CONTEMPT OF COURT

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National Judicial Academy
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Publication of papers, monographs, journals and reports of research findings relevant to judicial administration and delivery of justice, is part of the mandate of the National Judicial Academy. In part fulfilment of this object, the Academy has initiated a series titled "Occasional Papers" under which at least a dozen monographs are proposed to be published annually beginning with 2004.

Fali S. Nariman, Senior Advocate and President of Bar Association of India gave an address at the Academy on 7th November, 2003 on the subject of Law & practice of Contempt of Court. Given the changing character and scope of contempt power in administration of justice in contemporary times, it is interesting to know its evolution and transformation under the impact of constitutional interpretation and democratic processes. The paper not only describes the current state of the law but also gives some meaningful guidelines for lawyers and judges to follow in order to uphold the dignity and independence of courts. While arguing against codification of contempt law, the author suggests three significant reforms to administer the law justly and fairly.

JANUARY, 2004

N.R. Madhava Menon
Director, NJA

I. Introduction

In India, there is civil contempt and criminal contempt. Civil contempt is defined in the Contempt of Courts Act 1971 as "wilful disobedience to any judgment, decree or order, writ or other process of a Court breach of an undertaking given to a Court": it is a formidable adjunct to the administration of justice and essential for upholding the rule of law. It is punishable with a fine unless the Court considers that a fine will not meet the ends of justice[1]

But the entire law of Criminal Contempt is shrouded in uncertainty: the definition of the term "Criminal Contempt" is itself vague and indeterminate. It is defined as the publication (whether by words, spoken or written or by signs or by visible representation or otherwise) of any matter or the doing of any other act whatsoever which scandalises or tends to scandalise or lowers or tends to lower the authority of any Court or prejudices or interferes or tends to interfere with the due course of any judicial proceeding or obstructs or tends to obstruct the administration of justice in any other manner. Criminal Contempt is made punishable with simple imprisonment for a term which could extend to six months or with fine which may extend to two thousand rupees or with both. Added to the beautifully evasive language of the definition section (Section 2(c)) there is another uncertain dimension: the inherent jurisdiction of High Court and of the Supreme Court mentioned in Article 215 and Article 129 of the Constitution respectively. The power of High Court and of the Supreme Court to commit for contempt is not restricted or constrained even by the vaguely – worded contempt law enacted by Parliament: the Supreme law (the Constitution)

[1] Sub-Section (3) of Section 12 provides: "Notwithstanding anything contained in this section where a person is formal guilty of a civil contempt, the Court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit."

expressly empowers the Higher Judiciary "to punish for contempt of itself', and leaves it to the Judges to define "contempt".

The origin of the branch of law known as "scandalizing the court" is shrouded in antiquity – it has been described in text books as both "dubious and controversial"[2]. It originates from a celebrated dictum of Justice Wilmot in his judgment in Wilkes Case[3] way back in 1765 – a judgment which was never actually delivered, but meant to be delivered, and later published by Justice Wilmot's son when his father's papers were edited. It was a judgment reserved after argument, and when ready to be delivered it was discovered that the writ against Wilkes was incorrectly titled and since an amendment of the Writ was not consented to, the case had to be abandoned. This is the real ancestry of that part of the law of contempt known today as "scandalizing the Court": it is based on a judgment never delivered in a case, -a case which had already abated!

Is this jurisdiction necessary? On balance I believe it is.

The Judge is the umpire in every lis because of the special role of the judiciary in society. As the guarantor of Justice the Judge must enjoy public confidence if he (or she) is to carry out judicial duties fearlessly.

Confidence in the administration of justice must be protected against "destructive attacks", invariably unfounded; especially since Judges who have been criticised are precluded by their position from responding. But the line between "destructive attacks" and genuine but trenchant criticism, is a thin one. In decision as to on which side of the line the case falls, our Judges often adopt (it is suggested that they should always adopt) the approach commended

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[2] Borric & Lowe – Law of Contempt – 3rd Edition page 331
[3] R. vs. Almon 1765 Wilmot 243

by Lord Atkin:

"The path of criticism is a public way": he had said in a decision of the Privy Council, (AIR 1936 P.C. 141) "the wrongheaded are permitted to err therein; provided the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and, respectful, even though outspoken, comments of ordinary men".

The more respectful the "outspoken comments", the more noticeably absent any imputation of improper motives, the lesser the chance of being hauled-over-the-coals. With the Atkin – approach there is little to fear; absent the Atkin – approach the dice gets loaded against free-speech.

II. Should Scandalising the Court remain punishable?

In an adversarial system of litigation like ours there are always two parties, one must lose, the other must win. And when it goes through three-tiers of litigation – again an unfortunate characteristic of our law – the party who ultimately wins sometimes harbours inbuilt (often unjustified) grievances against one or more Judges down the line who may have decided against him.

People who propagate these grudges are often lawyers themselves.

And top lawyers have big egos. An egotistical lawyer never likes to lose a case and when he does, he is not averse to blaming the Judge or suggesting to clients that there was some ulterior motive.

Now, judging cases is a difficult business and the occupational hazards of judging are many – the memory of a wrong

decision (or what is ultimately found to be a wrong decision) sometimes festers; it also (though less often) gives rise to irresponsible sometimes scurrilous comment – first about the case itself, and then inevitably about the Judge or Court which rendered judgment.

The law reports are strewn with cases of disgruntled litigants (and occasionally lawyers as well) going to great lengths in making charges, often unfounded, against the Judiciary.

One important part of judicial ethics which requires to be observed by Judges at all times is the need for avoiding giving an impression of bias or apparent bias against any litigant whosoever he or she may be, and the conduct himself or herself in a manner which precludes any adverse comments. The expedient known as recusal from a case is often adopted and recommended even when the Judge because of his or her training would be able to decide impassionately - although the public perception of his or her perceived or published views may point otherwise. This is a very important ingredient which contributes in no small measure towards upholding the dignity of the judiciary and of the Court in every civilized country including ours.

The law of contempt – that part of which is so colourfully described as "scandalising the Court" – is intended as a wall of protection against the vicissitudes of judging. Ours is a very litigious society and there are a number of odd citizens ("Nuts" they are sometimes called): persons who will make any type of allegation against anyone at the drop of a hat.

This is why I believe that this part of the Criminal Contempt Jurisdiction, though now obsolete in England, should remain in India.

But there are problems - in this branch of the law, the lines are thinly drawn and are not very clear: and they depend very much

on the perception of the Judge administering the Contempt Jurisdiction in the name of the Court. The public, the men and women of the media, and lawyers are content to accept constraints imposed by the "Rule of Law", but are not prepared to accept ad hoc rules imposed according to the whims, vagaries and idiosyncrasies of individual Judges.

This ad-hocism was typified in the first **V.C. Mishra case**[4]

No one liked what V.C. Mishra said and did in Allahabad, but the three – Judge Bench that decided his case, in their enthusiasm to teach him a lesson deviated from the law: ultimately, sobriety prevailed; the Constitution Bench of the Supreme Court[5] also did not like what Mishra said or did and yet they overruled the punishment meted out to him and set out the true contours of the penalties that can be imposed in contempt cases. This case has set an example and prompts a word of advice to all: lawyers and judges:

Never-never - behave as Mishra did; And never, never, lose your temper as the three Judge Bench did in Mishra's case: always keep your cool as the five judge Bench did, and so earn the admiration of all.

Mishra's case has established (a fact over looked by Judges in the High Court) that the contempt jurisdiction must not and cannot be used to discipline the lawyer in conduct of a case: this must be left to the Bar Councils entrusted with disciplinary powers under the Advocates Act. Temper and contempt never go together, and anger does not help but in fact impedes resolving contempt issues.

Please do remember that to be angry does not necessarily mean that you are right.

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[4] 1995 (2) SCC 584.
[5] Supreme Court Bar Association vs. UOI – 1998 (4) SCC 409.

In 1787 the future Lord Eldon as advocate argued a case in Court and lost. Thirty-three years later the same case was cited to him as Lord Eldon presiding in the Court of Chancery. He said that he remembered the case "and very angry I was with the decision; but I lived long enough to find out that one may be very angry and very wrong."

Judges must always remember what Lord Eldon said.

III. SCANDALISING THE COURT – the status of the person "Scandalising" -

Since there are no rules there are no constraints: the Criminal Contempt jurisdiction is a mercurial one.

It was Jeremy Bentham (the theoretical jurist) who characterized the Common Law as "Dog Law."

> "When your dog does anything you want to break him off", (he wrote in 1823), "you wait till he does it, and then beat him for it. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

The law of contempt of court in Anglo-Saxon jurisprudence both in England in the past, and in India in the past and present, has been no more, no less than "Dog-Law". There are no rules, no constraints - no precise circumstances when the administration of justice is brought into contempt.

The judgments are strewn with pious platitudes that give little guidance to the editor, to the commentator, to lawyers, and to members of the public: this part of the law of contempt though necessary, is a standing threat to free expression.

It leaves too much to the discretion of the particular judge (or judges). And at times decisions do give rise to a strange feeling that the status of the person who scandalizes the Court perhaps

did affect the ultimate result.

In 1988 a sitting Cabinet Minister made wide and improper remarks against Judges of the Supreme Court – he said:

> "Zamindars like Golaknath (he was speaking of Golaknath's Case) evoked a sympathetic cord nowhere in the whole country except the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Cooper's case (1970), Anti social elements, FERA violators, bride burners and a whole hoard of reactionaries have found their heaven in the Supreme Court."[6]

The minister then went on to say that because the Judges of the highest Court had their "unconcealed sympathy for the haves" (as opposed to the have nots) they had interpreted the expression "compensation" in the manner they did: clearly attributing motives.

And yet a Bench of two Judges (in Duda vs. Shiv Shankar) exonerated him. Let me quote what the Bench said:

> "Bearing in mind the trend in the law of contempt (they were speaking of the liberal trend) – established by the Judgment of Justice Krishna Iyer in Mulgaokar's case[7] the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into disrepute or impair administration of justice. The Minister is not guilty of contempt of the Court."!
>
> Admirable. Laudable. Free speech upheld. But one cannot

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[6] P.N. Duda vs. P. Shiv Shankar AIR 1988 SC 1208 at 1213
[7] S. Mulgaokar's case AIR 1978 SC 727

help wondering whether their Lordships would have been quite as liberal if the criticism had been made by a less important personage than a Cabinet Minister!

In Re S.K. Sundaram 2001 (2) SCC 171 dated 15-12-2000; and Madras High Court Advocates Association Vs. Dr. A.S. Anand, CJI 2001 (3) SCC 19 dated 14-02-2001: where Sundaram and his Advocate challenged the age of the CJI – and persisted in the challenge even after the President had decided the matter in accordance with the Constitution. The decision in each case was correct, but somehow what irked me was that when a criminal complaint was filed against Chief Justice Anand, the Supreme Court did not let the Magistrate decide as he inevitably would have viz. to dismiss the complaint as scurrilous. The heavy hand of the Supreme Court was an unnecessary overbearing exercise in exhibiting authority – so much so that it alienated a large section of the Bar in Madras.

Very recently in another matter pertaining to an Inquiry Report made by the Chief Justice of the Bombay High Court (sitting in a Panel with two other High Court Judges) which inquired into the incidents in Karnataka and the alleged role of some of its Judges in those incidents, a petition was filed in the Supreme Court of India for disclosure of the Inquiry Report which was rejected by a Bench consisting of Justice Rajendra Babu (the senior most puisne Judge) and Justice Mathur[8]. But what is significant is what the Judges themselves said in Para 7 of the judgment:

> "7. If the petitioner can substantiate that any criminal offence has been committed by any of the Judges mentioned in the course of the petition, appropriate complaint can be lodged before a competent authority for taking action by complying

[8] Indira Jai Singh Vs. Registrar-General Supreme Court 2003 (3) SCC 494

with requirements of law. There is hardly any need for this Court to give any such direction in the matter. Therefore, we decline to entertain this petition."

The Judges rightly held that even Judges were not immune from the criminal process in respect of their conduct and it would be for the appropriate Magistrate and (there after for the authorities in Appeal and Revision from his orders) to decide whether process should or should not be issued against the particular Judge: if he chose to issue process (wrongfully) the order could be called up and quashed.

And yet the Judges have set their face against any critical assessment of their performance. When after interviewing fifty lawyers practising in the Delhi High Court one of the city's colourful magazines published their reactions under the heads (1) Manners in Court; (2) General reputation on personal integrity; (3) Quality of judgment delivered; (4) Depth in basic law; (5) Observance of punctuality in holding the Courts; and (6) Receptiveness to the arguments addressed (with marks allotted for each), a Full Bench of five Judges of the High Court of Delhi came down hard on the Editor, Publisher and Journalist: they held them to be in gross contempt, - three of the Judges administered a reprimand – the other two (in the minority) said they would impose a harsher punishment.

The case has left a distinct impression amongst a large section of people that the conduct of Judges even in Court is beyond critical appraisal. "Hands off Judges" is the message conveyed by the decision. If the conduct of Presidents, Governors, Politicians and Chief Ministers – and a vast range of officials can be commented on, written about and criticised, there is no reason why the performance of Judges in their respective Courts cannot be. This cloak of immunity ill–befits a Judiciary under a

constitutional democracy. If sovereign nations can be assessed for their performance of governance, their financial markets and their attempts at human development, rated, it is preposterous for the Higher Judiciary to claim that the conduct of those who administer Justice is beyond cavil.

In the year 2001 Maharashtra's erudite Governor P.C. Alexander (now a Member of India's Rajya Sabha) published a book with the title "India in the New Millennium". In it he describes the integrity and accountability of judges as "a sensitive subject". But he goes on to add that "in an open democracy like India's, one should feel free to discuss this problem", since it directly affects the people, who have the right to expect the Judiciary to maintain the highest standards of integrity and cleanliness. After all, he argues, the Constitution gives the Judiciary enormous power and responsibility to ensure that every institution and every citizen must strictly conform to law and to the standards of propriety: it is logical then to expect that the institution of the judiciary itself must be worthy of the full confidence of the people.

Despite the caution of the Supreme Court in a judgment in the early years of the Republic (1952) cautioning Judges never to be "over sensitive to public criticism", the decision of the Full Bench of the Delhi High Court[8A] is — out of tune with the stark reality of modern times: it must be regarded as an aberration: fortunately the case did not wind its way to the Supreme Court and find acceptance there.

The Supreme Court of India itself has not been too consistent in upholding the dignity of its own members. It will be recalled that in the first Judges Case (1982) a sitting Chief Justice (Y. V. Chandrachud) was made a party respondent in his own Court in a

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[8] 2004 Delhi Law Times, 665 (FB)

Writ Petition (challenging transfers of High Court Judges made in consultation with the Chief Justice). It was expected that the Bench which dealt with the case would uphold the dignity of his office and accept his word on affidavit; regrettably it did not: it commented adversely on the Chief Justice of India's sworn testimony.

In the days of the Roman Empire it used to be said that when the Emperor spoke, all controversy was at an end (Roma Locuta est Causa Finta est) – "Rome has spoken the cause is ended".

When the head of the judicial family, the Chief Justice of India, whosoever he be, speaks on a matter pertaining to the judiciary that, in my opinion should be the end of the matter: the cause must end.

But regrettably in the 1982 case some of the Justices of our Court did not have the judicial discipline to understand the cardinal importance of not disputing the word of the constitutional Head of the Judicial family. When Judges harbour ill-feeling amongst themselves anywhere in any Court (especially in the highest Court) there is far more danger of the administration of justice being brought into disrepute – in the mind of the public - than scurrilous attacks by ignorant and ill – informed citizens. When Judges attack Judges whether insidiously or indirectly, it affects the entire Court and the entire judicial system far more than when some disgruntled litigant or a misguided lawyer utters some scandalous statement about a Judge or a Court.

When an important personage Mr. Mohd. Yunus, Chairman of the Trade Fair Authority of India known at the time to be very close to the then Prime Minister – had criticized a judgment delivered by a Supreme Court Judge in the Jehovah Witness' case holding that the singing of the National Anthem for a particular sect

of Christians was not compulsory – Mr. Mohd. Yunus said that this Judge (Justice Chinnappa Reddy)

"has no right to be called either an Indian or a Judge."

An Association of individuals called the Conscientious Group[9] filed a petition seeking a direction that Mr. Yunus should be hauled up for contempt.

But close colleagues of Justice Chinnappa Reddy daily sitting with him suddenly found themselves powerless to even call for an explanation from Mr.Mohd. Yunus – on the technical ground that when the Attorney-General was approached by the petitioners to give his sanction he had declined, and the Solicitor-General had also demurred.

They knew that the power to issue notice suo motu for any contempt was plenary (not dependant on the fiat of the Attorney-General or Solicitor-General) – yet they chose not to invoke it even though a Sitting Judge of the Supreme Court – their own colleagues – had been described as a person not fit to be an Indian, not fit to be a Judge!

And yet in a later case (also reported) when a not-so-important litigant said that a Judge was anti-national he was hauled up for contempt of Court. When a Bench of the Supreme Court of India hearing a miscellaneous application[10] said that it was inclined to think that a particular case should go before a Bench, which had earlier passed some orders, an inconsequential member of the public Mohd. Zahir Khan (the litigant) addressed the Court in a loud tone thus:

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[9] Conscientious Grup vs. Mohammed Yunus and Ors AIR 1987 SC 1451
[10] Mohd. Zahir Khan vs. Vijai Singh & Ors. 1992 Supp (2) SCC 72

"Either he is an anti-national or the Judges are anti-nationals."

A notice was issued and the litigant was found guilty of contempt of court and made to suffer imprisonment for one month!: Prudence is a quality that must be cultivated at all levels – particularly at elevated juridical levels.

These examples are given not to deride our Judges or criticize previous decisions. It is only to illustrate very graphically – that the true nature of this aspect of contempt jurisdiction: is mercurial and unpredictable - capable of being exercised (and therefore in fact exercised) differently in different cases also by different Judges in the same Court.

And the disturbing trend persists.

IV. IN THIS BRANCH OF THE LAW – the dice is loaded.

At a conference held in Bangalore many years ago a prominent American journalist recalled how he had been "cited" in the United States for contempt for reporting a pending case in colours too fanciful and garish for the Judge. The journalist told the Federal Judge (somewhat brashly):

> "We want no accommodation from you. The First Amendment is on our side. We will fight it out".
>
> The Judge responded,
>
> "Have it your way – but remember, who is the umpire in this battleground!"

Always my friends remember this

- first, in this branch of the law the Judge is the prosecutor,
- second, you are presumed guilty till you convince him of your innocence: and

– third, it is the Judge against whom or against whose decision you spoke that will decide whether or not you should be sent to jail! The dice is loaded - the great question is: should it be so loaded? Is this the right procedure or the right approach? It is not

Definitely not-according to the Recommendations of the Second Press Commission (K.K. Mathew Commission – 1982) on Contempt of Court[11]

With regard to the law of Contempt of Court the Mathew Commission recommended two important things:

(a) That contempt cases including scandalising the Court should be triable only on prosecution at the instance of Attorney-General or Advocate-General and not by the Court scandalised.

(b) Second, they also suggested that if the defendant were to prove the truth of the allegation and also show that the publication was for public benefit he should be acquitted.

"In our view, (said the Commission) the creation of the new offence with the defence suggested above would go a long way in removing the complaint that the summary procedure adopted for trying contempt cases inhibits honest and truthful criticism of the administration of justice in public interest". (p-49).

But twenty years on, the recommendation of the Mathew Commission have never been translated into enacted law.

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[11] Justice Sisir Kumar Mukherjea, Smt. Amrita Pritam, Sarvashri P., V. Gadgil, Ishrat Ai Siddhqui, Rajendra Mathur, Girilal Jain, K.,R. Ganesh, Madan Bhatia, Ranbir Singh, and Professor H.K. Paranjape.

V. THE CONSTITUTIONAL ANGLE – Never use this jurisdiction to suppress those who speak against Courts or Judges nor merely to uphold the dignity of the Court or of its Judges

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, the law must then be justified on the ground that it is a "reasonable restriction" under Article 19(2): otherwise it would be unconstitutional.

There is a judgment of the Division Bench of the Calcutta High Court[12] delivered some years ago, which correctly appreciated this constitutional principle. It was not widely reported and deserves greater publicity than it has so far received. It is a judgment of a Bench of two Judges – S. C. Sen J. & U. C. Banerjee J (each of whom became Judges of the Supreme Court of India). The fact that the law of contempt is an exception to the fundamental right of free speech has been nowhere more felicitously described than in this judgment (delivered for the Bench by Justice Banerjee). In that case the Court was called upon to decide whether an article in the a Calcutta 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 High Court. When it came up for hearing – no apology was called for or tendered. But the Newspaper was exonerated: the contempt notice 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

[12] Smt. Archana Guha vs. Sri Rajnit Guha Neogi @ Runu Guha Neogi 1989 (1) Calcutta High Court Notes (CHN) 252

> 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 better, polite and more sober. Freedom to criticize (even wrongly and obtusely) a judgment of the Court was upheld as part of the cherished freedom of speech.

The decision of the Calcutta High Court helps to underscore another important point: the contempt jurisdiction is not to be used merely because a proceedings in a Court of law are erroneously reported: for this, resort should be had to the Registrar communicating to the Press pointing out what the correct facts are. It is only if the misreporting is persisted in that invocation of the contempt jurisdiction may perhaps be justified, not otherwise.

The judgment of the Calcutta High Court makes me recall what was said by Lord Denning in a now famous contempt case: Quinton Hogg son of a Lord Chancellor and future Lord Chancellor of England himself had written an article in very critical and caustic tone about a decision of Denning in a gaming case. The litigant Blackburn moved for contempt and this is what Lord Denning said:[13]

> "This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to

[13] (R vs. Metropolitan Police Commissioner – 1968 (2) AER 319 at 320.

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.

Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this. Mr Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost.

I hold this not to be a contempt of court, and would dismiss the application."

Lord Denning in England, like Justices Sen and Banerjee in

India put free speech first – in a conflict between this freedom and the contempt jurisdiction.

VI. Personal insults Uttered without malice - not contempt.

I also recall the visit of Lord Templeman some years ago with a British Team of Judges and Lawyers to participate in an annual feature called the Indo-British Legal Forum.

Lord Templeman was then the senior-most sitting Judge in the House of Lords in England, having since retired. One of the topics we discussed at the Forum was "Freedom of the Press including Contempt of courts". It was shortly after the controversial decision in the Spycatcher Case[14] – which attracted worldwide attention. Lord Templeman believed that Peter Wright who wrote Spycatcher, and had it published in the U.K., should be held fast to the undertaking given by him - which was not to publish confidential information obtained by him in his capacity as a member of the British Secret Service, not withstanding that the information had, with lapse of time, percolated into the public domain.

Two of his colleagues (in the House of Lords) agreed with him – which put Lord Templeman in the majority. The Press (the free Press – if you will – but certainly not a very responsible Press) held them up to ridicule; the Daily Mirror published photographs of all three Judges (Templeman included) and below the photograph was written in capital letters "OLD FOOLS".

I pointedly asked him why no contempt proceedings were initiated against the particular newspaper (the Daily Mirror). And what has endeared him to me was his answer. He smiled, and without a trace of bitterness, said that Judges in England did not

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[14] Att-Gen vs. Guardian Newspaper 1987 (3) AER 316 (HL)

take notice of personal insults, uttered without malice. After all, he said, he was old, and though he believed he wasn't a fool, someone else who sincerely thought he was, was entitled to his opinion.

And then his eyes lighted up. "But if they (he meant the Editor and Publisher) – had said we were dishonest or not true to our conscience, I would have promptly hauled them up".

I said to myself: here is a Daniel come to judgment: a judge who was so conscious of his enormous power that he knew when not to use it: a self-restraining quality which (I believe) greatly enhances the prestige of all judicial power. I respectfully commend this attitude to all judges, present and future – both in the High Courts and in the Highest Court.

And to you – future Judges of the High Court and hopefully of the Supreme Court.

Remember compassion.

VII. IN THIS BRANCH OF THE LAW OF CONTEMPT - TRUTH MUST BE A DEFENCE

Then there is another disturbing aspect of this branch of the law. Unlike defamation truth, is not considered to be a defence – Does the law of contempt then impose reasonable restrictions on freedom of speech – if you are not permitted to speak and establish the truth? India's noted constitutional historian H.M. Seervai had no doubt on the point. This is what he had to say in the Fourth Edition of his famous book on the Constitution of India -

> "a law relating to defamation, which provided that truth, spoken or written, for the public good shall not be a defence in a libel action would impose restrictions which would be unreasonable." .....the position would be no different if a law were to enact that truth should not be a defence to a

charge of contempt of court, if it consists in scandalizing a judge".

Seervai then goes on:

"In a criminal prosecution for libel, the prosecution would fail if it were shown that specific charges were true and it was for the public good that they should be made. But is there one law for a corrupt Minister and another for a corrupt Judge?"

The author then boldly says that no Court in India would say that there was one law for a corrupt Minister and another for a corrupt Judge, and says quite confidently that no Court would by any process of reasoning punish for contempt the writer of an article who, in sober language sets out specific acts of bribery and is able to successfully prove them.

For this view the author relies on a judgment of a Constitution Bench of the Supreme Court itself – in B. Ramakrishna Reddy vs. State of Madras 1952 SCR 425 where Justice B.K. Mukherjea said:

"The article in question is a scurrilous attack on the integrity and honesty of a judicial office. Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false, they cannot but undermine the confidence of the public in the administration of justice and bring the judiciary into disrepute."

Unfortunately these observations were read in a later case

(by a bench of 3 Judges) in Perspective Publications Pvt. Ltd., & anr. vs. State of Maharashtra (1969)[15] as not laying down affirmatively that truth and good faith could be set up as a defence in contempt proceedings; and ever since then the law in the Perspective Publications Case is the law that is followed. Wrongly, I would submit.

Particularly since years after the Perspective Publications case another Bench of three Hon'ble Justices of the Supreme Court (in August 1976) set aside a Full Bench decision of the High Court of Punjab, which held that a prima facie case for contempt was made out. In that case 15 Members of a Bar Association made a complaint about observations of a High Court Judge made during an inspection at the District Court Bar – the Judge had said nasty things about politicians and the lawyers felt that the Judge was wrong to talk politics and they said so in the letter. The letter was addressed to the Chief Justice but it was placed before for the consideration of a Bench of the Court and on perusal of the contents the Bench that a prima facie case of criminal contempt was made out. Mark this - None of the allegations in the letter against the Judge were disputed or challenged.[16]

Yet the High Court proceeded on the basis that even though the letters written correctly recorded what had happened and commented adversely on the Judge's conduct the authors were guilty of contempt. The Supreme Court overruled and by so overruling emphasized that allegations when true were not capable of sustaining a charge of contempt.

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[15] 1969 2 SCR 779 -

[16] Ram Pratap vs. Daya Nand – AIR 1977 S.C. 809

A few years ago in Dr. Subramanian Swamy vs. Rama Krishna Hedge [2000 (10) SCC 331] three Judges Bench has referred the Perspective Publications (P) Ltd., vs. State of Maharashtra – 1969 (2) SCR 779 for reconsideration to a Constitution Bench on this very point.

A recent endorsement of this view is the decision of the Privy Council (March 1999[17] in which Lord Slynn (in an appeal from the Republic of Mauritius), whilst upholding the constitutionality of the offence of scandalising the Court, under the Constitution of Mauritius, emphasised two things:

First, that the scope of the offence was a narrow one (mark the word "narrow") and

Second, that exposure and criticism of judicial misconduct plainly in the public interest would not necessarily constitute contempt: that is to say truth and good faith would trump the Contempt Law, which is as it should be.

The present Chief Justice of India sitting in Court has said as much-albeit orally. You remember the recent "scandal" created by reports in the press (in Times of India 29-03-2003 certain Judges of a certain High Court had been alleged to be guilty of wrong doing outside Court hours and outside Court premises and since the legal wrong doing had to attract public attention it was highlighted by the media with catchy titles – it was what is now called "sexed – up" It became in the public eye "a sex scandal": the former Chief Justice of India informally constituted a committee of High Court Judges chaired by the Chief Justice of the Mumbai High Court. The Report was not made public but some of its contents were disclosed by the present Chief Justice of India himself in open Court during an appeal from an order of a full Bench of the Karntaka High Court holding certain publications to be guilty of contempt. What the Chief Justice of India said was actually reported in The Times of India (one of the alleged contemnors).

"Our purpose is not to punish anybody, but are these people

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[17] Gilbert Ahnee vs. Director of Public Prosecutor 1999 (2) W.L.R. 1305

ready to come out with the truth even now?" He then went on to say: "I will reward the media if they come out with the truth. but by reporting without any basis, the media, instead of helping the judiciary, has damaged it."

Even the Chief Justice of India has now accepted (in my opinion rightly) that truth would be a defence – because truth can never scandalise, it can educate and help in taking steps for improvement; it can never "scandalise". The favourite quote of a distinguished former Chief Justice of India was: "Sunlight is the best disinfectant; elective light the best policeman."

Our Constitution makes freedom of speech and expression a fundamental right, and the exception to it is the law of contempt – not any law of contempt – but reasonable restrictions in that law. The Contempt of Courts Act does not say that truth cannot be a defence and will not be a defence and it is for the Courts to interpret the meaning of the word "scandalise."

If it is part of the law as understood that a person commits contempt if he truthfully publishes as a fact that a particular Judge (God forbid and hypothetically speaking) has accepted a bribe for giving a judgment in a party's favour - then such a law in my view would be void as imposing unreasonable restrictions on the freedom of speech and expression: the Judge who took the bribe would be false to his oath, to do justice without fear or favour; and it would be absurd to say that although Article 124(4) provides for the removal of a judge for proved misbehaviour, no one can offer proof of such misbehaviour except on pain of being sent to jail for Contempt of Court.

This is a glaring defect in our judge-made law (in reported decisions) that needs to be remedied - hopefully by the Judges themselves; if not by law made by Parliament.

It is interesting to notice that when the Ontario Court of Appeal some years ago considered the offence of scandalizing the Court in the light of the Canadian Charter of Human Rights, the majority in the Court concluded that scandalizing the Court was no longer compatible with the fundamental freedom of speech and expression.[18]

VIII. WHAT OF COMPLAINTS AGAINST ERRING JUDGES?: RESORT TO IN-HOUSE PROCEDURE

But we have still to live with the regrettable decision of a Bench of two Judges of the Supreme Court in Ravichandra Iyer vs. Bhattacharji 1995 5 SCC at page 478 (popularly known as Bhattacharji's case). Regrettable because the Bench in that case said that even Bar Associations cannot take up matters and pass resolutions with regard to allegations of corruption against sitting judges. They must take up the matter first with the Chief Justice and await his response for a "reasonable period". And what if the Chief Justice does not respond – what after that? Their Lordships gave no answer.

It is Bhattacharji's case which quotes Harry Edwards, Chief Justice of the US Court of Appeals of the District of Columbia who was at one time Chairman of what is known as the Judicial Council in the United States (a Council for disciplining federal Judges in the US – Judges who are appointed for life).

I had the privilege of visiting Justice Edwards when a team of Judges and Lawyers (Indo-US Legal Forum) toured the United States some years ago.

He is a charming person, and he told me how the Judicial Council in the US dealt with all manner of charges against all manner of Judges (including his own colleagues - federal Judges) – when

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[18] R. Vs.Kopyto 1987 (47) DLR 4th Series.

litigants made complaints they were investigated; he handed me a decision of his in respect of a colleague (whom I saw sitting on the Bench with him) where a litigant had made certain allegations in a particular case; the allegations were investigated and dealt with in a speaking order in a judgment that was printed and circulated.

There was no hard feeling amongst the Judges - the in-house procedure in the United States is both open and transparent.

In Bhattacharji's case our Courts quoted from an article by Harry Edwards in which he had said, and I quote:

> "Ideal of judicial independence is not compromised when judges are monitored and regulated by their own peers. This limited system of judicial self-regulation present no constitutional dilemma as long as the removal power remains with Congress. I argue that the judiciary alone should monitor this bad behaviour through a system of self-regulation."

We have so far lacked a system of a "transparent judicial self-regulation" and this must now be adopted.

I was particularly happy to hear a former Chief Justice of India say so, on the occasion of Law Day – a couple of years ago.

As you know in Delhi we celebrate every year the 26th November the day the Constituent Assembly adopted the Constitution of India as Law Day. CJI Bharucha said:

> "Where the subordinate judiciary is concerned, the High Court exercises adequate disciplinary jurisdiction and it is very necessary that errant subordinate Judges should be disciplined, after adequate inquiry. This would send out a message not only to other judges but to the public at large that corruption within the judiciary is not tolerated. So far as

> the higher judiciary is concerned, impeachment is the only legal remedy and it is available only in the cases of what are called "high crimes and misdemeanours". In any case, a recent experience of the impeachment process showed how flawed it could be. The only alternative is internal, namely, the in-house procedure, and I would like to see it enforced whenever the conditions to do so exist."[19]

Chief Justice Bharucha knew the importance of an in-house procedure". He was a Senior Judge in the Bombay High Court, where it was first informally initiated – and successfully tried.

In June 1990 two Bar Associations in the High Court of Bombay resolved that none of its members would appear before four named Judges of the High Court against whom there had been repeated allegations of nepotism and corruption by responsible members of the Bar, and which had gone unheeded by the Chief Justice of Bombay, and also by the then Chief Justice of India. The resentment had been building up and simmering among all sections of the Bar not just for a few months, but over some period of time. In fact, when I was invited to speak at the 125th anniversary of the Bombay High Court I had mentioned in my address about the problem of the two Great C's (Corruption and Caste) – creeping into the higher echelons of the Judiciary in the State (i.e. State of Maharashtra).

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[19] The issue of Judicial Accountability had been discussed at the Conference of Chief Justices held in 1990 and on the basis of the broad consensus emerging out of the deliberations the then Chief Justice of India had summed up the position in the following words:
"The Chief Justices of the High Court has the competence to receive complaints against the conduct of the Judges of his court and when he receives any he would look into it for finding out if it deserves to be closely looked into. Where he is satisfied that the matter requires to be examined, he shall have facts ascertained in such manner as he considers appropriate keeping the nature of allegations in view and if he is of the opinion that the matter is such that it should be reported to the Chief Justice of India, he shall do so.
The Chief Justice of India shall act in a similar manner in regard to complaints relating to conduct of Judges of the Supreme Court and in regard to conduct of Chief Justices of the High Courts.

Chief Justice Dharmadhikari who presided, acknowledged that the High Court was faced with this very grave problem, and was glad I had openly raised it, but alas this able judge could do nothing about it, as he was then only acting as Chief Justice. His successor, Justice Chittatosh Mookerjee who hailed from Calcutta and who (then) knew nothing of the problems in Bombay was just finding his feet – he was a great judge: (judging was in his veins: - his father Justice Ramaprasad Mookerjee and his grandfather Sir Asutosh Mookerjee before him had presided over the High Court of Calcutta).

So, when two representative Associations of the Bombay Bar, exasperated at the lack of initiative from the Judges and from the then CJI, took the unprecedented step of virtually declaring guilty four named sitting judges – yes, without even hearing them: on the principle that the hand that holds the scales of justice must not be "seen by responsible sections of the Bar to manipulate them".

Chief Justice Chittatosh Mookerjee did the right thing. He carefully read the representations, made his own inquiries, and then refused to assign any work to any of the three judges named in the Bar resolutions (the fourth having resigned earlier): not in deference to the near unanimous wishes of the Bar, but because he himself had gone into the allegations and found them not lacking in substance. On a later visit to Bombay a former Chief Justice of India reportedly upbraided the Bar Associations for having taken this hasty step; many judges of the Supreme Court had then felt likewise. But my sympathies were and are with the Bombay Bar – not because I believe in the boycott of Courts by lawyers (I have

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On the basis of the facts ascertained, the Chief Justice of the High Court or the Supreme Court, as the case many be shall take such appropriate action as may be considered proper, keeping the interests of the judiciary as the paramount consideration."
My comment on this is that there has to be more transparency, more accountability – something to show that the in-house procedure is in fact in operation and is being used.

for long openly protested against lawyer's strikes) but because I believe the Bar was left with no choice: the Higher Judiciary though repeatedly given the opportunity, did not, only because it would not, take care of its own domestic problems; if the Bombay Bar had not acted when it did, the entire High Court (I believe) would have soon been swamped with ill-founded rumours by disgruntled litigants.

IX. THE LINE BETWEEN DESTRUCTIVE ATTACKS AND TRENCHANT CRITICISM IS A THIN ONE: – the experience in other jurisdictions

As I have already mentioned, there is a passage in a speech of the great Lord Atkin – which is purple prose. It has been forgotten by most modern judges (at least in the developing world) even after sometimes quoting from it:

> "The path of criticism is a public way: the wrongheaded are permitted to err therein..... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".[20]

I commend to our Judges the Atkin approach - "balancing" the two public interests is not difficult with this approach; absent the Atkin approach the dice gets loaded against "free speech"!

The line between "destructive attacks" and trenchant criticism is always a thin one – not only in India but in other countries as well. A case in the European Court of Human Rights illustrates the difficulty of making choices. A few years ago the European Court of Human Rights – had to decide the case of Prager and Obershilick vs. Austria.[21] The Petitioners before the European Court were: Prager a Journalist living in Vienna, and Obershilick, Publisher

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[20] Andre Paul v. Attorney-General (1936), A.C. 322 = AIR 1936 P.C. 141.

of a periodical known as "Forum". An article by Prager was published in the "Forum" entitled "DANGER"! HARSH JUDGES!". It contained a diatribe against Judges in Austria's Criminal Courts. Prager said they exercised absolute power, exploited the weaknesses or peculiarities in the accused, acquitted only as a last resort, and treated lawyers for the accused "like miscreants".

He described Judges as "arrogant bullies", who maintained their independence as Judges only to inflate inordinately their own self-importance which enabled them to apply the law in all its cruelty and irrationality, without scruple and without anyone being able to oppose them. And so it went on.

On April 26, 1995, the European Court of Human Rights handed down its Opinion. It was a majority opinion – a narrow one 5:4. The majority said:

> "Of the accusations levelled by those allegations, some were extremely serious. It is therefore, hardly surprising that their author should be expected to explain himself. By maintaining that the Viennese Judges "treat every accused at the outset as if he had already been convicted", or in attributing to Judge J a "bullying" and "contemptuous" attitude in the performance of his duties, the applicant had, by implication, accused the persons concerned of having, as Judges, broken the law or, at very least, of having breached their professional obligations. He had thus not only damaged their reputation, but also undermined public confidence in the integrity of the judiciary as a whole".

There were strong dissents however equally forcefully expressed. Judge Pettiti's views were expressive of the opinion of the minority of four Justices:

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[21] 1996 (21) E.H.R.R. 1

> "Clearly judges must be protected from defamation, but if they wish to institute proceedings it is preferable for them to opt for the civil avenue rather than criminal proceedings. States that allow judicial proceedings to be televised accept by implication that the judge's conduct is exposed to the critical view of the public. The best way of ensuring that objective information is imparted to the public for its education is to secure fuller and franker co-operation between the judicial authorities and the press".

The case from Austria shows that there is a sharp divergence of opinion even amongst eminent Judges as to which of the two great concepts are more necessary to be maintained and upheld in a democratic society: Free Expression or Independent Judiciary. And Judge Pettiti's recommendation of a "fuller and franker" cooperation between the judicial authorities and the press" comes not a day too late.

The concern of the journalist (or media-person) is not just that Courts can (and do) issue restraining orders, but that if a gag order is disobeyed, the same court will issue a contempt citation, which is enforced even if the restraining order is eventually reversed by a higher Court! Most journalists (and media-persons) genuinely believe in the law of the land, but do not believe that the judge – as opposed to the editor – is the one to strike a just balance between the concepts of "Freedom of Expression" and "Fair Trial".

All this is further compounded by judicial distrust of the press. In the play **"Night and Day"**, Tom Stoppard has one of his characters saying: "I'm with you on a free press. It's the newspapers I can't stand!" Some Judges share this view but will not publicly admit it.

CONCLUSION

The current state of the law is certainly not ideal: till altered we must cope with it. I take the liberty of offering some guidelines to Bar and Bench.

(A) To Lawyers:

1) Argue your cases competently and vigorously and be as critical of judgments of Courts as you wish; but do remember never to use offensive and exaggerated language: not only is it bad form but it rebounds on you.

2) If on rare occasions you do have to criticise Courts, Judges and the administration of justice tread softly – because you tread on the feet of Judges: some of whom are more easily hurt than others; We Lawyers must never forget that we are also part of the administration of justice and derogatory irresponsible comments reflect on lawyers themselves.

3) Exercise your right of free speech and make your point – but pause in your choice of words: so that people who hear or read do not get the impression that you are attributing motives or malice to the Judge or to the Court;

(B) And to Judges:

I would respectfully commend to them the Atkin approach and the Templeman approach: Courts are not fragile flowers; they do not wilt in the heat of argument nor of criticism, howsoever trenchant and caustic. I would suggest: that the contempt power not be used to discipline either the lawyer or the press: this creates a needless conflict which (with tact) could be avoided. As for the litigant a "benign neglect" is recommended.

Treat contempt with "benign neglect": or in other words treat contempt, with contempt!

".... An American Judge had once said about the US Supreme Court – "the important thing we do there is not doing": useful words to remember in the area of contempt jurisdiction.

(C) Generally:

The law regarding scandalising the Court can never be codified because the circumstances in which the Courts and the administration of justice are scandalised are too diverse for exact definition: but I would recommend three things:

(i) First: –

that truth and good faith must be reinstated as valid defences in the power to punish for contempt (either by judicial diktat or by law): because they are vital for the future administration of justice. The motto should be: let nothing defile the temple of justice. not the errant litigant, not the errant lawyer nor even the errant judge.

(ii) Second:-

In view of the vagueness of the contours of contempt jurisdiction, the power to punish for scandalising the Court or the administration of justice must never be invoked by the Judge who is "scandalised" – he is the actor and must of necessity recuse himself. Also the power must never be exercised by a single Judge or even a Bench of two judges: it must always be exercised by a Bench of at least five Judges both in the High Courts and in the Supreme Court: because when the Judges speak in a contempt case they speak

for the Court and it is important that what they say is representative of the thinking in the Court as a whole.

(iii) Third:-

Power to commit for contempt should never be conferred on Commissions or Tribunals even if they are manned by retired Judges of the highest Court – Judges when they retire love to have the full panoply of power which they enjoyed as sitting Judges: the Contempt of Court power is too serious and fraught with too many grave consequences to be left to any ad hoc institutions, howsoever important - except established High Courts and the Supreme Court of India. Do remember that the exception to free speech and expression is "laws relating to Contempt of Courts: mark you contempt of court, not contempt of tribunals or other bodies which are not established courts.

And, Lastly in this branch of the law, the watchword is to "keep your cool": Contempt law to be justly administered requires robust commonsense and an abundant sense of humour: the ability to laugh at yourself: which prompts me to conclude with a story, reputedly a true story:

It concerns Chief Justice Tate of the U.S. Supreme Court who once went to his former law school and jokingly told the Dean (formerly his own law teacher):

"Well, Dean, I suppose you still teach your students that all Judges are fools;"

To which the Dean very politely (but pointedly) responded:

"No, No, Chief Justice – we let them find that out for themselves!"

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