A

IN RE : SHRI S. MULGAOKAR

February 21, 1978

[M. H. BEG, C.J., V. R. KRISHNA IYER AND P. S. KAILASAM, JJ.]

B *Contempt of Court—Newspaper article criticising the judges of Supreme Court—If contempt—Tests for determining contempt of Court.*

In its issue dated December 13, 1977, Indian Express published a news item that the High Courts had reacted very strongly to the suggestion of introducing a code of judicial ethics and propriety and that "so adverse has been the criticism that the Supreme Court Judges, some of whom had prepared the draft code, have disowned it." In its issue dated December 21, 1977 an article entitled C "Behaving like a Judge" was published which *inter alia* stated that the Supreme Court of India was "packed" by Mrs. Gandhi "with pliant and submissive judges except for a few". It was further stated that the suggestion that a code of ethics should be formulated by Judges themselves was "so utterly inimical to the independence of the judiciary, violative of the Constitutional safeguards in that respect, and offensive to the self-respect of the Judges as to make one wonder how it was conceived in the first place." A show cause notice had been issued to the Editor-in-Chief of the Newspaper why proceedings for contempt under D Art. 129 of the Constitution should not be initiated against him in respect of the above two news items.

Dropping the contempt proceedings

HELD : *Per* Beg, C.J.,

Proceedings before the Court should be dropped without any finding against E any individual. [171 H]

1. National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. This should be a part of national ethics. [169 G-H]

2. The comments about Judges of the Supreme Court suggesting that they F lack moral courage to the extent of having "disowned" what they had done or in other words, to the extent of uttering what was untrue, at least verge on contempt. None could say that such suggestions would not make Judges of this Court look ridiculous or even unworthy, in the estimation of the public, of the very high office they hold if they could so easily "disown" what they had done after having really done it. [166 A-B]

3. Editors of responsible newspapers should be aware that it is courts of law and not newspaper readers who have to try certain issues which Courts alone G are empowered to determine. The character and the legal consequences of any publication about conduct of Judges are certainly matters for Courts to determine. Editors of newspapers are expected to know also something of the special place of this Court in the Republic's Constitution which amply protects its Judges so that they may not be exposed to opprobrious attacks by either malicious or ignorant persons. [166 B-D]

4. The judiciary cannot be immune from criticism. But, when that criti- H cism is based on obvious distortion or grossmis-statement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. Though action for contempt of Court, which is discretionary, should not be frequently or lightly taken the Court should not abstain from using this weapon even when its use is needed to correct

standards of behaviour in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of *bona-fide* concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in the judicial system and demoralize Judges of the highest Court by making malicious attacks, anyone interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. [170 A-C]

5. Although, the question whether an attack is malicious or ill intentioned, may be often difficult to determine, yet, the language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the care taken in justly and properly analysing the materials before the maker of it, are important considerations. Moreover, in judging whether it constitutes a contempt of Court or not the Court is concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done. A decision on the question whether the discretion to take action for contempt of Court should be exercised in one way or the other must depend on the totality of facts and circumstances. [170 F-H]

Per Krishna Iyer, J. concurring

Precedentially validated judicial norms relating to contempt powers of Courts are : (1) The Court will act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process; (2) The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the judge. To criticise a judge fairly *albeit* fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it; (3) The Court must avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is *not* contempt, but later *is*, although overlapping spaces abound; (4) The fourth functional canon is that the Fourth Estate should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court; (5) The fifth normative guideline for the Judges to observe is not o be hypersenstive even where dstortions and critcisms overstep the limits, but to deflate vulgar denunciation by dignified bearing and (6) The sixth consideration is that, if the Court considers the attack on the judge or judges scrurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream. [173 E, F 174F, 175 D, E, F]

R. v. *Brett* [1950] C.L.R. 226, *Queen* v. *Gray* [1900] Q.B.D., 36, *Mcleod* v. *St. Aubyn* [1899] A.C. 549, *Ambard* v. *Attorney-General for Trinidad* [1936] A.C. 322, *R. V. Metropolitan Police Commissioner ex. p. Blackburn* [1968] 2, W.L.R. 1204, *Sambhu Nath Jha* v. *Kedar Prasad Sinha & Ors.* [1972] 3 SCR 183 at 189, *Perspective Publications Ltd.* v *State of Maharasthra* [1971] 2 SCR 779 *R. C. Cooper* v. *Union of India* [1970] 2 SCC 298, 301=[1970] 3 SCR 230, *Brahma Prakash Sharma & Ors.* v. *The State of Uttar Pradesh* [1953] SCR 1169 at 1178-1180 *C. K. Daphtary & Ors.* v. *O. P. Gupta* [1971] Supp. SCR 76 at 92-93, *Shri Baradakanta Mishra* v. *The Registrar of Orissa High Court and Anr.* [1974] 1 SCC 374=[1974] 2 SCR 282, *Bridges* v. *California* [1941] 319 U.S. 252 at 279, 283, 284, *Sheopard* v. *Maxwell* [1966] 384 U.S 333, *Nebraska Press Association* v. *Stuarts* [1976] 96 *Sup. Ct.* 2791 *Los Angeles Times' Case* (314 U.S. 263) and *Craig* v. *Harney* (331 U.S. 367) referred to.

Per Kailasam, J. concurring

Without hearing the parties concerned, it is not right and proper to make any comments about the facts of the case. Contempt proceedings were dropped without calling upon the counsel for the respondents. [189G]

A ORIGINAL JURISDICTION : In Re : S. Mulgaokar.

V. M. Tarkunde and *A. N. Goyal* for the alleged contemner.

S. N. Kacker Solicitor General, Mr. R. N. Sachthey and *Miss A. Subhashini* for the Sol. Genl.

B *Dr. L. M. Singhvi, D. Bhandari* and *S. K. Jain* for the intervener.

The following Orders of the Court were delivered

BEG, C. J.—The matter before us arises out of a publication in the Indian Express newspapers dated 13th December, 1977. Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against C the highest Court of Justice in this country and its pronouncements. If this is done in a reasonable manner, which pre-supposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous. In *Bennett Coleman & Co. & Others v. Union of India & Ors.*(1) I had said (at p. 828) :

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> "John Stuart Mill, in his essay on "Liberty", pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the 'dialectical' process of a struggle with wrong ones which exposes errors. Milton, in his "Areopagitica" (1644) said :

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> 'Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously be licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter ?.....Who knows not that Truth is strong, next to the Almighty; she needs no F policies, no stratagems, no licensings to make her victorious; those are the shifts and defences that error makes against her power.....'

> Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. G At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told an adversary in arguments ! 'I do not agree with a word you say, but I will defend to the death your right to say it'. Champions of human freedom of thought and expression throughout the ages, have realised that intellectual paralysis creeps over a H Society which denies, in however subtle a form, due freedom of thought and expression to its members.

(1) [1973] 2 S.C.R. 757 @ 828-29.

> Although our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article 19(1)(a) of the Constitution, yet, it is well recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said 'Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited'."

I find, however, that gross distortions of what was actually held by this Court in what is known as the Habeas Corpus case (*Additional District Magistrate, Jabalpur* v. *S. Shukla*)(1) are being made presumably to serve ulterior objects. Some of these distortions have been exposed by me in a separate statement of detailed reasons which place on record my difference of opinion with the order ultimately passed by a majority in this Court upon a case resulting from a news item published in the Times of India recently. I have, unfortunately, now to take notice of a much milder publication in the Indian Express newspaper, in which the following sentence occurs about the supposed code of judicial ethics assumed wrongly to have been drafted by some Judges of the Supreme Court :

> "So adverse has been the criticism that the Supreme Court Judges, some of whom had prepared the draft code, have disowned it".

Judges of this Court were not even aware of the contents of the letter before it was sent by me as Chief Justice of India to Chief Justices of various High Courts suggesting, inter-alia, that Chief Justices could meet and draft a code of ethics themselves or through a Committee of Chief Justices so as to prevent possible lapses from the path of rectitude and propriety on the part of Judges. The error of the assumption that Judges of the Supreme Court had any hand in drafting a code which I could have had at the back of my mind when I sent my suggestions to Chief Justices of High Courts was pointed out to the Editor of the Indian Express in a letter sent by the Registrar of this Court. No question of disowning the supposed code by any Judge could, in the circumstances, arise. And, I had never "disowned" the suggestions made by me. The Registrar of this Court, therefore, wrote to inform the Editor of the mis-statement which ought to have been corrected. In reply, the Registrar received a letter from the Editor showing that the contents of my letter to Chief Justices of High Courts, which were confidential, were known to the Editor. Instead of publishing any correction of the mis-statement about the conduct of Judges of this Court, the Editor offered to publish the whole material in his possession, as though there was an issue to be tried between the Editor of the newspaper and this Court and the readers were there to try it and decide it.

(1) A.I.R. 1976 S.C. 1207.

A Comments about Judges of the Supreme Court suggesting that they lack moral courage to the extent of having "disowned" what hety had done, or, in other words, to the extent of uttering what was untrue, at least verge on contempt. I do not think that anyone could say that such suggestions would not make Judges of this Court look ridiculous or even unworthy, in the estimation of the public, of the very high office they hold if they would so easily "disown" what they B had done afer having really done it. The readiness with which possible correctness of such a suggestion could be accepted by the Editor of a newspaper has its own implications about the general fall in standards and values in life which Judges are supposed to share.

It seems to me that Editors of at least responsible newspapers C should be aware that it is Courts of law and not newspaper readers who have to try certain issues which courts alone are empowered to determine. Courts adopt a procedure designed to prevent, as far as possible, unfair prejudices, irrelevances, and untruths creeping in. The character and the legal consequences of any publication about conduct of judges are certainly matters for Courts to determine. Editors of newspapers are expected to know also something of the special place of this Court in the Republic's Constitution which amply protects its D judges so that they may not be exposed to opporbrious attacks by either malicious or ignorant persons.

This Court is armed, by article 129 of the Constitution, with very wide and special powers, as a Court of Record, to punish its contempts. Elsewhere, I have said in an attempt to explain the principle of the Supremacy of the Constitution which this Court represents and E expounds :

> "Thus, the principle of Supremacy of the Constitution requires for its maintenance in full force and vigour; firstly, an executive which respects the judiciary and its verdicts and does not take away, by the exercise of its constitutional F powers, judicial powers to deal with the rights of citizens even against executive actions of the State; and, secondly the absence of any legislative interference with judicial functions in a manner characterised by Dean Roscoe Pound as "legislative lynching" of threats of any kind held out for reaching particular conclusions however unpalatable they may be to any one. Articles 121 and 211 of our Consti- G tution, prohibiting discussion of the conduct of a Supreme Court or a High Court Judge in the discharge of his duties even by Parliament or a State Legislature, except upon a motion for his removal by the constitutionally prescribed procedure of addresses presented by each House of Parliament after proved misconduct or incapacity of a Judge and resolutions by 2/3 majorities of each House present and H voting, are there in our Constitution to ensure this. Can ordinary citizens do elsewhere, with impunity, what members of Parliament cannot do in Parliament and legislators cannot do in a State Legislature, and, if so, to what extent?

Such questions will have to be answered by Courts with reference to the facts of particular cases if and when brought to their notice." A

I also said there :

"It would be a sad day for the supremacy of the Constitution and for the Rule of Law, which it implies, if malicious or ill informed persons, filled with the irrationality involved in the spirit of what Dean Pound called "lynching" or misguided zest or vindictiveness, acting in a manner freed from the restraints of law or reason, were allowed to take upon themselves the task of passing judgments on actions of others particularly of Judges performing judicial functions. That would certainly sound the death knell of what Dean Roscoe Pound calls "judicial justice" and the Rule of Law. The supremacy of the Constitution can only be maintained when there is a spirit of law abidingness and discipline amongst citizens so that principles of law can be applied scientifically to facts by Courts of Justice, which are the custodians of what has been described by political philosophers as the abiding or continuing "Real Will" of the whole nation embodied in the Constitution as contrasted with the will or wishes of some or majority of citizens for the time being expressed in legislatures or elsewhere. Judges, who have taken oaths of allegiance to the Constitution, are bound to uphold it, conscientiously without fear or favour, affection or illwill'. They have to give their honest judgments without caring for popular approval or disapproval." B C D E

It seemed particularly necessary to point out the protections enjoyed by this Court and its Judges in order to safeguard the supremacy of the Constitution and the rule of law, which speak through pronouncements of this Court, because it was found that, soon after the incorrect stand taken by the Editor of the Indian Express, in the manner mentioned above, an article appeared, entitled "Behaving like a Judge", in this very newspaper. The suggestion that a code of ethics should be formulated by judges themselves was characterised in this article as "so utterly inimical to the independence of the judiciary, violative of the Constitutional safeguards in that respect, and offensive to the self-respect of the Judges as to make one wonder how it was conceived in the first place". The writer of the article asserted a right of the public to know what I, at any rate, would be quite willing to tell him if he came to me as a citizen wanting, in good faith, correct information. F G

The writer of an article of a responsible newspaper on legal matters is expected to know that there is no constitutional safeguard or provision realing to the independence of the judiciary which could possibly prevent Judges themselves meeting to formulate a code of judicial ethics or to constitute a committee to formulate a code of judicial ethics and etiquette. This is what was suggested to Chief Justices of High Courts. Indeed, in America, the American Bar Association has formulated a code of this kind. None has been formulated so far in this H

A country. A purported enactment which tried to prevent Judges from meeting and formulating such a code of ethics and etiquette so as to be clear about points on which, at times, there is uncertainty in the minds of Judges themselves, would not be valid. Such a purported law would offend against article 19(1)(a) of the Constitution. Neither our Constitution nor our law, could conceivably be infringed if Judges were to meet to device means to prevent situations arising B in which an accusing finger could be raised against the conduct of a judge, whether inside or outside the Court, let alone involving Constitutional provisions of Article 124 for his removal after an inquiry by a body constituted under the Judges Inquiry Act, 1968. A code of this kind, if scrupulously observed by all the Judges, could only enhance their independence and prestige and not injure these in any C way whatsoever.

This article proceeds on the assumption that there is already a formulated code of ethics sent to the Chief Justices. In fact, nothing more than some suggestions or examples of the kind of conduct which a possible code could deal with were sent to the Chief Justices. If there was anything inappropriate which could be found in those D suggestions, that could be criticised and set right or discarded. Better suggestions could be made and incorporated in a proper code of judicial ethics and etiquette, if that could be framed. Indeed, in case the Judges felt bolder, it was suggested that they could formulate a mode of action to deal with allegations which are sometimes made baselessly or maliciously against Judges. If a Committee of Chief Justices or Judges could consider the allegations made against E any individual Judge and was to find them baseless or malicious it would protect the unfortunate Judge who was made a victim of malicious onslaughts. On the other hand, if there was substance in the very serious allegations which are sometimes made against Judges of High Courts (I am glad to say that their number is extremely small and limited), the Committee could itself forward its findings for appropriate action under Article 124 of the Constitu- F tion, to the Central Government which could then set up a Committee of Inquiry. In this way, in serious cases, the Judge concerned would get a consideration from his peers as well as by the Committee provided by the Judges' Inquiries Act, 1968.

The article of 21 December, 1977, referred to above, ends by G attempting to make a distinction between the wonderful performance of High Court Judges and the "disappointing" record of the Supreme Court. It was suggested there that this was due to the fact that the Supreme Court is "packed" by the former Prime Minister, Mrs. Gandhi, "with pliant and submissive judges except for a few". Questions, naturally, must arise in the public mind : To what do they become "pliant"? Is it to the dictates or directions of the Executive? H When and how have they done so? Had such insinuations any factual basis—which they, fortunately, do not have—I would, at any rate, be among those who would say that the sooner this Court is wound up the better it would be for the country.

The supposed writer of the article was evidently so shaky about his ability to substantiate his suggestions, on the strength of his own knowledge or opinion, that he took shelter behind views alleged to have been expressed by Mr. Jayaprakash Narayan on some occasion to the effect alleged by him in the article. We cannot pass any judgment upon such views without giving notice to other parties, and without taking evidence about the circumstances and the context, which largely determine the real meaning, in which any opinion to that effect may or may not have been expressed by anybody.

Mr. Jethmalani appearing for A. G. Noorani, to whom we had issued no notice, tried to convince us that there was no intention on the part of the writer of the article or the editor to injure the dignity or position of this Court but the intention was only to direct public attention to matters of extreme importance to the nation. If this were so it would be a desirable object. But, as we should all know, there are proper and permissible ways of carrying out such an object and others which are not permitted by law, or, at least by elementary rules of fairness.

A reason which has also weighed with me in dropping this and a similar earlier proceeding is that, we have been passing through a period of exceptional strain and stress and excitement in this country in which unusual remarks made have not been confined to what appears in newspapers. Indeed, extraordinary and surprisingly erroneous statements, which could not be there if rules of judicial ethics were formulated and strictly adhered to, have found place even in solemn pronouncements of this Court on rare occasions. However, I do not want to expatiate on that theme here. All I can say is that, if this is a correct observation, it would also disclose a need for rules of judicial ethics or propriety for judges of even this august Court.

The statement made above by me should remove the misapprehension, if there was really any in the mind of whoever wrote the article in the Indian Express of 13th December, 1977, condemning my proposals for framing a code of judicial ethics on the ground, *inter alia*, that it was proposed to have one only for High Court Judges. I think that there should be codes of ethics not merely for judges but for occupants of every office—high or low—and for members of every profession and calling. Without such codes, progress in right directions in any sphere becomes more uncertain and problematic than it could be with such codes of ethics.

National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. This should be a part of national ethics. Newspapers, in particular, ought to observe such a rule imbued with what Montesquieu considered essential for a healthy democracy : the spirit of "virtue". They should, if they are interested in promoting national welfare and progress, support proposals for framing correct rules of ethics for every class of office holder and citizen in the country. And, the judiciary must, in its actions and thoughts and pronouncements, hold aloft the values and

A the spirit of justice and truth enshrined in the Constitution and soar high above all other lower loyalties and alignments if it is to be truly independent.

The judiciary cannot be immune from criticism. But, when that criticism is based on obvious distortion or gross mis-statement and made in a manner which seems designed to lower respect for the judi-
B ciary and destroy public confidence in it, it cannot be ignored. I am not one of those who thinks that an action for contempt of Court, which is discretionary, should be frequently or lightly taken. But, at the same time, I do not think that we should abstain from using this weapon even when its use is needed to correct standards of behaviour in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude
C even when utterly uncharitable and unfair criticism of its operations is made out of *bona fide* concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralize Judges of the highest court by making malicious attacks, anyone interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. I sincerely hope that my own undisguised
D perturbation at what has been taking place recently is unnecessary. One may be able to live in a world of yogic detachment when unjustified abuses are hurled at one's self personally, but, when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effects upon national honour and prestige in the comity of nations. Indeed, it becomes a matter deserv-
E ing consideration of all serious minded people who are interested in seeing that democracy does not flounder or fail in our country. If fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them. However, as we have not proceeded further in this case, I do not think that it would be fair to characterize anything written or said in the Indian Express as really malicious or
F ill-intentioned and I do not do so. We have recorded no decision on that although the possible constructions on what was written there have been indicated above.

My opinion on matters touched by my learned brother Krishna Iyer is that, although, the question whether an attack is malicious or ill intentioned, may be often difficult to determine, yet, the language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the care taken in justly and properly analysing the materials
G before the maker of it, are important considerations. Moreover, in judging whether it constitutes a contempt of Court or not we are concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done. A decision on the question whether the discretion to take action for contempt of Court should be exercised in one way or the other must depend on the totality of facts and circumstances.

H After I had drafted my reasons for dropping the proceedings I have had the benefit of perusing the views expressed by my learned brother Kailasam. I would like to make it quite clear that there is,

as I have already mentioned above, no finding given here by me against any person. I entirely agree that it would not be fair or legal, without giving opportunities to be heard to any persons against whom any aspersions are to be cast or any remarks are to be made to record findings against them. But, I think that we are entitled to express our separate and individual opinions for dropping the proceedings now before us. Indeed, my separate judgment in the case relating to the recent publication in the Times of India case was a dissenting one. It was, therefore, all the more necessary for me to record my reasons for a dissent. In the case now before us, we are all agreed that the proceedings should be dropped. Nevertheless, I think that we are completely justified in giving and are free to give our separate reasons why this should be done either with or without comment so long as we do not give any finding which may be unfair to anyone. I would, therefore, like to make it clear once again that, as the matter has not proceeded beyond putting the cause of the notice to learned counsel and hearing only their *prima facie* reactions on whether the proceedings should be dropped or not, we have accepted the submissions of Mr. Tarkunde and Mr. Jethmalani that we should not proceed further, there is no question of recording any finding against anyone and I have not done so. It was, however, necessary to indicate the way in which and reasons for which the notice was issued. It seems to me that it was also necessary for me to refer to the reasons why I consider codes of ethics, and, in particular, judicial ethics are necessary. That is a matter of conscience and of my understanding of what is right for a judge to do "without fear or favour, affection or ill will".

The need for appropriate standards relating even to what our judgments should or should not contain is so great that I think this matter has to be taken up soon by Judges themselves at some stage or other. Even the difference of views between learned judges of this Court on such a question illustrates that. If we had clear rules of judicial practice and ethics on even such matters our judgments would not be encumbered with what should not be there. If such rules are absent there may be, sometimes, serious disagreement as to what a judgment should or should not contain. In such a case, the only sound rule I could follow is to hear all those who are to be heard according to law but no others and then to express the opinion I feel bound by my conscience to express without allowing any other consideration to weigh with me.

As I have already pointed out above, I think that the need for appropriate norms of conduct exists in practically every sphere of life in which enlightened people strive to attain exalted ends irrespective of consequences. If our separate statements of reasons for dropping the proceedings before us succeed in at least emphasizing that need they would not have been made in vain. I concur in the order that the proceedings before us be dropped at this stage without any finding against any individual.

KRISHNA IYER, J.—Silence is no sanctuary for me when speech from the Chief Justice persuades my pen into a divergent course. I

A profoundly appreciate and deeply respect his sense of hurt and obligation for explanation but prefer to travel along another street in stating why I agreed to jettison the contempt proceedings. My judgment is more an explanation than an expostulation and certainly not a reflection on the respondents.

B We had unanimously directed that the above proceedings in contemplation of contempt action be dropped but the fact that we had converged to this conclusion did not rule out—as is now apparent—our divergence in the process of reasoning. Minds differ as rivers differ. Such, perhaps, in part, is the case here.

C The contempt power, though jurisdictionally large, is discretionary in its unsheathed exercise. Every commission of contempt need not erupt in indignant committal or demand punishment, because judges are judicious, their valour non-violent and their wisdom goes into action when played upon by a volley of values, the least of which is personal protection—for a wide discretion, range of circumspection and rainbow of public considerations benignantly guide that power. Justice is not hubris; power is not petulance and prudence is not pussilanimity, especially when judges are themselves prosecutors and D mercy is a mark of strength, not whimper of weakness. Christ and Gandhi shall not be lost on the judges at a critical time when courts are on trial and the people ("We, the People of India") pronounce the final verdict on all national institutions. Such was the sublime perspective, not plural little factors, that prompted me to nip in the bud the proceeding started for serving a larger cause of public justice than punitive action against a publisher, even assuming (without E admitting) he was guilty. The preliminary proceeding has been buried publicly; let it lie in peace. Many values like free press, fair trial, judicial fearlessness and community confidence must generously enter the verdict, the benefit of doubt, without absolutist insistence, being extended to the defendant. Such are the dynamics of power in this special jurisdiction. These diverse indicators, carefully considered, F have persuaded me to go no further, by a unilateral decision of the bench. This closure has two consequences. It puts the lid on the proceedings without pronouncing on the guilt or otherwise of the opposite parties. In a quasi-criminal action, a presumption of innocence operates. Secondly, whatever belated reasons we may give for our action, we must not proceed to substantiate the accusation, if any. To condemn unheard is not fairplay. Bodyline bowling, perhaps, is G not cricket. So my reasons do not reflect on the merits of the charge.

Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cere- H bration of the judicial mind. The integral yoga of *shanti* and *neeti* is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court. I quite realise how hard it is to resist, with

sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge. A

Why did I concur in the short order? Why do I now strike a variant note to that of the learned Chief Justice? I do not take up the position that scandalising the Judges does not come within the contempt clutches of the court. The Court's jurisdiction to initiate proceedings and punish for constructive contempt *suo motu* crystallized in the eighteenth century even though it is clear that the Court's inherent powers in this regard were not as wide as Wilmot J. made them out to be in his posthumously published opinion in *R.* v. *Almon* [1765 published in (1802) Wilmot's opinions](1). Fortunately, the attacks on the judiciary have been comparatively few in most countries, having regard to the character assassination of the personnel in the other great branches of Government. Even so, the law which punishes those who scandalize judges is as old as the Common Law itself. The *existence* of the contempt power, however, does not obligate its exercise on every occasion but triggers it only in special situations, not routinely. B C D

What then are the complex of considerations dissuasive of punitive action? To be exhaustive is a baffling project; to be pontifical is to be impractical; to be flexible is to be realistic. What, then, are these broad guidelines—not a complete inventory, but precedentially validated judicial norms? E

The *first* rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The court is willing to ignore, by a majestic liberalism, trifling and venial offenses—the dogs may bark, the caravan will pass. The court will not be prompted to act as a result of an easy irritability. Much rather, it shall take poetic look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt. F

The *second* principle must be to harmonise the constitutional values of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the judge. A happy balance has to be struck, the benefit of the doubt being given generously against the judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists or olympian establishmentarians. Not because the judge, the human symbol of a high value, is personally G H

(1) See further R. Dhavan : "Contempt of Court and the Phillimore Committee Report" (1976) 5 *Anglo American Law Review*, 186 at 194 and the literature cited there.

armoured by a regal privilege but because 'be you—the contemner—ever so high, the law—the People's expression of Justice—is above you. Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy. For, it blesseth him that gives and him that takes. Where freedom of expression, fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking. A free people are the ultimate guarantors of fearless justice. Such is the cornerstone of our Constitution; such is the touchstone of our Contempt Power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of court, there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line. As it happens, our Constitution-makers foresaw the need for balancing all these competing interests. Section 2(1) (c) of the Contempt of Courts Act, 1971 provides :

> "Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsover which—
>
> (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court."

This is an extremely wide definition. But, it cannot be read apart from the conspectus of the constitutional provisions within which the Founding Fathers of the Constitution intended all past and future statutes to have meaning. All laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech. The courts were given the power—and, indeed, the responsibility—to harmonize conflicting aims, interests and values. This is in sharp contrast to the Phillimore Committee *Report* on Contempt of Court in the United Kingdom (1974) *bund.* 5794 prs. 143—5, pp. 61-2) which did not recommend the defence of public interest in contempt cases.

The *third* principle is to avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is *not* contempt, the latter *is*, although overlapping spaces abound.

Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such. As Professor Goodhart has put it :

> "Scandalising the court means any hostile criticism of the judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel."

(See 'Newspapers and Contempt of Court' (1935) 48, Harv. L. R. 885, 898.)

Similarly, Griffith, C. J. has said in the Australian case of *Nicholls*(1) that :

> "In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of Court."

Thus in *In the matter of a Special Reference from the Bahama Island*(2) the Privy Council advised that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticised local sanitary conditions. Though couched in highly sarcastic terms the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not a contempt.

The *fourth* functional canon which channels discretionary exercise of the contempt power is that the Fourth Estate which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court.

The *fifth* normative guideline for the judges to observe in this jurisdiction is *not* to be hypersensitive even where disortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, condescending indifference and repudiation by judicial rectitude.

The *sixth* consideration is that, after evaluating the totality of factors, if the court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream.

Speaking generally, there are occasions when the right to comment may be of supreme value (for instance, the thalidomide babies cases in England)(3) and the law of contempt must adjust competing values and be modified, in its application by the requirements of a free society and the shifting emphasis on paramount public interest in a given situation.

(1) (1911) 12 C.L.R. 280, 285.

(2) (1893) A.C. 138.

(3) I prefer the judgment of Lord Denning M. R. in the Court of Appeal to those in the Divisional Court or House of Lords in the Thalidomide case : *Att. Gen.* v. *Times Newspapers Ltd.* (1972) 3 All. E.R. 1136 (D.C.) ; (1973) 1 All. E.R. 815 (C.A.) ; (1973) 3 All. E.R. 54 (H.L.).

A Indeed, there is an interesting Australian decision *R. V. Brett*(1) which has a meaningful relevance for our case and I quote from the Australian Law Journal :

> "In *R.* v. *Brett,* the publisher of a newspaper was called on to show cause why he should not be committed for contempt of court. It appeared that the newspaper, under the B heading "Mr. Justice Sholl—Diehard Tory" had criticised the appointment of Mr. Justice Sholl and inferentially of all his brethren except one not specified, because they were out of touch with the life of the people and had no experience (it was alleged) in the Criminal Court "the only court where even a semblance of the problems of the people arise", and C it concluded that his appointment showed that the judiciary was "an institution forming an integral part of the repressive machinery of the State".
>
> "O' Bryan, J. pointed out that the fact that the article made ridiculous mistakes of fact and that its logic was greatly at fault, did not prove that it was a contempt. The question D was whether the article, honestly though mistakenly and offensively, criticised the policy of this and previous administrations in appointing judges, or whether it did indeed set out to lower the authority of the Court as such and to excite misgivings as to its partiality. With very great hesitation, his Honour came to the conclusion that a case for the exercise of the extra-ordinary summary jurisdiction of the Court E had not been made out and he discharged the order nisi."

Another useful illustration from the Australian jurisdiction is contained in short report made of a decision in Australian Law Journal, 1928-29, Vol. 2, 145-146 :

> "The Tasmanian case (*The King* v. *Ogilvie*) concerned F statements made by the respondent at public meetings, imputing lack of impartiality to Mr. Justice Crisp, and asserting that the respondent was personally disliked by his Honour, and that respondent's clients could not get justice from him. Nicholls, C. J., in delivering the judgment of the Court, agreed with the authorities that fair comment on judicial actions is not only justifiable, but beneficial. He G then pointed out "that we regard these preceedings as instituted and our powers conferred, not for the benefit or comfort of the Judges personally, to protect them from criticism or even from libel, but simply to secure that this institution, the Supreme Court, which in the final analysis has to declare and enforce the rules which hold the community together, shall be challenged only in the proper ways, which are two" H first, by appeal, and secondly by approach in the proper form to Parliament."

(1) (1950) C.L.R. 226.

A quick flash back to English decisions also is instructive. As early as 1900 in *Queen* v. *Gray*(1) Gray published in a newspaper an article which was "personal scurrilous abuse of a judge as a judge" Lord Russel of Killowen C. J. observed :

> "It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge—scurrilous abuse, in reference to the conduct of the judge while sitting under the Queen's Commission, and scurrilous abuse published in a newspaper in the town in which he was still sitting under the Queen's Commission. It cannot be doubted—indeed it has not been argued to the contrary by the learned counsel who represents Howard Alexander Gray—that the article does constitute a contempt of Court; but, as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as "scandalising a Court or a Judge."

The learned Law Lord, however, indicated a guideline which is extremely important :

> "*Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court.* The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court and nobody has suggested, or could suggest that it falls within the right of public criticism in the sense I have described. It is not criticism : I repeat that it is personal scurrilous abuse of a judge as a judge....."
>
> (emphasis, added)

The tone of *R.* v. *Gray* (supra) sharply contrasted with the much more liberal tone adopted by the Privy Council in *McLeod* v. *St.*

(1) (1900) Q.B.D. 36.

A *Aubyn*(1) even though certain aspects of the latter decision assume a somewhat imperialist tone. Dr. Rajeev Dhavan has observed :

> "For some strange reason the Privy Council judgment was neither referred to by the Chief Justice or even cited to the Court even though a time lag of nine months separates the two judgments".(2)

B

A harmonious blend and a balanced co-existence of a free press and fearless justice desiderates that the law ought not to be too astute in such cases and that public criticism has a part to play, even if it oversteps the limit, in preserving the democratic health of public institutions. But beyond a point, the wages of contempt is committal.

C In *Ambard* v. *Attorney-General for Trinidad*(3) the Privy Council pronounced on a case of public criticism of the administration of justice. Lord Atkin stated, with admirable accuracy, the law on this branch of contempt of Court :

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no
> D wrong is committed by any member of the public who exercise the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exer-
> E cising a right of criticism, and not acting in malice or attempting to impair the administration of justice, 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."

F Indeed, Lord Morris in *Mcleod* v. *St. Aubyn* (supra) has commented :

> "Courts are satisfied to leave to public opinion attacks or comments derogatory or seandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the
> G Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

In will not condemn the Indian people with the contempt manifest in Lord Morris' observation regarding small colonies and coloured populations. We are cultured people with traditions and canons and may at least be equated in these matters with English men.

H (1) [1899] A.C. 549.

(2) See R. Dhavan : "Contempt of Court and the Phillimore Committee Report" (1976) 5 *Anglo American Law Review* 186 at 205.

(3) (1936) A.C. 322.

A very valuable and remarkably fresh approach to this question of criticism of Courts in intemperate language and invocation of contempt of court against the contemner, a person of high position, is found in *Regina* v. *Metropolitan Police Commissioner ex. p. Blackburn*(1). Lord Denning's judgment is particularly instructive in the context of the obnoxious comments made by Quintin Hogg in an article in "Punch" about the members of the Court of Appeal. The remarks about the Court of Appeal were highly obnoxious and the barbed words thrown at the judges obviously were provocative. Even so, in a brief but telling judgment, Lord Denning held this not to be contempt of court. It is illuminating to excerpt a few observations of the learned judge :

> "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 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 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. 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, 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."

The Indian precedents must naturally receive referential attention from us and so I switch over to the cases of this Court which have relevance to that branch of the contempt jurisprudence bearing upon scandalising the judges. After a brief survey, I will summarise the conclusions. In *Sambhu Nath Jha* v. *Kedar Prasad Sinha & Ors.*(2)

(1) (1968) 2 W.L.R. 1204.
(2) [1972] 3 S.C.R. 183, 189.

A "It would follow from the above that the courts have power to take action against a person who does an act or publishes a writing which is calculated to bring a court or judge into contempt or to lower his authority or to obstruct the due course of justice or due administration of law.... in such cases, the court would exercise circumspection and judicial restraint in the matter of taking action for contempt
B of court. The court has to take into account the surrounding circumstances and the material facts of the case and on conspectus of them to come to a conclusion whether because of some contumacious conduct or other sufficient reason the person proceeded against should be punished for contempt of court."

C In *Perspective Publications Ltd.* v. *State of Maharashtra*(1) Grover, J., speaking on behalf of the Court, reviewed the entire case law and stated the result of the discussion of the cases on contempt as follows :

"(1) It will not be right to say that committals for contempt for scandalizing the court have become obsolete.

(2) The summary jurisdiction by way of contempt must
D be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair com-
E ment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

(4) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt
F of the Court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as Contempt.

G

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee, J. (as he then was) (*Brahma Prakash Sharma's* Case) (1953) S. C. R., 1169) the publication of a disparaging statement will be
H an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability

(1) [1971] 2 S.C.R. 779.

or fairnes of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties."

Hidayatullah, C. J., in *R. C. Cooper* v. *Union of India*(1) observed :

"There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others ..... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from these to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism."

In *Brahma Prakash Sharma and Others* v. *The State of Uttar Pradesh*(2) this Court said :

"It seems, therefore, that there are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in cases of contempt committed by "scandalising" the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt of such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. "The path of criticism", said Lord Atkin (Ambard v. Attorney-General for Trinidad and

(1) (1970) 2 S.C.C. 298, 301.
(2) (1953) S.C.R. 1169, 1178, 1180.

A Tobago, (1936) A.C. 322 at 335) is a public way. The wrong headed are permitted to err therein; provided that members of the public abstain from imputing motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice, or attempt to impair the administration of justice, they are immune."

B In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt. The distinction between a libel and a contempt was pointed out by a Committee of the Privy Council, to which a reference was made by the Secretary of State in 1892 (In the matter of a special reference from the Bahama Islands (1893) A. C. 138). A man in the Bahama Islands, in a letter published in a colonial newspaper criticised the Chief Justice of the Colony in an extremely ill-chosen language which was sarcastic and pungent. There was a veiled insinuation that he was an incompetent judge and a shirker of work and the writer suggested in a way that it would be a providential thing if he were to die. A strong Board constituting of 11 members reported that the letter complained of, though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law and therefore did not constitute a contempt of court. The same principle was reiterated by Lord Atkin in the case of *Devi Prashad* v. *King Emperor* (70 I. A., 216) referred to above. It was followed and approved of by the High Court of Australia in *King* v. *Nicholls* (12 Com. L. R. 280), and has been accepted as sound by this Court in *Reddy* v. *The State of Madras* (1952) S. C. R., 452). The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libeller in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well

established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is interference with the proper administration of law."

(Mr. Mookerjee J. in *In re : Motilal Ghosh and Others* ILR, 45, Cal., 269 at 283.)

There is no doubt that condign and quick punishment for scandalising publication has been awarded by this Court, (Vide *C. K. Daphtary & Ors.* v. *O. P. Gupta*[1])

Another one is *Shri Baradakanta Mishra* v. *The Registrar of Orissa High Court and Another*[2]. In the latter case, I had occasion to examine the root principles of Indian Contempt jurisprudence and I summed up thus :

"Judges and Courts have diverse duties. But functionally, historically and jurisprudentially, the value which is clear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the counterveiling good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealour, criticism cannot be overlooked. Justice is no cloistered virtue."

. . . . . .

"The Court being the guardian of people's rights, it has been held repeatedly that the contempt jurisdiction should be exercised "with scrupulous care and only when the case is clear and beyond reasonable doubt"."

I relied on an observation made by Justice Gajendragadkar, C.J., in Special Reference No. 1 of 1964 and proceeded to state the key to the jurisdiction :

"We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously. wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

If judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion.

(1) (1971) Supp. S.C.R. 76, 92-93.
(2) (1974) 1 S.C.C. 374.

A To wind up, the key word is "justice", not "judge"; the key-not thought is unobstructed public justice, not the self-defence of a judge; the cornerstone of the contempt law is the accommodation of two constitutional values—the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair com-
B ment or trivial reflections on the judicial process and personnel."

Indeed, I am convinced that democratic institutions, including the Court system and judges, must suffer criticism and benefit from it This approach has been emphasised by me in that case :

C "Even so, if Judges have frailties—after all they are human—they need to be corrected by independent criticism. If the judicature has serious shortcomings which demand systemic correction through socially-oriented reform initiated through constructive criticism, the contempt power should not be an interdict. All this, far from undermining the con-
D fidence of the public in Courts, enhances it and, in the last analysis, cannot be repressed by indiscriminate resort to contempt power. Even bodies like the Law Commission or the Law Institute and researchers, legal and sociological, may run 'contempt' risks because their professional work sometimes involves unpleasant criticism of judges, judicial processes and the system itself and thus hover perilously
E around the periphery of the law if widely construed. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardised by an undefined apprehension of contempt action."

American legal history has lessons for us but when national conditions vary adaptation, not imitation, is the creative alternative, to
F avoid breakdown on the rock of real life. New York is not New Delhi and New York Times deals with different customers from the Times of India. The law of contempt fluidly flows into the mould of life. This fact once noted, there is instructive thought in the American cases.

Their lofty approach, grounded on constitutional values, has an
G appeal for us. The issue is one of the gravest moment for free peoples and to choose between the cherished basics of free expression and fair hearing is a trying task. For a free press it may be argued as did the U. S. judges :

"What is at stake here is a societal function of the First Amendment in preserving free public discussion of governmental affairs. . . . (P)ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the

right of free expression..... An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large.

It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court.

The argument further asserts that a curtailment of press freedom is a serious matter. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

We may glance at the vigorous dissent of Mr. Justice Frankfurter to this reasoning in *Bridges* v. *California*(1)

"Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in the matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law—means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution....."

(1) [1941] 319 U.S. 252, 279, 283, 284.

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market".....A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

.....The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press as these phases of liberty have heretofore been conceived even by the stoutest liberatarians. In fact, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty."

The representative thinking on the subject is neatly summed up by John R. Brown, Chief Judge :

"Thus does Alexander again confront the Gordian Knot. For our history demands that breaches of the unqualified commands of the First Amendment cannot be tolerated and freedom of the press must be given the broadest scope that a liberty-loving people can allow.....On the other hand, our fundamental concepts of absolute fairness in trials dictate that the environment within which justice is administered must be maintained unpolluted by the

potential infamous notoriety and biased predilections which a completely unfettered but omnipresent press can irrevocably engender in an age of the mass media....."

It is apparent from this long discussion that the future of Free Press and of Fair Justice desiderates a juristic socio-political national debate, not ex-cathedra admonitions from the Bench or assertions from the Bar. We must evolve a know-how for the co-existence of free speech and free justice in tune with the Preamble and Article 19. Scurrilous attacks on judges or on parties to pending cases foul the course of justice. Mischievous half-truths, brazen untruths and virulent publicity by partisan media, political organs and spokesmen for vested interests can be traumatic to the cause of social justice.

In an area of competing social values absolutist approaches are sure to err. And yet benign neglect of courts to arrest injurious publicity may be misread as importence and timely affirmative action may stem the rot. *Sheppard*(1) is an American case in point Remember, a 'free' press is often a monopoly press and has been made gargantuan by modern technology. Of course, we must also remember, courts work in public and publishing their proceedings fairly cannot be taboo. Please remember, further, that those who cry 'wolf' against Contempt Power are more often the Proprietariat, not the Proletariat, with exceptions which prove the rule.

Prejudicial publicity, indulged in by a 'free' press owing no institutional responsibility or public accountability, cannot be all that good, especially when judges are personally vilified, assured that the 'robes' traditionally, and for good reasons, do not and should not wrestle with caluminating columnists or yellow journalists. Likewise, a litigant or judge, run down by powerful vested interests wearing the mask of mass media owned by them or hiring the pen of arch spokesmen of political or economic reactionaries, cannot run riot, raising the alarm that free speech is in peril and get away with it. Heroism on the face may often be villainy at heart and the law cannot retreat from its justice—function scared by slogans. Balancing of values is difficult, delicate but indispensable. Neither the Press nor the courts are above the People. Otherwise, even gutter talk or, to borrow the phraseology of justice Stevens in *Nebraska*(2), shabby, intrusive or perversely motivated media practices, may be dignified as free press and given protective constitutional status, leaving the citizen litigant demoralised and citizen judge powerless, panicked by the ballyhoo of Press restraint.

The Court is not an inert abstraction; it is people in judicial power. And when drawing up standards for Press freedom and restraint, as an 'interface' with an unafraid court, we must not forget that in our constitutional scheme the most fundamental of all freedoms is the free quest for justice by the small man. 'When beggars

(1) *Sheppard* v. *Mawell* [1966] 384, U.S., 333.

(2) *Nebraska Press Association* v. *Stuarts* [1976] 96 Sup. Ct. 2791.

A die, there are comets seen' and 'when the bull elephants fight, the grass is trampled'. The contempt sanction, once frozen by the high and mighty press' campaign, the sufferer, in the long run, is the small Indian who seeks social transformation through a fearless judicial process. Social justice is at stake if foul press unlimited were to reign. As Justice Frankfurter stated, may be 'judges as persons, or courts as institutions, are entitled to no greater immunity from criti-
B cism than other persons or institutions' (a question I desist from deciding here), but when comment darkens into coercive imputation or calculated falsehood, threats to impartial adjudication subtly creeps. Not because judges lack firmness nor that the dignity of the bench demands enhanced respect by enforced silence, as Justice Black observed in the *Los Angeles Times*(1) case but because the course of justice may be distorted by hostile attribution. Said Justice
C Jackson in *Craige* v. *Harney*(2) :

> "I do not know whether it is the view of the Court that a judge must be thickskinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame—a good
D public name—is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a medicore one."

I do not dogmatise but indicate the perils. Of course, the evil must be substantive and substantial, not chimerical or peripheral.

E A concluding note. I have launched on this long, inconclusive essay in contempt jurisprudence bearing on scandalizing the judges *qua* judges, aware that not high falstaffian rhetoric but hard-headed realism, illumined by constitutional values, must set the limit and interpret the statute. It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalizing judges with flippant or motivated write-ups wear-
F ing a *pro bono publico* veil and mood of provocative mock-challenge. The court shall not meditate nor hesitate but shall do stern justice to such 'professional' contemners, not shrink because they are scurrilous, influential or incorrigible. Even so, to be gentle is, to be just and the quality of mercy is not strained. So, it is that a benign neglect not judicial genuflexion, is often the prescription, and to inhibit haphazardness or injustice it is necessary that the Bar
G and the Press evolve a dignified consensus on the canons of ethics in this area, with due regard to the Constitution and the laws, so that the Bench may give it a close look and draw the objective line of action. The process of arriving at these norms by those mighty forces who influence public opinion, cannot be delayed and until then the law laid down in precedents of this court will go into action when judge-baiting is indulged in by masked men or media might.
H Freedom is what Freedom does and Justice fails when Judges quail.

(1) 314 U.S. 263.
(2) 331 U.S. 367.

For sure, my plea is not for judicial pachydermy, but for dignified detachment which ignores ill-informed criticism in its tolerant stride, but strikes when offensive excesses are established. Frankly, all these are hypothetical and have no specific reference to the present case. These *obiter-dicta* are intended to indicate the pros and cons, not to pontificate on the precise limits for exercise of contempt power and to emphasize what Chief Justice Warren Burger mentioned in *Nebraska Press Association*(1) as 'something in the nature of a fiduciary duty' of the press to act responsibly and I may add, respectfully.

An afterword.

An afterword has become necessitous because the learned Chief Justice has, in his reasons, made some critical observations on men and matters based on his rich experience, high responsibility and urge to right wrongs. While respecting his feeling of hurt and attempt to set the record straight regarding his prior judgment and letters on canons of judicial ethics, I desist from comments on the author or the article, including its correctness and propriety, for fear that an indelible word, writ incautiously, may fester into an incurable wound. I am in no mood to pronounce on these subjects or to judge these generalities. Many an arrow at random sent hits a mark the archer never meant, and *ex cathedra* generalisations run the genetic risk of noetic imperfections. The Almighty does not share His omniscience with the Judiciary.

KAILASAM, J.—I had the benefit of reading the Judgments proposed to be delivered by My Lord the Chief Justice and Justice Krishna Iyer.

I would have been contented with stating that, in my view, on taking into account the facts and circumstances of the case this is not a fit case to be proceeded with under the Contempt of Courts Act, 1971. But now it has become necessary for me to state whether I agree with the judgments to be delivered.

My learned Brother Justice Krishna Iyer in his concluding note has expressed that he had launched on this long inconclusive essay which relates to hypothetical questions and has no specific reference to the present case. The Judgment which he himself characterises as *obiter dicta* may be left alone without any comments.

When the matter was taken up in the Court on 27th January, 1978, the contempt proceedings were dropped without calling upon the learned counsel who was appearing for the respondent in response to the notice. Without hearing the parties concerned, it is not right and proper to make any comments about the facts of the case. In this view I refrain from referring to the publication in "The Indian Express" or about the article in the newspaper by Shri A. G. Noorani.

Contempt proceedings will stand dropped.

P.B.R. *Proceedings dropped.*

(1) 96 S. Ct. 2803.