CHAPTER VI

REFORMING THE LAW OF CONTEMPT OF COURT

THERE ARE many things that are wrong with the law of contempt of court. It is an arbitrary power. It involves the use of summary process rather than the ordinary procedure. A person can be found guilty of contempt even if he acted in good faith and did not intend to commit contempt. Truth cannot be pleaded as defence. Even the slightest criticism of courts or comment on pending proceedings can technically be called contempt. It is designed to virtually eliminate all criticism of the judiciary. It is supposed to guard litigants before the court, judges presiding over courts, the judicial process, courts as institutions and the exclusive right of these institutions to deal with certain kinds of matters. In actual fact this jurisdiction has turned out to be as much of an embarrassment as it purports to be a boon.

It is not surprising that attempts to reform the law of contempt have proceeded on all kinds of bases. Some have concentrated on curing one aspect of the law of contempt while others have concentrated on another aspect. The judges themselves have also tried to make adjustments to accommodate all kinds of demands on this jurisdiction both in respect of the law and through their sentencing policy.

Attempts to reform the law of contempt were made in England as early as 1810.[1] A comprehensive Bill—Lord Selbourne's Bill—was introduced in Parliament in 1883 and it sought to define contempt, limit the punitive powers of the courts—as was subsequently done in India in the Contempt of Courts Act, 1926—and provide for an appeal.[2] Even though the House

1. (1810) 16 *Hansard Debates* (First Series) 484.
2. (1883) 276 *Hansard* (Third Series) 1707.

of Commons passed strong resolutions about the law of contempt,[3] the movement for reform did not really get off the ground. It was not until the fifties in this century that more considered attention was paid to reforming the law of contempt.

One attitude to reform has been to leave matters exactly where they are. This was the view taken by the Press Commission of India in 1954 :

> The Indian press as a whole has been anxious to uphold the dignity of Courts and the offences committed more out of ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. [I]nstances where it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised are extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts.[4]

One can find many objections to this, 'things-are-not-so-bad' attitude. To begin with, it was beyond question that the principles on which the law was based needed to be re-examined. Further, the Press Commission seemed to take an extremely sanguine picture of the actual working of the law of contempt. The concrete evidence before the commission consisted of the court cases themselves. On a reading of these cases it seems strange to argue either that the press was restrained or that the contempt jurisdiction was not being used to further private quarrels.[5] Apart from the diverse evidence provided by the court cases, it is really difficult to say how much note is taken of the law of contempt and the extent to which the law of contempt has interfered in activities of newspapers. The 1954 Report may well be right in asserting that the Indian press has not been adventurous in investigating, reporting or commenting on the activities of courts. The cases suggested that it has concentrated on gossip and invective. To that extent the Indian press has not been seriously hampered by the law of contempt. What one does not dare to do does not pose a threat. Research needs to be done on the extent to which the national, regional and local press takes note of the law of contempt.[6] The court cases are

3. (1906) 155 *Hansard* (Fourth Series) 814; (1908) 185 *Hansard* (Fourth Series) 1424.
4. *Report of the Press Commission of India* (1954).
5. Note the analysis and citation of case law in chapter II, *supra*.
6. No research has been done on how the working newspaper actually respons to the requirements of the law of the press. An examination of the manner in which the press reports on court matters or the actual note that journalists take of the law of contempt when writing and publishing of news stories might shed light on the working pathology of the press in this area. Two examples of possible research projects come to mind. The first would be to set up a field study of how a newspaper office actually monitors news items about courts.

marginal cases. They represent extreme situations. They may not, in themselves, constitute a representative sample. Even so, the range of cases is such that it does not really support the otherwise comforting view that there was no newspaper abuse or court arbitrariness.

In England the report of *Justice*, in 1959, accepted that there were many things wrong with the law of contempt.[7] As far as reform was concerned, it concentrated on procedural matters and the rigorous application of strict liability aspects of contempt on publishers and distributors who had no reason to believe that proceedings were pending or imminent. The procedural changes suggested included, *inter alia*, a right to appeal, the consent of the Attorney-General in order to initiate proceedings, removing certain proceedings in chambers from the purview of the law of contempt except where there was a breach of an order of publication, the hearing of applications for attachment or committal in public and after permitting oral evidence, limiting contempt in the face of the court and civil contempt to wilful contempt and the inclusion of the power to certify contempt in the face of the court for trial by another judge of the High Court. The Report accepted that the power of contempt ought to be retained as a residuary power, and that there should be no conviction for contempt unless interference in the administration of justice was substantial and unjustifiable. Some of these recommendations were accepted and the Administration of Justice Act, 1960 sought to protect those who did

The second would be to study a representative sample of newspaper reports on the courts. I am grateful to Miss Shireen Mehdi of the Press Council for these suggestions. She is herself doing extensive research for the Press Council on how newspapers handle certain kinds of news.

The general research on contempt of court in India has tended to be a discussion of the issues or comments on leading cases *e.g.* V. S. Mani, "Contempt of Court and Democratic Criticism : The Khadilkar Contempt case", (1970) *C.L.T.* 3-6; V.G. Rama chandran, Comment (1971) *Lawyer* 31-6; V.K.S. Nair, On Judgments (1971) *K.L.T.* 12-4; H.M. Seervai, "The Supreme Court and Contempt of Court", (1969) 71 *Bom. L.R. Jnl.* 5; N.G. Shelat, "Contempt of Court", (1972) *Gujarat L.R. Jnl.* i-xii; V. G. Ramachandran, "Contempt Jurisdiction under the 1971 Act : A Criticial Appraisal" (1975) 9 *J.C.P.S.* 1-27; N.C. Banerjee, "Whether it will amount to Contempt if an Accused is Granted a Pardon by the Executive during the Pendency of Judicial Proceedings" (1975) 12 *L.Q.* 94; S.J. Sorabjee, "The Law of Contempt: some anomalies", (1978) 18 *Ind. Aff.* 17-25: R. Dhavan and B. Singh, "Publish and be Damned : The Contempt Power and the Press at the Bar of the Supreme Court", (1979) 21 *J.I.L.I.* 1-30. The Calcutta Weekly Notes has kept up a constant stream of editorial comments on contempt of court—see "Marx and Engels on Contempt of Court", (1970-1) 74 *C.W.N.* 141-3; "Thalidomide Children and Co ntempt of Court", (1973-4) 77 *C.W.N.* 133-5: (1974-5) 78 *C.W.N.* 21-2; 25-6: "Contempt of Court and the Board of Revenue", (1974-5) 78 *C.W.N.* 29-30; "Contempt of Court and Pending Proceedings", (1974-5) 78 *C.W.N.* 137-9; "Contempt of Court of Discourtesy", (1977-8) 81 *C.W.N.* 48-50; "Freedom of the Press and Contempt of Court" (1978-9) 82 *C.W.N.* 151-3; "Contempt of Court and Laughing Gas" (1974-5) 79 *C.W.N.* 123-4.

7. 'Justice" *Report on Contempt of Court* (1959). A summary of the recommendations of this report have been added as one of the Appendices.

not know that proceedings were imminent or pending, removed certain kinds of chamber proceedings from the contempt jurisdiction and provided a right of appeal.[8]

The basic format of the Sanyal Committee[9] was the same as that of the *Justice* Report. The Sanyal Committee did, however, proceed on the assumption that no major reforms in the law of contempt could take place because the constitutionally guaranteed power of contempt of the High Courts and Supreme Court could not be taken away by legislation.[10] A constitutional amendment was necessary. We have already recounted how the Bhargava Committee took a slightly wider view of the changes that could be made and how the Law Minister was partly successful in convincing the *Rajya Sabha* that no radical changes could be made.[11]

The Contempt of Courts Act, 1971 in India sought to iron out some of the problems of the law of contempt. It incorporated the English statutory changes and went slightly further in some respects. The significant changes made in the Contempt of Courts Act, 1971 have been recounted earlier.[12]

Meanwhile, some attempts were made in England to examine the contempt jurisdiction in relation to tribunals and inquiries. The Salmon Commission wanted to ensure that free comment was allowed on the subject of an inquiry, that some restrictions could be imposed from the date of the appointment of the tribunal in that nothing should be "said or done in relation to evidence relevant to the subject of the Inquiry which is intended or obviously likely to alter, destroy or withold such evidence from the Tribunal."[13] As it happened, the Tory Government did not feel that any change was really necessary.[14]

So far, most of the recommendations had concentrated on difficult aspects of the law of contempt—all of which did not affect the press directly. Some attempt to look at the problems of the press were made in England when a group of Members of Parliament in England put forward the Freedom of Publication (Protection) Bill, 1969.[15] There was an attempt to define contempt to the extent to which it was stated that :

8. Sections 11-13, Administration of Justice Report, 1960.
9. 'Sanyal' Committee, *Report of the Committee on Contempt of Court* (1963).
10. *Id.* at 13-18.
11. This is discussed in chapter III, *supra*.
12. This is discussed in chapter V, *supra*.
13. Royal Commission on the Working of Tribunals under the Tribunals and Inquiries Act, 1921 ; (1966) *Cmnd.* 3121, see further Report of the Inter-Departmental Committee on Contempt of Court (1969) *Cmnd.* 4078.
14. White Paper, *Contempt of Court as it Affects Tribunals and Inquiries* (1973) *Cmnd.* 5313.
15. Note the discussion in the House of Commons (1969) 776 H.C. Deb, 1709ff and the discussion by M. Carlisle, "Publish and be Damned", (1969) *Crim. L.R.* 124-9.

> [C]ontempt of court shall not be an offence in respect of a publication of any matter in a newspaper or a broadcast save where the effect of such publication is likely to influence the fair conduct of a trial or judicial proceedings.

In order to protect the press, it was suggested that consent of the Attorney-General should be necessary before proceedings are begun against the press. The Bill also attributed certain mythical consequences to the 'gagging writ' and tried to remove these consequences. It left open the possibility of scurrilous attacks on individuals. At the same time it was felt that "it is difficult to resist the conclusion that the contempt aspects of this Bill really do need thinking through a little more carefully."[16] In any event, the Bill was abandoned and the issues raised by it made part of the concerns of the Phillimore Committee on contempt of court.

Reporting in 1974, the Phillimore Committee looked at the whole law of contempt and not just at those aspects of the law which concerned the press.[17] As far as the press was concerned, the first task was to consider whether the strict liability aspects of the law ought to be retained.[18] The salutary provision in the Administration of Justice Act, 1960, protecting the innocent publisher and distributor was to be retained and a fixed time was recommended for when proceedings would be deemed to be pending. But the concept of strict liability was retained as long as proceedings were pending.[19] As far as pending proceedings were concerned it was also recommended that in Scotland it should continue to be a contempt of court to publish the content of written pleadings before the record is closed.[20] Overall, it was readily accepted that contempt should give rise to strict liability only if there is a risk that the course of justice will be seriously impeded.[21]

While the Phillimore Committee permitted the press to make fair and accurate reports of hearings,[22] it was in respect of comments that could be made that there were problems. Litigants could be persuaded about the justice of their cause as long as unlawful or illegal threats were not made. The press were allowed as individuals to plead that a publication was part

16. C.J. Miller, "The Freedom of Publication (Protection) Bill", (1969) *Crim. L.R.* 177 at 184.
17. Phillimore Committee, *Report of the Committee on Contempt of Court* (1974) *Cmnd.* 5794. A summary of recommendations and conclusions have been added as one of the appendices.
18. *Id.* at prs. 73-79, pp. 33-35.
19. *Id.* at prs. 121-128, pp. 52-54 on when the proceeding is deemed to be pending. *Cf.* Robin Day's separate report at 98-100 suggesting that a *sub judice* list should be drawn up.
20. *Id.* at pr. 130.
21. *Id.* at pr. 74, pp. 33-4.
22. *Id.* at pr. 141, pp. 59-60.

of a legitimate discussion[23] but it was made clear that a general defence that a publication was in the public interest should not be a part of the law of contempt.[24] This was done on the basis that the public interest in investigation and information cannot outweigh the interest of the accused in a trial and for the second reason that defining the public interest would make the law vague.[25] The second argument is not wholly convincing. The plea of public interest has been introduced in the law of libel. It is possible to quantify what it means in this context. The first argument that two aspects of the public interest should not be balanced is just an intuitive policy assumption. It should be noted that there are far more persuasive reasons—some of which have been discussed earlier—as to why the press should not be made the repository of the public interest.

All in all, the Phillimore Committee had not gone much further than the Indian Contempt of Courts Act, 1971. It had tidied up some untidy aspects of this branch of the law. It allowed some freer discussion and recommended that the law would apply only in serious cases. It stated some of the existing court practice. It did not devise a radically new solution.

The Working Paper of the Canadian Law Commission took a more radical view.[26] In an otherwise Herculean move to clean the Augean stables, the most objectionable principles underlying the law of contempt were virtually reformed out of existence. It was laid down that the ordinary criminal procedure would be used in all contempt cases except in cases of misbehaving in court and in exceptional cases where a use of the new summary procedure would be more compatible with basic rights when the interests of justice so require.[27] The strict liability aspect of the law of contempt was also removed and contempts other than those relating to misbehaving in court were made crimes requiring some form of intent.[28] Apart from recommending that the contempt of scandalizing the court should be made an offence it was also suggested that the specific defence of truth may also be pleaded provided it is shown to be in the public interest.[29] The recommendations do not totally work out certain aspects of the contempts in relation to comment during pending proceedings. This would presumably be left to the judges.[30] In effect, the Canadian proposals are quite like the law in America. They trust the press. But unlike America, the inclusion of certain offences to protect the judiciary in the ordinary law of the land serves as a second line of defence.

23. *Id.* at pr. 142, pp. 60-1.
24. *Id.* at pr. 145, p. 61.
25. *Id.* at pr. 143-5, pp. 61-2.
26. **Law Reform Commission,** ***Criminal Law Offences: Contempt of Court—Offences against the Administration of Justice*** **(1977) Working Paper No. 40.**
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*

Apart from these statutory attempts at reform, the *Sunday Times* case[31] represents a renewed effort on the part of judiciary to try and evolve new strategies to accommodate the public interest in allowing individuals to comment on and influence the work of the courts. But the *Sunday Times* case creates as many problems at it solves. It allows a great deal of comment as far as litigants are concerned but virtually silences comment in respect of the issues before the court.

All these attempts at reform cannot just be considered in analytic isolation. They arise out of an explicitly stated and otherwise implicit understanding of each of the reformers in respect of what they believe to be the actual needs of the judiciary in the context of the reliability of the press in that society. It is for this reason that while the ideas put forward in many of these proposals should be considered by courts and policy makers in India, they do not necessarily admit of a simple and easy transplant from one jurisdiction and society into another.

In this essay we have assumed that law is a constantly transforming social reality. Statutes and case law begin their social life as no more than symbolic declarations. Some statutes retain their symbolic character all through their uneventful lives. But it is society, and not some mythical attribute of the law, EQ which determines the *real* existence of the law. The answers to many questions about the law do not lie in the declaratory statements which are said to be a part of the law, but in the social practice that accepts, rejects, manipulates, modifies, ignores or destroys the law.

It is part of the claims and rhetoric of law that the 'law' 'legal values' and 'legal institutions' act as a check to the exercise of social, political and economic 'power' in a society. The validity of this rhetoric must be rejected to the extent that those that possess power in a society have been able to devise various legitimate devices to use 'law', 'legal values' and 'legal institutions' in such a way that these are not too serious an impediment to the exercise of power.[32]

The story of the 'contempt' jurisdiction in India supports this view. Contempt of Court was created to safeguard and extend the power of the courts. In the very first few cases,[33] it became clear that a discretion was found whereby differential punishments were meted out to Englishmen

31. *Attorney General* v. *Times Newspapers Ltd.*, (1973) 3 All E.R. 54.
32. For a theoretical exploration of this in relation to litigation see, M. Galanter, "Why the 'Haves' Come Out Ahead : Speculations on the Limits of Legal Change", (1975) 9 *Law and Society Review* 95.
33. *In the Matter of William Taylor*, (1868—but reported years later in A.I.R. 1918 Cal. 713) ; *In the Matter of Banks and Fenwick*, (1868—but reported years later in A.I.R. 1918 Cal. 752); *Surendra Nath Banerjee* v. *The Chief Justices and Judges of the High Court at Fort William*, (1883) 10 Cal. 109. In *Surendra Nath Banerjee's* case, Justice Mitter's dissenting view was exclusively devoted to the sentencing disparity between the earlier cases and this one.

and Indians. It is with the advent of the national movement that the potentialities of the contempt jurisdiction as a weapon of control and oppression were really discovered. It is clear from the debates on the Contempt of Courts Act, 1926 that the confirmation and creation of this jurisdiction was a sequel to the law of sedition.[34] Far from trying to reconcile the right to free expression against the legitimate needs of judicial institutions, the Act sought to empower the courts to punish any kind of critical or unfavourable comment made about them. The courts made full use of this power while constantly promising to be lenient and forbearing.

Those that possessed social power and viability were not to be deterred by this grant of power. Some people simply ignored this jurisdiction and carried on their market place quarrels in court.[35] Others evolved the deviously clever, but otherwise unexceptionally legitimate technique of making the contempt jurisdiction the theatre of their private, sectional or other quarrels. A contempt case heightened the tension and gave greater publicity to the allegations. Since the Contempt of Courts Act. 1926 had imposed a tariff on the punishment and courts were always willing to accept apologies, the contempt jurisdiction was used to help rather than hinder those who wanted to make adverse comments about the court. This is the actual social reality precipitated by the law of contempt of court.

One of the most convincing examples of the social transformation of a statute can be found in respect of the workings of the Contempt of Courts Act, 1971.[36] Even if we take the limited sample of court cases as indicative of some kind of trend, it is clear that not much notice has been taken of the statute. Some judges have refused to accept that this statute—or any other, for that matter—can take away their power.[37] Judges have ignored or by-passed some provisions. Litigants continue to use the contempt jurisdiction with the same ruthlessness and for the same purposes as before. The makers of this statute took an extremely optimistic view about the manner in which this statute would be received.

Where do we go from here? It can be very strongly argued that the law of contempt has already been given considered attention and been reformed as recently as 1971. As such, there is little need to open the Pandora's box of reform yet again. We have tried to show that since 1926 the statutory attempts to reform the law have not taken place on a

34. Discussed in chapter III, *supra*.
35. Discussed in chapters II, and IV, *supra*.
36. Discussed in chapter III, *supra*.
37. The cases on the constitutionality of the contempt of court are discussed in chapter IV, *supra*. This matter should be referred to the Supreme Court for an advisory opinion.

mature basis. The Contempt of Courts Act, 1926 was designed to give protection to certain institutions of the *Raj* and not to resolve the problems raised by the law of contempt. The Contempt of Courts Act, 1952 was passed without much thought and attention. The Contempt of Courts Act, 1971 was passed after many compromises and in the shadow of the Law Minister's restraining observations that any reform in the law of contempt would be unconstitutional.[38] It is for this reason that a case has been made out for a review of the law of contempt.

What are the principles on which such a change can be affected? We have assumed that the press is a private group discharging certain functions in the public interest rather than a public institution which should be specially empowered to discharge these functions. The rights of the press are the same as those of any other private individual : no greater and no less. But some attempt needs to be made to try and accommodate the public interest in some of the functions that the press performs and set them against the public interest defending the other rights of individuals. There is also a public interest in maintaining the viability of the judiciary as an institution which depends, in part, on its capacity to stand up to public scrutiny. Litigation before courts is both a private and a public activity. We have assumed that the public have a right to information about what is going on in court, a right to participate in respect of issues and matters before the courts, a right to exercise their freedom of speech irrespective of the fact that the court may be seized of a matter, and to comment on and criticise the working of the judiciary.

But all those rights of the public cannot totally outweigh the public interest in the judiciary as an institution. While it is only right that no member of the public or press should be found guilty of crimes where he acted in good faith and did not intend to commit that crime, the press, or any individual, cannot be allowed to harass the private litigant or totally foreclose the determination of questions for the courts. Harassing litigants would defeat the purposes of justice and foreclosing judicial inquiry would make courts redundant by usurping their functions.

The Indian cases clearly demonstrate a need to retain the jurisdiction relating to scandalising the judges in India. Judges are too often made a part of the unverified and, often, irresponsible politics of the market place. It has been suggested that an *in camera* machinery should be set up to investigate allegations of bias, corruption and gross incompetence. The contempt jurisdiction would be used to protect the secret nature of the investigation as well as to prevent irresponsible allegations being made. Beyond that, the contempt of scandalizing the court should be made part of the ordinary law of the land to be tried, like criminal defamation, by the ordinary process and carrying with it the right to

38. Discussed in chapter III, *supra*.

plead both justification and fair comment in the public interest. It will be noted that throughout it has been assumed that there is some need to give protection to the judiciary as an institution.

Dedicated, but conservative, pressmen and radical revolutionaries alike will feel a sense of irritation at the emphasis given to the protection of institutions like the courts and judiciary. As it happens, the problems created by the law relating to contempt of court have been considered in the context of a commitment to the existing framework of institutions. This is not necessarily a personal commitment. For that is another matter altogether. It has been assumed that within the existing framework a premium has to be attached to the viability of all the institutions created by this framework. This premium is not an absolute one. Institutions are not an end in themselves. But the law relating to contempt of court is essentially a law designed to protect what is regarded as an important public institution. Whether this institution is worth protecting is another matter. For the purposes of this essay, we have assumed that it is.