Truth as a Defence: How Effective is the Amendment of the Contempt of Courts Act?

V. Venkatesan[*]

I. Introduction: The Background to the Amending Act

The Contempt of Courts (Amendment) Act, 2006 made an important addition to the Contempt of Courts Act, 1971, to provide for truth as a valid defence in contempt proceedings. This article traces in the Indian context, the development of the doctrine of truth as a defence in contempt of court proceedings, examines the objectives of the 2006 amendment, and the chances of the amended Act achieving those objectives. In doing so, I look at the objectives of the Act itself, and relevance of those objectives in the light of the amendment. I argue that even though the legislature has the right and authority to step in and clarify the legal position through an amendment, inconsistencies in the amendment will only add to confusion. I suggest that the apprehensions expressed over the doctrine of truth as a defence in contempt proceedings are misplaced, and the reform of the contempt law is yet incomplete.

II. Development of the Doctrine of Truth as a Defence in Contempt of Court Proceedings

The interpretation of the phrase "contempt of court" is itself a paradox. The Chamber's Twentieth Century Dictionary defines contempt as scorn, disgrace, disregard of the rule, or an offence against dignity, of a court. The Concise Oxford Dictionary of Current English defines contempt of court as disobedience to or disrespect for a court of law and its officers. But the offence has been interpreted in practice to mean interference with the administration of law or impeding and perverting the course of justice.[1] As the concept of contempt of court in India is derived from English Law, the legal meaning of contempt of court, as distinct from its literal meaning, must provide the appropriate background to any discussion on the provisions of the Contempt of Courts Act.[2] During the Constituent Assembly Debates, Dr. Ambedkar drew attention to the fact that the power to punish for contempt is largely derived from Common Law, and as we have no such thing as Common Law in this country, we felt it better to state the whole

---

* Deputy Editor, (Delhi Bureau), Frontline Magazine. I would like to thank Arun Thiruvengadam, Dilip Rao, Manoj Mitta, Tarunabh Khaitan, and Vikram Raghavan, for their critical comments and helpful suggestions on a previous draft of this article. I also thank T.R. Andhyarujina for helping me to clarify some of the issues dealt in this article.

1. Lord President Clyde made the concept inapplicable to cases where the dignity of the Court is offended, and confined it to those where the fundamental supremacy of the law is challenged. See *Johnson v. Grant*, (1923) SC 789-90.
2. I shall return to this distinction between the literal and legal meaning later in this article.

position in the statute itself.[3] Thus Articles 129 and 215 of the Constitution expressly declared the Supreme Court and High Courts to be Courts of Record, possessing all the powers of such Courts, including the power to punish for contempt of themselves. Article 19(2) provides, inter alia, that the right guaranteed by Article 19(1)(a) is subject to any law imposing reasonable restrictions in relation to contempt of court.

At this point, it may be instructive to look at the evolution of the law of contempt in India, primarily, as the 1971 Act declares in its Preamble, for the purpose of defining and limiting the powers of certain courts to punish for contempt of courts and to regulate their procedure in relation thereto. During the early years of independence, this concern to define and limit the powers of courts in punishing contempt of courts was notably absent. The Contempt of Courts Act of 1952 and the 1926 Act which it replaced did not give any definite or clear definition of the term "contempt". "This omission on the part of the Legislature was deliberate; the reason behind it being to maintain the elastic character of the law, to enable it to cover a wide field for its application by the courts."[4]

However, this omission, in due course, contributed to an "uncertain, undefined and unsatisfactory" state of affairs, forcing the Government to set up a Committee in 1961, headed by H.N. Sanyal, to suggest amendments to the Act, with a view to clarify and reform the law. "Based on the Committee's recommendations, the Government brought forward the Contempt of Courts Bill, 1971 to replace and repeal the Act of 1952."[5]

The Statement of Objects and Reasons of the 1971 Bill underlined the fact that jurisdiction to punish for contempt "touches upon two important fundamental rights of the citizens, namely, the right to personal liberty and the right to freedom of expression."[6] But it took more than three decades for the Government to realise that it was precisely these rights which were under threat under the 1971 Act, even though the Act had made a substantial contribution to the definition of contempt in Section 2. Both the Contempt of Courts (Amendment) Bills 2003 and 2004 declared that the Act would introduce fairness in procedure, and meet the requirements of Article 21 of the Constitution.[7] Considering that both these Bills were in response to the uncertain nature of the case law on the subject of allowing truth as a defence in contempt of court proceedings, it may be useful to consider the Statement

3. Constituent Assembly Debates, Volume VIII, pp. 378-383.
4. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Twelfth Report on the Contempt of Courts (Amendment) Bill, 2004, para 5 (Sudarsana Nachiappan, Chairman, 2005) available at http://rajyasabha.nic.in/book2/reports/personnel/12threport.htm, last visited June 26, 2008.
5. Id., para 7.2.
6. Id.
7. Statement of Objects and Reasons of Bill No. 34 of 2003 and Bill No. 87 of 2004.

of Objects and Reasons[8] of these Bills.

The SOR of the Contempt of Courts (Amendment) Bill, 2004 begins with:

> "The existing provisions of the Contempt of Courts Act, 1971 have been interpreted in various judicial decisions to the effect that truth cannot be pleaded as a defence to a charge of contempt of court."

The SOR however, does not cite any judicial decisions to prove the veracity of this statement. It simply repeats the claim first carried in the SOR of a similar Bill introduced in 2003, which had lapsed with the dissolution of the 13th Lok Sabha. It will be pertinent therefore, to reproduce the relevant SOR of the 2003 Bill, which has been pruned in the SOR of the 2004 Bill:

> "It has been interpreted in various judicial decisions that even truth cannot be pleaded as a defence to a charge of contempt of court under the existing provisions contained in the Contempt of Courts Act, 1971. Therefore, the existing provisions contained in the said Act are not satisfactory. It is indeed anomalous that in our country which proclaims 'Satyameva Jayate' 'Truth alone Triumphs,' as its motto, truth should not be available as a defence to a charge of contempt of court."

The SORs of both the 2003 and 2004 Bills cite the recommendation of the National Commission to Review the Working of the Constitution,[9] which does not explicitly make the claim made by the two Bills. Instead, it says:

> "*Judicial decisions have been interpreted to mean*[10] that in the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law...A total embargo on truth as justification may be termed as unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto of 'Satyameva Jayate' in the High Courts and 'Yatho dharma statho jaya' in the Supreme Court, the courts could rule out the defence of justification by truth."[11]

---

8. Hereafter, "SOR".
9. Hereafter, "NCRWC".
10. Emphasis added.
11. Report of the National Commission to Review the Working of the Constitution, Vol. 1, para 7.4.1 (M.N. Venkatachaliah Chairman, 2002) available at http://lawmin.nic.in/ncrwc/finalreport/v1ch7.htm, last visited June 26, 2008.

The NCRWC further recommended:

> "A mere legislation by the Parliament amending the Contempt of Courts Act, 1971 alone may not suffice because the power of the Supreme Court and the High Courts to punish for contempt is recognized in the Constitution. Therefore, an appropriate amendment by way of addition of a proviso to article 19(2) of the Constitution to the effect that, 'in matters of contempt, it shall be open to the Court on satisfaction of the bona fides of the plea and of the requirements of public interest to permit a defence of justification by truth.'"[12]

Put in this context, the SORs of both the 2003 and 2004 Bills seem to have assumed that there were judicial decisions ruling out truth as a defence in contempt proceedings, and therefore, amendment was necessary to enable justification of contempt. However, I argue that there were no definite judicial pronouncements to the effect that truth could not be pleaded as a defence in contempt proceedings; therefore, the amendment was conceived more as a response to a general perception (which I consider erroneous) gleaned from various observations made by Judges. Secondly, I submit that the Government's keenness to introduce this amendment, when there were more serious issues plaguing the Act than truth not being allowed as a defence, is inexplicable, if not an instance of its dissemblance, and the amendment will hardly change the manner the Courts have been handling cases of criminal contempt. While sections of the media may be emboldened to be critical of the Courts, they will do so not because of the amendment (which could still scare the media and dissuade them from exposing cases of corruption and wrong-doing among the Judges), but despite it.

III. The Necessity of the Amendment

The question of the necessity of the amendment is not just academic in nature. Practically, if truth could be implicitly pleaded as a defence to a contempt charge even in the absence of this amendment, and if Courts were reluctant to allow such a defence based on a flawed interpretation of judicial decisions, then it is plausible to suggest that the Courts would invariably find ways to circumvent this amendment as well. Therefore, it becomes important to look at the manner in which Courts have dealt with this issue in the past.

The starting point for this discussion would be the amended Section 13 of the Act, which deals with kinds of Contempt which are not punishable.

---

12. Id., para 7.4.2.

The provision states:[13]

> "(a) No Court shall impose a sentence under this Act for a contempt of court unless it is satisfied that contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice; (b) The court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide."

The amendment retains Section 13(a) as it stood prior to the amendment, and inserts Section 13(b) as a new provision. The drafting of this provision clearly suggests that the Court has the discretion to admit truth as a defence to contempt proceedings, as long as the discretion is guided by the twin factors of public interest, and the bona fide nature of invoking the said defence. This however, also gives the Court the discretion to determine what is "public interest" and "bona fide". Thus, I suggest that the amendment has actually limited the freedom enjoyed by the alleged contemnor in the pre-amendment era, to argue that in his or her view, the requirements of "public interest" and "bona fide" have been met. Now it is not for the alleged contemnor to seek to justify the contempt by invoking truth as a valid defence; instead, it will be the same Court he or she may have made allegations against, which will have the discretion to decide, on the basis of its own satisfaction, whether the requirements of truth as a valid defence to the alleged contempt, have been met. Such a restriction is *prima facie,* contrary to the one of the cardinal principles of natural justice, *nemo debet esse judex in propria causa,* that no one should be a judge in his own cause.

On the other hand, before this amendment, the alleged contemnor actually had a clearer incentive and better safeguard to use justification by truth as a valid defence, than under the amended Act as the law earlier was silent on the circumstances under which truth could be permitted as a valid defence. The amendment appears to have changed this, by leaving the alleged contemnor at the mercy of the Judge who would decide whether truth could be permitted as a defence.

To elucidate further, if we examine the law on the same prior to the amendment, it would be evident that the alleged contemnor had more freedom in invoking truth as a defence to the alleged contempt.

---

13. Contempt of Courts Act, 1971, Section 13.

For instance, in *Bathina Ramakrishna Reddy v. State of Madras*[14], the Constitution Bench of the Supreme Court stated:

> "The article in question is a scurrilous attack on the integrity and honesty of a judicial office. Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false, they cannot but undermine the confidence of the public in the administration of justice and bring the judiciary into disrepute."[15]

In this case, the appellant, though he took sole responsibility regarding publication of the article, was not in a position to substantiate, by evidence, any of the allegations made therein. The appellant admitted that the allegations were based on hearsay. The Court held that it was incumbent upon him, as a reasonable man, to attempt to verify the information he had received and ascertain, as far as he could, whether the facts were true or mere concocted lies. The Court held that the appellant had not acted with reasonable care and caution, and could not be said to have acted bona fide, even if good faith could be held to be a defence at all in a proceeding for contempt.

As pointed out by Fali S. Nariman,[16] the aforesaid observations of the Court were misinterpreted by a three-judge Bench in *Perspective Publications v. State of Maharashtra*[17] as being ambivalent and not holding affirmatively that truth and good faith could be set up as a defence in contempt proceedings.[18] Noted academic H.M. Seervai has also opined that since truth is a complete defence to an action for libel, it should be a complete defence to contempt of court proceedings as well,[19] which further raises doubt on the decision in *Perspective Publications.* Nariman explains that the law laid down in the *Perspective Publications* case ought not to be followed as the correct law, as another three-judge Bench of the Supreme Court had in August 1976 had set aside a Punjab High Court decision, which had held the alleged contemnor *prima facie,* guilty of contempt.[20] In that case, 15

---

14. AIR 1952 149.
15. Id., para 14.
16. "The Law of Contempt – Is it being Stretched too Far?" C.L. Agarwal Memorial Law Lecture delivered by Fali S. Nariman at Jaipur, Rajasthan, December 1, 2001, a booklet published by the Bar Council of Rajasthan.
17. (1969) 2 SCR 779 (hereafter, "*Perspective Publications"*).
18. Id., para 18.
19. H.M. Seervai, Constitutional Law of India: A Critical Commentary, vol. 1, p. 724 (Universal Law Publishing, 3rd ed. 1991).
20. Nariman, supra note 16.

members of a Bar Association had lodged a complaint regarding the observations of a High Court Judge made during an inspection at the District Court Bar; that the Judge had said demeaning things about politicians, which the lawyers, as stated in the complaint, felt he did not have the right to do. The letter, which was addressed to the Chief Justice, was put forth for the consideration of a Bench of the Court. On perusal of the contents of the letter, the Bench held that a prima facie case of criminal contempt was made out. None of the allegations in the letter against the Judge were disputed or challenged. Yet the High Court proceeded on the basis that despite the fact that the letters had truthfully recorded what had transpired during the inspection, and had commented adversely on the Judge's conduct, the authors were guilty of contempt. The Supreme Court overruled this and emphasized that allegations when true were not capable of sustaining a charge of contempt.

The Phillimore Committee on contempt of court in the United Kingdom had warned that an allegation of bias in relation to a particular case might, if the defendant were permitted to plead justification, be used in effect as a means of getting a case reheard. A simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his ability to try a particular case or class of cases. The Committee, therefore, did not consider that truth alone should be a defence and thus recommended public benefit to be considered along with truth, if it is to be recognised as a defence.[21] But the Committee added an important proviso, that if anyone believed that he had evidence of judicial corruption or bias, he could submit the same to the proper authority, namely, the Lord Chancellor. The Committee felt that it would be hard to conceive that the complaint was for public benefit if the complainant had not taken this step.[22]

The only case where the Supreme Court came close to suggesting that a contemnor cannot justify the contempt was in *C.K. Daphtary v. O.P. Gupta,*[23] where the Constitution Bench held that "if evidence was to be allowed to justify allegations amounting to contempt it would tend to encourage disappointed litigants – and one party or the other to a case is always disappointed – to avenge their defeat by abusing the Judge."

I agree with T.R. Andhyarujina who has suggested that the *O.P. Gupta* case cannot be considered as a definite pronouncement of the court on this question. According to him, it was not necessary to lay down a wider

21. Report of the Committee on Contempt of Court, para 166 (Lord Justice Phillimore, Chairman, 1974).
22. T.R. Andhyarujina, "Scandalising the Court – Is it Obsolete?", (2003) 4 SCC (Jour) 12, at p. 20.
23. (1971) 1 SCC 626, at pp. 644, 647 (hereafter, "*O.P. Gupta*").

proposition that a contemnor can never justify a statement alleged to be in contempt. He has pointed out that the Bench in this case made no reference to Justice Mukherjea's observation in the *Bathina* case which suggests that truth could not only be a defence but may also be in public interest.[24]

That the Courts did not refuse to permit truth as a defence, if it was in public interest and bona fide can be inferred from a few Judgments after *O.P. Gupta* judgment. In *In Re: S.K. Sundaram,*[25], a two-Judge Bench of the Supreme Court held that "good faith" in criminal jurisprudence has a definite connotation. Its import is totally different from saying that the person concerned has honestly believed the truth of what is said. Citing Section 52 of the Indian Penal Code, the Bench held that the solitary item included within the purview of the expression 'good faith' is what is done with "due care and attention". Thus the Bench held that before a person proposes to make an imputation on another, the author must first make an enquiry into the factum of the imputation which he proposes to make. The enquiry expected of him is of such a depth as a reasonable and prudent man would make with the genuine intention of knowing the real truth of the imputation.

It is pertinent also to refer to the Bombay High Court's decision in *V.M. Kanade v. Madhav Gadkari*[26], where it was contended by the counsel for the contemnor that it must first be established that the statements made by the contemnor were not true, and that it was only after this was done, that the question of meeting the case by the contemnor could arise. To this, the Bench replied: "One cannot accuse a man of dishonesty and then ask him to prove that he is not dishonest."[27] The contemnor himself did not state in his affidavit-in-reply that what he had stated was true. On the other hand, he asserted that since there was no allegation either in the petition or in the notice that he had made any false statement, he had been advised that he was relieved from the burden of establishing the truth of his statement.

In this case, the contemnor had alleged that a Judge of the Bombay High Court dispensed justice not on merits, but by looking at the face of a lady advocate, and by being influenced by her seductive charm. The Bench held that even if they gave the contemnor opportunity to prove the truth of the allegations, he could only lead evidence to show that there were several cases in which the lady advocate had appeared where the learned Judge had passed orders in favour of her clients. The Court further held that unless it was established that each of these orders or a majority of them were incorrect, it would be impossible to provide basis for an allegation that the

24. See Andhyarujina, supra note 22.
25. 2001 CrLJ 2932.
26. 1990 CrLJ 190 (Bom).
27. Id., para 22.

said Judge passed orders in favour of the lady advocate without looking into the merits of the cases. The correctness of a judicial order can only be questioned by procedures provided by law, such as appeal and revision. In collateral proceedings, the correctness or otherwise of the orders passed by a judicial officer cannot be questioned. The Court held that even if the orders were found to be in a majority of cases wrong, it could, by no stretch of imagination be proved that the orders were passed dishonestly.[28]

However, this judgment cannot be interpreted to have rejected the contention that truth can be a ground in contempt proceedings, if the alleged contemnor is ready to back up his allegations with facts, rather than with just insinuations and innuendo.

IV. Need for a Comprehensive Reform of the Law

The SORs of 2003 and 2004 Bills mechanically quote the diagnosis of the NCRWC Report, that the contempt law requires an appropriate change, but do not adopt its recommendation, that is, to amend Article 19(2) of the Constitution. The Parliamentary Standing Committee's 12th Report on Personnel, Public Grievances, Law and Justice[29] submitted on August 29, 2005 on the 2004 Bill sheds some light on why the NCRWC's recommendation in this regard was not accepted.

The Attorney General had given his opinion that a Constitutional amendment would be a lengthy and a time-consuming process. He had also opined that it was unlikely that the Supreme Court and High Courts would act in disregard of a statutory provision which, in essence, sub serves the requirement of fairness and reasonableness. The Government agreed with the Attorney General that the amendment of the Constitution, even though desirable, would be a lengthy and a complicated process.[30] However, the rejection by the Committee of the NCRWC's recommendation to amend the Constitution, on the ground that it was a time-consuming process, is not very convincing, especially because a Constitutional amendment, on the lines suggested by the NCRWC, would have proved to be an important safeguard against arbitrary exercise of power to punish for contempt of court.

It is instructive to read the apprehensions and misgivings expressed over the amendment when the same was being discussed by the Committee. Some of the expert witnesses heard by the Committee referred to *Pritamlal v. High Court of Madhya Pradesh,*[31] wherein the Supreme Court held that its

28. Id., para 45.
29. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4.
30. Id., para 11.
31. (1993) 1 SCC Supp. 529.

power of contempt cannot be restricted and trammelled by any ordinary legislation including the provisions of the Contempt of Courts Act. The Bar Council of India pointed out that through Section 20, the Act contains a limitation period of one year,[32] but it has been overlooked by the Courts, as contempt allegedly committed two years earlier were also taken into consideration by the Judiciary.[33] Thus in *Firm Ganpat Ram Rajkumar v. Kalu Ram,*[34] the Supreme Court held that Section 20 has no application where the contempt is a continuing wrong,[35] and in the *High Court of Karnataka v. Y.K. Subanna*,[36] it was held that Section 20 does not derogate from the power vested in every High Court under Article 215 of the Constitution.

It was also pointed out to the Committee that once justification by truth is permitted, the question of the bona fides of the plea would be imposing an extreme restraint because once truth is established there cannot be truth without bona fides. The restriction regarding public interest was also criticized because in an issue involving contempt where justification by truth is made a defence, imposing another limitation, that is, that the same should be in public interest, would be virtually defeating the objective of justification by truth.[37] It was pleaded before the Committee that once a Court issues a notice of contempt, the issue of bona fides and public interest being conditions precedent to the Court allowing the plea of justification by truth would virtually result in the law remaining as it is in spite of the proposed amendment.[38] One expert witness said: "Everything need not be in public interest. When you say it is in public interest, defence given to an accused is taken away".[39] Another said: "Truth itself is bona fide. When truth is there, public interest is also there. Truth may be bitter, but it is sufficient."[40] It is submitted, that to allay these apprehensions, the Bill could have been suitably amended to incorporate the Phillimore Committee's recommendation that a contemnor must first have submitted his complaint to a competent

32. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (V. Radhakrishnan, Secretary).
33. Id.
34. AIR 1989 SC 2285.
35. Id., para 7.
36. 1990 CrLJ 1159 (Kar).
37. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (Vinod Kumar Bharadwaj, Chairman, Executive Committee, Bar Council of India).
38. Id.
39. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (V. Radhakrishnan, Secretary).
40. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (Vinod Kumar Bharadwaj, Chairman of the Executive Committee, Bar Council of India).

authority, before making an allegation against a Judge public.

The former Union Law Minister, Ram Jethmalani, told the committee that the amendment was half-hearted and unworkable. He suggested a different phraseology of the amendment as follows: "No imputation against the Judge shall be punishable as contempt, if imputation is substantially true or in good faith believed to be true." The amended Section 13(b) begins by stating, "The Court may permit...." According to him, the Court will never permit a defence if the imputation is that the Judge is dishonest."[41] Jethmalani's plea is perhaps in favour of adopting a liberal definition of 'good faith' as carried in the General Clauses Act, 1897 which states: "A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." However, as seen in the *Sundaram* case, the Supreme Court is inclined to interpret 'good faith' according to Section 52 of the Indian Penal Code which reads, "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." The adoption of the definition under the General Clauses Act will only encourage persons out to market gossip in order to embarrass the judiciary. [42]

Justice G.N. Ray, Chairman of the Press Council of India, told the committee: "The definition of public interest should be more explicit so that there is little scope to say that it is not in public interest. If we want to amend this, let us amend it with full heart."[43]

Prashant Bhushan, Convenor of the Campaign for Judicial Accountability and Reforms, told the Committee that even if a Journalist claims he wrote a bona fide story, he may not be able to prove the truth of what he has written. "He may legitimately believe as true what he is saying, but he may not be able to prove in a Court of law unless statutory investigation is made by the police agency and documents are seized," he said.[44]

This raises the issue of what happens when the Court does permit justification by truth as a valid defence, after satisfying itself that it is in public interest and the request for invoking the said defence is bona fide. If

41. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (Ram Jethmalani).
42. Rajeev Dhavan, Contempt of Court and the Press, pp. 99-100 (Indian Law Institute, Press Council of India, 1982).
43. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (Justice G.N. Ray, Chairman of the Press Council of India).
44. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, Chapter 4: Relevant Minutes of the Meetings of the Committee (Prashant Bhushan, Convener of the Campaign for Judicial Accountability and Reforms).

a journalist is unsuccessful in proving the truth of his allegations, because there has been no parallel investigation into the allegations by the police, the objective of this amendment may remain unfulfilled.

V. The Adequacy of the Amendment

The very first major case to be heard since the coming into force of this amendment has exposed certain inconsistencies inherent in the Act. In the *Delhi Mid Day* case decided by the Delhi High Court on September 11, 2007 (*Court on its own motion v. M.K.Tayal and Ors),*[45] the Supreme Court stayed the sentencing of the contemnors,[46] till it disposed of their appeal against their conviction, i.e. *Vitusah Oberoi v. Court of its own motion*[47]. But the Delhi High Court's brief order in this case, holding the accused guilty of contempt raises important issues which were not anticipated by the authors of this amendment or by the Standing Committee which examined the Bill.

The Delhi High Court, in this case, was clearly not in conformity with Section 11 of the Act, which states that a High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it. The contempt of the Supreme Court is certainly outside the High Court's jurisdiction, but the question strangely was not raised during the arguments, or addressed by the Bench which delivered the order.

One of the main arguments advanced by the accused in this case was that the attack in the press was focused on the ex-Chief Justice of India at a time when he has ceased to be in office and therefore, cannot be termed as denigrating the authority of the Supreme Court. But the Delhi High Court rejected this argument saying the contemnors wanted to project the Supreme Court as having permitted itself to be led into fulfilling an ulterior motive of one of its members. "The Supreme Court sits in divisions and every order is of a Bench. Therefore, by imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfil the ulterior design. The publications in the garb of scandalizing a retired Chief Justice of India have, in fact, attacked the very institution which, according to us, is nothing short of contempt."[48]

The High Court has made a subtle distinction between a scandalous attack on a Judge, and the implied scandalous attack on his brother Judges

---

45. See this link for the judgment on conviction, available at http://courtnic.nic.in/dhcorder/dhcqrydisp_j.asp?pn= 3531&yr=2007, last visited June 26, 2008. They were sentenced on September 21, 2007 by the Delhi High Court.
46. 2007 (11) SCALE 604.
47. Crl. App. No. 1234/2007.
48. *Court on its own motion v. M.K. Tayal and Ors*, para 5, available at http://courtnic.nic.in/dhcorder/dhcqrydisp_j.asp?pn= 3531&yr=2007, last visited June 26 2008. They were sentenced on September 21, 2007 by the Delhi High Court.

who sat with him on the Bench. The contemnors may not have intended to make any allegations against the brother Judges who sat with the Judge against whom they made specific allegations. But the Bench was free to draw such an inference, and broaden the scope of the contempt charge against the accused. This, it appears, helped the Bench to circumvent the amended Section 13 of the Act, providing for truth as a defence. If the accused did not make any allegations against the brother Judges, there is no question of asking the accused to prove the truthfulness of their allegations. Therefore, the contempt charge against the accused – insofar as the brother Judges are concerned – can stand independent of the truth of their allegations against the particular Judge. The High Court Bench thus ignored the plea of the accused who invoked the amended Section 13 of the Act in their defence.

More importantly, Section 13 of the Act deals with contempt not punishable in certain cases. It shows that Section 13 of the Act can be invoked only at the time of sentencing the contemnors, and not earlier. It would then imply that the Court would be free to hold the accused guilty and convict them of contempt of court, without hearing any arguments on the truth of the allegations made against a Judge. Once the Court finds the accused guilty of contempt, the question of permitting justification by truth as a valid defence, just in order to avoid awarding of punishment on the contemnors, appears to be illogical. Thus it is understandable that the Delhi High Court Bench asked the counsel for contemnors, who invoked Section 13 during the arguments on sentencing, "Truth of what?"[49]

Permitting the contemnors to invoke truth as a valid defence to the alleged contempt at this belated stage hardly makes sense, as the Court had already concluded that they were guilty. Even if the Court permits such a defence, and if such a defence is sustained, would it not contradict its own conclusion that the contemnors were guilty? Any allegation of corruption against a Judge, even if it is consistent with public interest and good faith, is likely to shake the public confidence in the integrity of the Judiciary, including those brother Judges who sat with the allegedly corrupt Judge on a Bench. But the considerations of public interest and good faith must perforce outweigh this contempt which is based entirely on perceptions.

The Standing Committee was aware of this inconsistency in the amendment. It noted that eminent witnesses which it heard, had pointed to this, and wanted Section 13(a) to be so amended as to prevent even a finding

49. Express News Service, "Articles on Ex-CJI: HC gives Prison Term to 4 Journalists, then Bail", *Indian Express*, September 22, 2007, available at http://www.indianexpress.com/story/219741.html, last visited June 26, 2008.

of guilt by the Court when no appreciable injury to administration of justice is caused by the conduct of the contemnor.[50] They suggested similar amendment of Section 13(b) to say that "no one shall be held guilty of contempt of court by making or publishing any statement relating to a Judge or court which is true or which he, in good faith, believes to be true."[51] The Committee wanted the Government to appropriately address this, along with other concerns expressed over the Bill.

The Standing Committee further wanted the defence of truth to be inserted suitably as one of the exemptions or defences under Section 8, which deals with other defences not affected.[52] The Committee felt it would give the contemnor an additional help, "because he may plead the defence of truth and may not be held punishable"[53]. But the Government apparently rejected these suggestions of the Committee, as is clear from the provisions of the Amendment Act.

VI. Conclusion: The Anomaly in the Amended Section 13

Amendment of Section 13 of the Act, as it finally resulted, thus appears to be a serious anomaly. The major source of friction between the freedom of an individual and the judiciary is not the absence of a legal provision guaranteeing truth as a defence in contempt proceedings, but the judiciary's temptation to use Section 2(c)(i) against genuine attempts to seek judicial accountability. This sub-section defines criminal contempt as the publication of any matter or the doing of any other act whatsoever which scandalizes, or tends to scandalize, or lowers or tends to lower the authority of any court. The Standing Committee report records that "eminent witnesses almost unanimously tried to persuade" the Committee to delete this provision from the definition of criminal contempt.[54] The Committee concluded, however: "The strength of this suggestion was not impressionable. It is felt that this change must wait for sometime."[55] Till such time, it appears, any reform of the Contempt of Courts Act, would have only limited impact.

Section 2(c)(i) is an aberration, and is completely at variance with the legal meaning of contempt, as enunciated by Lord President Clyde in *Johnson v. Grant*. This legal meaning is best exemplified by Section 2(c)(ii) and (iii) which define criminal contempt as publication of any matter or doing of any act which prejudices, or interferes or tends to interfere with, the due

50. Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, supra note 4, para 20.
51. Id.
52. Id., para 18
53. Id.
54. Id., para 20.
55. Id.

course of any judicial proceeding; and which interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

The offence of scandalisation at least needs to be qualified, if the time is not yet ripe for its repeal. The proposal of the Australian Law Reform Commission, for instance, is worthy of consideration. It has recommended that there should be a defence to the effect that the allegedly scandalising remarks, so far as they related to questions of fact, were true, or that the person making them honestly believed them to be true and was not recklessly indifferent as to truth or falsity. Evidence that the accused knew the remarks to be false, or was recklessly indifferent as to truth or falsity, would nullify the evidence.[56]

Some observers have noted that the Contempt of Courts (Amendment) Act, 2006, is problematic because while it recognizes truth as a defence of the alleged contemnor, it has nothing to say about the rights of the Judge concerned to defend himself in the face of what he may consider as baseless allegations.[57] But this sympathy for natural justice appears to be misplaced, because the objective of the Contempt of Courts Act is to define and limit the powers of Courts to punish for contempt. The aggrieved Judge certainly has remedies under other laws against what he perceives as defamation. The truth that is involved in contempt proceedings is different from that involved in a defamation suit against an individual. What is important is not whether the accused "knew" the judge to be corrupt for sure, but whether the facts reasonably point towards such a conclusion.

To sum up, there is indeed a case for a thorough reform of the law on contempt of courts, in the light of the deliberations of the Parliamentary Standing Committee on the Bill to amend the Contempt of Courts Act. The Act may fail to achieve the objectives of the Act as well as the amendment because of the many inconsistencies and infirmities in the Act. The 2006 Amendment is only a half-hearted attempt to ensure judicial accountability, and realise the objectives of the Contempt of Courts Act.

---

56. Christopher Miller, Contempt of Court, p. 358 (Oxford University Press, 3rd ed. 2000).
57. Speech by T.R. Andhyarujina at Session II of the workshop on reporting of court proceedings by media and administration of justice for legal correspondents and journalists, organized by Supreme Court Legal Services Committee and others, March 29, 2008, New Delhi. (Notes taken by this writer at the workshop). See also Samar Ditya Pal, "Contempt, Judges and Truth", in Courts, Legislatures, Media Freedom, edited by K.N. Hari Kumar, p. 17 (National Book Trust, New Delhi, 2006).