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Outrage au tribunal

Some contemporary problems in the English law relating to contempt of court

L. Neville BROWN *

Introduction

1. One day in 1970, a group of Welsh students, as a protest against a court order made against one of their student leaders, travelled to London from their University at Aberystwyth and invaded a courtroom in the Strand where Mr. Justice Lawton was hearing a case of libel wholly unconnected with their grievance. As Lord Denning vividly described the scene: "They strode into the well of the court. They flocked into the public gallery. They shouted slogans. They scattered pamphlets. They sang songs. They broke up the hearing." [1] For their criminal contempt, eleven of the students were sentenced to three months' imprisonment and a further eight who apologised for their behaviour were each fined £50. The Court of Appeal upheld Mr. Justice Lawton's decision but, as an act of mercy, freed those students who had appealed against their sentences of imprisonment.

2. A contemporary illustration of civil contempt, as opposed to criminal contempt, is afforded by the *cause célèbre* of *Midland Cold Storage Limited* v. *Turner*.[2] In this case five unofficial dock leaders (who were shop stewards of the Transport and General Workers Union) had refused to obey an order of the National Industrial Relations Court against the continued picketing of the premises of a cold store in London which employed non-dockers to load and unload containers. The policy of the T.G.W.U. was that the work of loading

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1. *Morris* v. *Crown Office* (1970) 2 Q.B. 114. The Welsh student movement has been concluding a vigorous campaign for the preservation of the Welsh language, including its equal use with English in court proceedings in Wales.

2. *Midland Cold Storage Limited* v. *Tumer* (1972) 3 All E.R. 773; *The Times* July 22 and July 28 1972 (see also the leading articles on those dates).

and unloading containers carried by sea should generally be reserved for dockers. The Court ordered the five dockers to be imprisoned for civil contempt by reason of their disobedience to its order. There was then a threat of a total stoppage in the docks, but after a week the shop stewards were set free upon the application of the Official Solicitor. This *deus ex machina* persuaded the Court that under the relevant statute its orders should be enforced by measures against the Union's funds and not against individuals, at least in the particular circumstances of the case.[3]

3. These two recent examples of criminal and civil contempt respectively show how relevant is the law of contempt to issues of contemporary society. The topicality of this area of English law is evidenced by the attention it has attracted in recent years. Thus, the organisation of British lawyers, *Justice*, issued a *Report on Contempt of Court* in 1959,[4] which led to Parliament passing the *Administration of Justice Act 1960* so as to confer a right of appeal in cases of criminal contempt.[5] In 1969 a government Committee under Lord Justice Salmon investigated the law of contempt as it affected Tribunals of Inquiry,[6] an investigation prompted by public disquiet after the so-called Vassal Tribunal in 1962 when three journalists were imprisoned for refusing to disclose their sources of information to the Tribunal.[7] In 1971 the Lord Chancellor appointed a Committee under Lord Justice Phillimore to examine the whole law of contempt, and the report of this Committee is expected imminently. Indeed, reference will be made later in this paper to an informed "leak" of its main recommendations.[8] Finally, in 1973 my colleagues in the Birmingham Institute of Judicial Administration, Gordon Borrie and Nigel Lowe, published a major treatise on the modern law of

3. Argument for the official Solicitor relied upon the judgment delivered the same day by the House of Lords in *Heatons Transport (St. Helens) Ltd.* v. *Transport and General Workers Union* (1972) 3 All E.R. 101, where (at 108) Lord Wilbefore stated: "the method of enforcement *The Industrial Relations Ad. 1971* prescribes, including expressly punishment for contempt, is against the organisation's funds. This is the method which has been adopted here: it appears to be the primary method contemplated by the Act, rather than any action against individuals".

4. *Justice*, Report on Contempt of Court (1959).

5. Section 13.

6. Report of the Committee on the Law of Contempt as it affects Tribunals of Inquiry (1969), Cmnd. 4078. A few years previously Lord Justice Salmon had presided over a Royal Commission on Tribunals of Inquiry, which reported in 1966 (Cmnd. 3121).

7. *Attorney-General* v. *Clough* (1963) 1 Q.B. 773; *Attorney-General* v. *Mulholland and Foster* (1963) 2 Q.B. 477.

8. *The Sunday Times* (1974), August 4, page 1.

contempt,[9] thereby filling a gap in the doctrinal literature which had persisted since 1910 when the third and last edition appeared of Oswald's classic *Contempt of Court*.[10]

4. In this paper I have assumed, as a rough and ready generalisation, that the law of contempt is substantially identical in England and Canada, and that within Canada this identity persists as between the Francophonic and Anglophonic provinces. So much I learn from a study of the excellent teaching materials which professors Beausoleil, Ferland and Vachon provide for their students of *Droit Judiciaire* in the Laval Faculty. Such identity of our respective laws makes it unnecessary for me even to state here in outline the English law. Instead, I propose to discuss a selection of current problems and difficulties which have arisen in the English law and practice, being matters no doubt upon which the Phillimore Committee will shortly pronounce in its report.

5. The four areas of difficulty and interest which I wish to consider relate to: (A) the uncertainty of the current law of contempt; (B) the reconciliation of that law with the freedom of the press; (C) the possible infringement of natural justice by the procedure followed in contempt cases; and, finally, (D) the search for a satisfactory classification of acts of contempt. In this last area, a comparison will be made with French law in an attempt to emphasise the generality of the English concept of contempt of court.

A - Uncertainty of the law

6. It has long been a complaint that there is uncertainty as to the moment of time at which the law of contempt begins to apply. This uncertainty usually arises in cases where the alleged contempt takes the form of a publication tending to prejudice the due course of civil or criminal proceedings.[11] Publishers and editors of newspapers need to know when they must exercise restraint in commenting upon events of public concern because of an impending trial (or public enquiry). But the law gives no certain answer. The uncertainty is compounded by the distinction made between criminal and civil proceedings.

7. So far as criminal proceedings are concerned, the law at the turn of the last century seemed to be settled that there could be no

9. BORRIE AND LOWE, *The Law of Contempt* (Butterworths, 1973). I am heavily indebted to this work for much of my paper.

10. OSWALD, *Contempt of Court* (3rd edn., 1910). In 1927 an historical study was published by Sir John Fox: Fox, *The History of Contempt of Court* (1927).

11. See BORRIE and LOWE, *op. cit.*, Chapter 5, *The Timing of Publications*.

contempt unless at the time of the offending publication a criminal trial was pending [12]; and by "pending" was meant that an arrest had been made or a warrant for arrest had been issued. This is illustrated by the *Crippen case* (1910) [13], where the *Daily Chronicle* was adjudged guilty of contempt for publishing an alleged confession by the notorious murderer after his arrest on board ship in Canadian waters, but three weeks before he was formally charged in London with murder.

8. In 1927, however, Lord Chief Justice Hewart appeared to draw a distinction between pending and "imminent" proceedings when he commented: "We are not called upon to consider the question whether there may be a contempt of court when proceedings are imminent but have not yet been launched." [14] And his successor, Lord Chief Justice Goddard, appeared to support the view that the law of contempt could begin to operate even before an arrest, when, in a case in 1957,[15] he cited with approval the statement of Wills, J.: It is possible very effectually to poison the fountain of justice before it begins to flow." [16] Parliament then lent apparent support to the distinction between pending and imminent when it enacted the *Administration of Justice Act 1960* which by section 11 provided:

> "A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings *pending or imminent* at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that proceedings were *pending, or* that such proceedings were *imminent*, as the case may be."

9. In 1969 the *Salmon Report* was able to conclude:

> "Although there have been differences of opinion expressed on this subject the better view seems to be that as far as criminal proceedings are concerned the law of contempt bites when such proceedings are imminent." [17]

Nevertheless, it must be admitted that there is no authoritative ruling of an English court on this point. Moreover, the Phillimore Committee is expected, when it reports shortly, to adopt the criterion of "pending proceedings" and to define these as when a person has been charged or summon served.

12. See *R.* v. *Parke* 1903 2 K.B. 432.
13. *R.* v. *Clarke, ex parte Crippen* (1910), 27 T.L.R. 32; 103 L.T. 636.
14. *R.* v. *Daily Mirror, ex parte Smith* (1927) 1 K.B. 845 at 851
15. *R.* v. *Odham's Press* (1957) 1 Q.B. 73 at 81.
16. *R.* v. *Parke* (1903) 2 K.B. 432 at 437.
17. Cmnd. 4078, p. 9.

10. In civil proceedings the law of contempt begins to "bite" (to borrow the graphic phrase of the Salmon Committee) as soon as the writ has been issued. This was the view of Oswald in his book on *Contempt* and it was adopted with approval by Sargant J. in *Dunn* v. *Bevan* in 1922.[18] In their recent book, Borrie and Lowe suggest that the criterion should be rather when proceedings are "imminent".[19] On the other hand, the Phillimore Committee is expected to recommend the more restrictive rule that there can be no contempt until a civil case has been set down for trial.

11. The Phillimore Committee by this recommendation will have found a solution for the problem of "gagging writs".[20] A gagging writ is a writ issued for the specific purpose of stifling comment, rather than with any real intention of bringing any action. The writ is almost always one for libel. The problem then is whether its issue prevents ("gags") any further comment being made, lest the comment be a contempt of court, even though there is no real intention of pursuing the action.

12. Thus, in 1962 Sir Oswald Mosley brought libel proceedings against the B.B.C. in respect of an item broadcast in a television programme. The Statement of Claim was delivered in December 1962 and the B.B.C. delivered its Defence in February 1963, but no further action was taken by the plaintiff. Then, in November 1965 the B.B.C.'s journal, *Radio Times*, published an article which reviewed a forthcoming programme entitled "The Thirties in Britain", and the plaintiff claimed that the article was prejudicial to the pending libel proceedings. His action for contempt against the B.B.C. failed, partly because the court held that he had no intention of pursuing the libel proceedings any further, as was evident from his inaction for over two years.[21]

13. In practice, there have been fewer cases involving civil proceedings. The searchlight of publicity is usually focussed on criminal cases. Moreover, a civil trial by *jury* is only encountered today in suits for defamation. Consequently, it will be more difficult to establish that a publication has prejudiced a civil trial by judge alone, for the professional judge is trained to immunise himself against the effects of prejudicial comment. Yet in a recent case involving civil proceedings, a newspaper was prevented from publishing an article on the ground that it would tend to deter one of the

18. (1922) 1 ch. 276 at 284.

19. BORRIE and LOWE, *op. cit.*, p. 148.

20. BORRIE and LOWE, *op. cit.*, pp. 90-96.

21. *R.* v. *Fox, ex parte Mosley* (1966), *The Times*, February 17.

parties from defending the action.[22] The case involved the tragic victims of the thalidomide drug on whose behalf a number of actions for damages were pending against the Distillers Company on the ground of their negligence in putting the drug on the market. Whilst negociations were in process to reach a settlement of the cases, the *Sunday Times* proposed to publish an article which, it was alleged, would establish the negligence of the company. The House of Lords held that this amounted to a contempt of court, as the newspaper intented to hold up to execration one of the parties to litigation and to conduct its own "trial by newspaper" of the issues in a parties to to conduct its own "trial by newspaper" of the issues in a pending case, with the object of bringing pressure on one of the parties to settle the case, rather than to defend it.

14. The implications of this decision of the House of Lords in relation to freedom of the press are far-reaching and will be returned to below.

B - Freedom of the press

15. The setting up of the Phillimore Committee in 1971 was largely prompted by concern that the law of contempt unduly inhibited freedom of the press. Mention has already been made of the imprisonment of three journalists for refusing to disclose their sources of information to the Vassall Tribunal.[23] Anxiety also arose in connection with another Tribunal of Inquiry, that which inquired into a landslip of colliery waste onto the Welsh village of Aberfan in 1966. Immediately after Parliament had set up the Aberfan Tribunal the then Attorney-General, Sir Elwyn Jones, issued the following statement:[24]

> "The Tribunal having been established with wide terms of reference, it is highly undesirable that any comments should be made either in the Press or on the radio or on television on matters which it will be the express function of the Tribunal to investigate.
>
> Apart from their manifest undesirability, such comments may have legal consequences which are, perhaps, not at present appreciated. Just as comments on the subject matter of a pending trial may constitute contempt of court, so also, the Tribunal would have to consider whether such comments amounted to such an interference with their highly important task as to necessitate the chairman certifying that it called for

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22. *Attorney-General* v. *Times Newspapers* (1973) 3 All E.R. 54 (H.L.).

23. *Attorney-General* v. *Clough* (1963) 1 Q.B. 773; *Attorney-General* v. *Mulholland and Foster* (1963) 2 Q.B. 477.

24. H. C. DEBS Vol 734, Col. 1315 — October 27, 1966.

an investigation by the High Court as whether there had been a contempt of the Tribunal."

16. This statement created much concern to the Press and other media. The Press Council expressed alarm at the implications of the Attorney-General's statement and commented that "the intrusion into the domain of free speech of ill-defined threats of legal proceedings is harmful to the proper conduct of public affairs in a free society." [25] Nevertheless, the Salmon Committee concluded in its report in 1969 that the Attorney-General had correctly stated the legal position, in applying the law of constructive contempt to Tribunals of Inquiry.[26]

17. Another episode which alarmed the upholders of free speech was the *Savundra* case in 1968.[27] Dr. Savundra appealed to the Court of Appeal against his conviction on the ground that his trial had been prejudiced by a television interview with him conducted by David Frost shortly before his arrest. The Court of Appeal dismissed the appeal as there was no real risk that the jury had been influenced by the interview, but Lord Justice Salmon made clear that such interviews would in future be punished for contempt even though proceedings were only imminent.

18. Freedom of the press is an important safeguard of a free society. But such freedom cannot be allowed to degenerate into licence. A French jurist [28] has remarked upon

> « la dégradation générale de la technique journalistique que l'on constate depuis quelques dizaines d'années, dégradation qui s'est étendue aussi à la radiodiffusion et à la télévision, dont les commentateurs se recrutent souvent parmi les journalistes. À la presse d'opinion, qui a pu jouer au XIXe siècle et au début du XXe siècle un rôle considérable dans la formation de l'opinion publique française, s'est substituée progressivement une presse d'information, plus soucieuse de voir monter le tirage de ses quotidiens que d'éduquer le sens civique, politique et moral des lecteurs. Les vices de cette transformation sont graves : place de premier plan donnée aux faits divers, à l'érotisme, aux détails scabreux, aux affaires sensationnelles, affirmations faites à tort et à travers sur la culpabilité ou la non-culpabilité de telle personne poursuivie, blâmes plus ou moins fondés (et souvent moins que plus) sur l'activité judiciaire, influence anormale et partiale exercée sur l'opinion publique et, indirectement, sur les magistrats et sur les jurés des cours d'assises. »

Although addressed to the situation in France, these remarks ring true for much of the Western world. The law of contempt serves as a

25. (1966), *The Times*, October 29.
26. Cmnd. 4078, paras. 16–19.
27. *R.* v. *Savundra and Walker* (1968) 3 All E.R. 439 (C.A.).
28. A. VITU, "Atteintes à l'autorité de la justice" *Juris-Classeur Pénal* (1963), p. 2.

necessary check upon the abuse of the freedom of the press in the interests of administration of justice, interests which must rank as high as freedom of speech itself.[29]

19. On the other hand, it is well to recall Lord Atkin's famous phrase that "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken, comments of ordinary men." [30] One wonders however what Lord Atkin would have thought of the comments which certain politicians made upon Sir John Donaldson, the Presiding Judge of the ill-fated and short-lived National Industrial Relations Court.[31]

20. The Phillimore Committee is expected to clarify to some extent the difficult borderline between permissible public comment and contempt of court.[32] It will propose that a publication should only be liable to prosecution for contempt if it creates a risk that the course of justice would be seriously impeded or prejudiced. In addition, it would be a defence that the publication formed part of legitimate discussion of matters of general public interest and that it only incidentally and unintentionally created the risk of serious prejudice to particular proceedings. But the Committee will reject the introduction into the law of contempt of a general defence that the publication is for public benefit.

21. So far as concerns the new technique of "investigative journalism" or "trial by newspaper", the decision of the House of Lords in the *Thalidomide* case stands as a warning that the English law of contempt is adequate to restrain its excesses.[33] However, the

29. "The Press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board...... But the watchdog may sometimes break loose and have to be punished for misbehaviour": DENNING, *Road to Justice* (1955), p. 78.

30. *Ambard* v. *Attorney-General for Trinidad and Tobago* (1936) A.C. 322 at 335.

31. In particular, Mr. Michael Foot, a Minister in the Labour Government of Mr. Harold Wilson after the election of February 1974, referred to the Judge as "trigger-happy" in his attitude to the Trade Unions. But his remarks (in December 1973) were made in the House of Commons within the shelter of parliamentary privilege, though it is a moot point how far this would project in contempt proceedings.

32. See note 8 above.

33. *Attorney-General* v. *Times Newspapers* (1963) 3 All E.R. 54 (H.L.). see especially the speech of Lord Simon at 81:
"Your Lordships, then, are concerned with two public interests, which are liable to conflict in particular situations — in freedom of discussion, on the one hand, and in unimpeded settlement of disputes according to law, on the other..... The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves. The public thus has a permanent interest in the general administration of justice and the general course of the law. This is recognised by justice being openly administered and its proceedings freely reported, by

Phillimore Committee is expected to propose a new statutory provision whereby it shall not be a contempt to bring influence or pressure to bear upon a party to proceedings unless it amounts to intimidation or unlawful threats to his person, property or reputation.

C - Contempt and Natural Justice

22. Where contempt is committed in the face of the court, English law recognises an inherent power in the higher courts to proceed by summary process to punish the contempt.[34] Such power was felt to be essential to uphold the course of justice. Accordingly, the person committing the contempt could not claim his normal right at common law to be tried by jury in a situation where he was at risk of imprisonment. For so-called constructive contempts, i.e. those committed outside the court (such as publications tending to prejudice proceedings), summary process has also become to accepted method of trial, although trial by jury was a seldom used alternative until 1902, since which date it has fallen into desuetude.[35]

23. The use of summary process is generally accepted as necessary in cases of contempt, both in the face of the court and outside the court. Indeed, it is the more readily accepted since in 1960 statute granted a general right of appeal to the Court of Appeal against all convictions for contempt.[36] At the same time, judges have been properly scrupulous not to abuse the almost arbitrary power which summary process entrusts to them. As the then Master of the Rolls, Jessel, declared in 1877 :[37]

> "This jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and

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public debate on the law and on its incidence. But, as regards particular litigation, society, through its political and legal institutions, has established the relevant law as a continuing code, and has further established special institutions (courts of law) to make the relevant decisions on the basis of such law. The public at large has delegated its decision-making in this sphere to its microcosm, the jury or judge. Since it would be contrary to the system for the remit to be recalled pendente lite, the paramount public interest pendente lite is that the legal proceedings should progress without interference." But Harry Street, "Could English Law Cope?" (1974) New Law Journal, 796, warns pertinently that in England the law of contempt would have inhibited the journalists Bernstein and Woodward of the Washington Post from exposing the Watergate affair because of pending charges against some of "the plumbers".

34. See BORRIE and LOWE, *op. cit.* p. 254.

35. *R.* v. *Tibbits and Windust* (1902) 1 K.B. 77 was the last reported instance of a trial by jury for contempt.

36. Administration of Justice Act 1960, section 13.

37. *Clements and Costa Rica Republic* v. *Erlanger* (1877), 46 L.J. Ch. 375 at 383.

> exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of the Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject".

24. Nearly a century later much the same language was used by the present Master of the Rolls, Lord Denning, in the extraordinary case of *Balogh* v. *St. Albans Crown Court* (1974).[38] Balogh was a clerk with a firm of solicitors and as part of his duties found himself having to attend a case about pornographic books being tried at St. Albans Crown Court by Mr. Justice Melford Stevenson. The case extended over several days and Balogh became bored. He decided to enliven the proceedings by releasing laughing gas into the air of the court-room. To this end he stole a cylinder of the gas from a hospital and climbed at night onto the roof of the court-house in order to locate the ventilating ducts into which to release the gas. Next day, before he could put his plan into effect, he aroused the suspicions of the court officers, the cylinder was discovered and the admitted his intentions, saying that he only meant to indulge in a pratical joke. When he was brought before Mr. Justice Melford Stevenson, the judge was not amused and sentenced him to 6 months imprisonment for contempt. On appeal to the Court of Appeal, the sentence was set aside on the ground that there had been no contempt committed in the circumstances, although Balogh would still have to stand trial for the theft of the cylinder.

25. One reason for the cautious use of the summary process to commit for contempt is that it could be said to offend the principle of natural justice that a person should not be judge in his own cause: *nemo iudex in causa sua.* For the judge towards whom a contempt has been committed in his court then proceeds to be judge of that contempt. This simplistic view can be met by the argument that committal for contempt is not done to vindicate the judge personally but rather to assert the majesty and authority of the law. As was said by Chief Justice Abbott in 1821, "the power to commit has been vested in the Judges not for their personal protection, but for that of the public." [39]

26. Nevertheless, the summary process of committal can place the judge if not in the position of judging "his own cause", certainly in that of doubling the roles of prosecutor and judge, which is a position no less objectionable as contrary to natural justice. Thus, Lord Denning observed in the "Laughing Gas" case: [40]

38. (1974) *The Times*, July 5.

39. *R.* v. *Davison* (1821), 4 B. & Ald. 329 at 333 ; 106 E.R. 958 at 959.

40. See note 38 above.

"But in all but urgent cases a judge should not take it on himself to move. He should leave it to the Attorney-General or the party aggrieved to move in accordance with the rules in order 52. *The judge should not appear to be both prosecutor and judge — a role which did not become him well.*"

27. It is to meet this objection that Borrie and Lowe in their book propose that as a general rule the judge should not deal himself with a contempt committed in the face of his court but should refer the contemnor to another judge.[41] This would also have the advantage of meeting the requirement in the European Convention on Human Rights whereby anyone accused of a criminal offence should have "adequate time and facilities for the preparation of this defence."[42] Some judicial support for changes of this nature can be found in the judgment of Lord Justice Lawton in the "Laughing Gas" case.

28. It is recognised however that this more measured procedure might be too cumbersome for contempts of a relatively minor character where the judge before whom the contempt was commited should retain a limited power to commit for a short term of imprisonment or to impose a small fine. There might also be emergency situations where the trial judge would have to act summarily in order that the due course of justice was not frustrated.

D - The problem of classification

29. One final problem in the English law of contempt which merits comment, especially from a comparative viewpoint, is that of finding a satisfactory classification for the various categories of contempt.

30. A basic distinction can be made, in the first place, between criminal and civil contempts. Criminal contempts are those which fall within the province of the criminal law, although they remain subject to many peculiarities of procedure and punishment when compared with ordinary crimes.[43] On the other hand, civil contempts are not crimes but may be regarded rather as an adjunct or offshoot of the civil law. A civil contempt always involves the failure to comply with an order of the court. Whereas a criminal contempt is a public wrong, that is an affront to the public interest in the due administration of

41. BORRIE and LOWE, *op. cit.*, p. 376.

42. Article 6 (3) (b).

43. Criminal contempts are in turn sub-divided into (1) contempts in the face of the court, and (2) contempts committed outside the court or "constructive" contempts. Under constructive contempts fall (a) publications "scandalising" the court and (b) publications which tend to prejudice proceedings, whether criminal or civil. See BORRIE and LOWE, *op. cit. passim.*

justice, a civil contempt is basically a private wrong, that is a wrong done to the person who is entitled to the benefit of a court order. For example, the equitable remedies of an order for specific performance (e.g. to fulfil a contract) or an injunction (e.g. to desist from a tort) rely for their effectiveness on the law of civil contempt, under which the person disobeying the order or the injunction may be committed for contempt at the motion of the party in whose favour the order was made. At the same time, there has always been a punitive element in civil contempt, so that the contemnor may find himself committed to prison.

31. To a comparative lawyer it may seem that the genius of the common law was to subsume criminal and civil contempts within the single category of contempt of court. In this the creators of the common law showed a remarkable economy of concepts, making the one concept of contempt cover so broad a field. Perhaps because of their historical emphasis on procedure and forms of action, that is on adjectival rather than substantive law, the common lawyers discerned the underlying unity beneath criminal and civil contempts: that both serve to uphold the due administration of justice. The former ensure that the courts may despatch their business in good order and without let or hindrance; the latter ensure that the authority of the courts is not undermined by disobedience to their solemn commands.

32. In this respect, French law appears to offer an interesting contrast with English law. For French law does not seem to have evolved to the same degree of generalisation but still to be compartmented into separate categories. Indeed, the French law of contempt is no more than a law of *criminal* contempts (of various categories). The enforcement of court orders in France is not a matter for the law of contempt at all but rather a topic within the law of civil procedure, namely, *l'exécution des jugements*. Only in the complicated technique of the *astreinte*, which is a device to compel obedience to a court judgment rather than to compensate the judgment creditor, has French law fumbled its way to a pale counterpart of the English civil contempt.[44]

33. As for criminal contempts, a French lawyer might arrange these under four heads. The first head would deal with the provisions of the Code of Civil Procedure relating to *la police de l'audience*, and

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44. See Nicole CATALA, *Astreintes* in French Law", Juridical Review (1959), 163 and (1961), 53.

les pouvoirs à l'audience du président;[45] or, since 1972, the new provisions in the reforming legislation of 1971/72, which refer to *l'obligation de réserver et de garder une attitude digne, imposée aux personnes assistant à l'audience.*[46] A second head would concern the similar powers which the Code of Criminal Procedure confers on the presiding judge to maintain order and control the proceedings in the criminal courts.[47] A third head would contain the two specific criminal offences set out in the Penal Code, namely, *l'outrage à magistrat*, and *les atteintes à l'autorité de la justice.*

34. *L'outrage* is extensively defined in the relevant texts (Articles 222, 223 and 224 of the *Penal Code*) so as to cover contempts both within and without the court and in respect not only of a judge but also of jurors and court officials.[48] The concept of "outrage" seems broad enough to correspond with what in English law would constitute direct contempts in the face of the court as well as indirect (or constructive) contempts such as comments "scandalising the court" or prejudicial to the course of justice. Publications generally, however, are a matter either for the French law of criminal libel under the Press Law of 1881,[49] or they may now fall within the new offences of *atteintes à l'autorité de la justice* introduced into the *Penal Code* by the notorious Ordinance of 23 December 1958.[50]

35. These offences are to be found in articles 226 and 227 of the *Penal Code*, and are two-fold. The first is defined by article 226 as a "publication throwing discredit on any act or decision of a court *dans les conditions de nature à porter atteinte à l'autorité de la justice ou à son indépendance.*" The publication may be by writing or word of

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45. Before the reforms of 1971-72 in relation to civil procedure, the relevant texts were Code of Civil Procedure, art. 10, 11 and 12 (concerning *Tribunaux d'Instance*) and art. 88 to 92 (concerning *Tribunaux de Grande Instance*). These provisions have been abrogated by Decree No. 71-140 of 9 September 1971 (which imposes an "obligation of reserve" on the parties to proceedings), Law No. 72-626 of 5 July 1972, and Decree No. 72-684 of 20 July 1972.

46. Art. 87 of Decree No. 72-684 of 20 July 1972.

47. The relevant texts are (for the Court of Assize) *Code of Criminal Procedure*, art. 306 to 322, and notably art. 321 and 322, under which the President has the power to have anyone removed who disturbs the proceedings; he also has a wide discretion in the conduct of the proceedings. In the *Tribunal correctionnel*, see art. 404 and 405; and in the *Tribunal de police* the same articles appear to govern.

48. See Henri BLIN, "Outrages envers les magistrats, jurés, les officiers ministériels et les commandants et agents de la force publique," *Juris-Classeur Pénal* (1974), commentary on *Penal Code*, art. 222 to 225.

49. Law of 28 July 1881, art 31 and 33; see Henry BLIN, *op. cit.*, paras. 138 *et seq.*

50. See A. VITU, "Atteintes à l'autorité de la justice" *Juris-Classeur Pénal* (1963), commentary on *Penal Code*, art. 226 and 227.

mouth, or it may be any "act" done publicly, such as a demonstration or carnival procession.

36. The second offence is defined by article 227 as the publication, before the final decision of a court, of comments tending to bring pressure on the statements of witnesses or on the decision of the investigating or trial court.

37. If one compares these last offences with English law, they correspond broadly to what in England might be treated as a publication prejudicial to the conduct of civil or criminal proceedings and therefore a constructive contempt of court. The offence under article 226 also resembles what in some circumstances would be treated as a contempt for "scandalising the court". The language of article 227 would seem apt to inhibit the worst excesses of "trial by newspaper", but it is doubtful whether the French courts would ever give it so extensive an interpretation as to match the decision of the House of Lords in the Thalidomide case.[51]

38. A fourth and final head to complete the assorted provisions of French law would be devoted to the special procedure in the Code of Criminal Procedure relating to offences committed at any court hearing (articles 675 to 678). Such "*infractions commises à l'audience*" are to be distinguished from "*délits d'audience*" but may properly be considered to amount to a ceontempts of court. Examples would be the picking of a pocket in the courtroom or the coming to blows of two membres of the public.

Conclusion

39. The English law of contempt is adjudged by Borrie and Lowe to be fundamentally sound. They suggest only relatively minor reforms. It seems likely that the Phillimore Committee will endorse this academic assessment. Yet at a time when every institution in Britain is being subject to critical reappraisal the courts of justice must be especially vigilant not to attract the charge of being unable to adapt themselves to the changing times. Abuse of the law of contempt to uphold an outmoded atmosphere of holiness in the temple[51] or to stifle all criticism, however justified, of the administration of justice is a very real danger at the present day. On the other hand, politicians do the courts, and also the public, a grave disservice when they impose

51. *Attorney-General* v. *Times Newspapers* (1963) 3 All E.R. 54 (H.L.).

51a. See D. J. HERMANN, *Contempt: Sacrilege in the Judicial Temple — The Derivative Political Trial* (1972) 60 Kentucky L. J 565.

upon the judiciary tasks that bring them into the centre of the political arena, as in the ill-fated attempt (now abandoned) to force industrial relations into a legal strait-jacket.[52]

40. To conclude, no better summary of the *raison d'être* of the law of contempt can be found than that with which Lord Diplock began his speech in the Thalidomide case:[53]

> "My Lords, in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decisions of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. "Contempt of court" is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes."

52. Politicians do an even greater disservice to the cause of justice when, for the sake of party advantage, they then proceed to castigate the judges for becoming involved in politics: see, for exemple, Mr. Micheal Foot's sneer at the President of the National Industrial Relations Court as "trigger-happy" (see note 31 above).

53. *Attorney-General* v. *Times Newspapers* (1973) 3 All E.R. 54 at 71.