

And this is where the courts have to judiciously navigate through the haze of multiple special laws. In the process, the courts have to be cautious, especially in invoking contempt laws, that in terms of optics, an impression isn’t conjured: “there is free speech until you criticize us” and end up becoming the judge in their own cause. The use of contempt law does not enhance the credibility or dignity of the Courts; it is their judgments, consistent application of precedent and fidelity to rule of law – that does!

More importantly, the most potent instrument is judicial restraint. It may well be within its power and jurisdiction for a court to take cognizance of a case under contempt laws and proceed to frame the charges, however, the guiding doctrine must always be restraint – whether it involves sliding the court into political thicket or otherwise. A policy orientation, that, courts did not consider lately. And it is in this context, Objection Case No. 8038 of 2020, is so significant. It sets a new direction and standard for other courts to follow. Those, in the press and legal community, who have followed the court of the Chief Justice, would tell you that indeed it is not the first instance where the Chief Justice of Islamabad High Court, has exercised judicial restraint or deference for greater public good. It has been the hallmark of Islamabad High Court in Justice Minallah’s era.

End piece: In Federalist No.78, Hamilton writes: “independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” While the independent judge nor his or her integrity is frail; yet it must be jealously guarded as a bulwark that holds the Constitutional order together. Judiciary, in any Constitutional democracy, cannot become a partisan currency nor be subservient to the whims of any coordinate branch. Therefore, while one may argue for judicial restraint in this space, restraint nonetheless is a relative concept. It can only be effective when other coordinate branches proactively enforce both the independence and integrity of our judges.

*The writer attended Berkeley and is a Barrister of Lincoln’s Inn*