



SUBMISSION

on

Contempt of Court in Sri Lanka: Recommendations for Codification

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
August 2003**

I. Introduction

Contempt of court, as Joseph Moskowitz observes, is “the Proteus of the legal world, assuming an almost infinite diversity of forms.”¹ Contempt of court, which has been irreverently termed a legal thumbscrew, is so manifold and so amorphous that it is difficult to lay down any precise definition of the offence.² In the past, contempt of court included any kind of conduct that tended to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties or their witnesses during litigation.³ This traditional understanding is now increasingly being challenged as failing to take into account the importance of freedom of expression.

In Sri Lanka, due to a combination of changing understandings of the relationship between the need to protect the administration of justice and freedom of expression and recent highly criticised cases involving contempt of court, there are moves to

¹ J. Moskowitz, “Contempt of Injunctions, Civil and Criminal” (1943) 43 Col. L.R.780.

² See C.J. Miller, *Contempt of Court, 3rd Edition* (2000, Oxford University Press). See also, Glanville Williams, *Textbook of Criminal Law, 2nd Edition* (1983, Sweet and Maxwell).

³ *Ibid.*, *Contempt of Court*. This definition was adopted in 1959 by the report of the Committee of Justice on the subject of contempt of court under the Chairmanship of Lord Shawcross as being one the Committee could not improve on. See p. 4 of that report.

reassess the existing law and to put the offence on a statutory basis. In this context, submissions are being invited as input to this process.

This is ARTICLE 19's Submission to the review of the law of contempt of court in Sri Lanka. It addresses various issues relating to contempt of court as that area of law affects or trenches on the right to freedom of expression. It does not address the full gamut of contempt of court issues, including in relation to the enforcement of court orders.

Numerous cases have in the past defined the crime of contempt of court. Lord Radcliffe, in *Reginald Perera v. The King*,⁴ noted that the offence must involve some act or writing calculated to bring a court or judge into contempt or to lower his authority or something calculated to obstruct or to interfere with the due course of justice or the lawful process of the courts. In the *St. James Evening Post* case, Lord Hardwicke, L.C. stated:

There are three different sorts of contempt. One kind of contempt is scandalising the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard.⁵

Lord Cross of Chelsea, in *Attorney-General v. Times Newspapers*, stated:

Contempt of court means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard.⁶

The law of contempt is essentially concerned with *interference with the administration of justice*. It was clearly defined by Lord Diplock in the following way:

[A]lthough criminal contempt of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.⁷

Contempt laws justify restrictions on freedom of expression on the basis of the need to administer justice, by sanctioning comments on pending judicial proceedings, by forcing individuals to disclose sources of information and by restricting criticism of judges and courts. There is a significant tension between freedom of expression and the administration of justice because of the high public interest in maintaining and

⁴ (1951) 52 N.L.R. 293 (PC).

⁵ (1742) 2 At. K. 469, p. 471.

⁶ [1973] 2 All ER 54.

⁷ *AG v. Levenson Magazine Ltd.*, [1979] AC 440, p. 449.

protecting both principles. In this Submission, ARTICLE 19 looks at contempt of court as it affects freedom of expression and set out recommendations to be considered when codifying the law of contempt in Sri Lanka.

II. Freedom of Expression

This section looks at international guarantees relating to both freedom of expression and the independence and fairness of the administration of justice.

The major international and regional human rights instruments on civil and political rights – the *International Covenant on Civil and Political Rights* (ICCPR),⁸ the *European Convention on Human Rights* (ECHR),⁹ the *American Convention on Human Rights* (ACHR)¹⁰ and the *African Charter on Human and People's Rights* (ACHPR)¹¹ – all protect both freedom of expression and the administration of justice. Freedom of expression is protected in Article 19 of the ICCPR as follows:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The administration of justice, particularly the right to a fair trial and the presumption of innocence, is protected in Article 14 of the ICCPR, which states, in part:

- (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or guardianship of children.
- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The permissible restrictions on freedom of expression are expressed in similar terms in international human rights conventions. Article 19(3) of the ICCPR states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are

⁸ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

⁹ E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

¹⁰ Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.

¹¹ Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

necessary:

- (a) For respect of *the rights* and reputations of *others*;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals. [Emphasis added]

The “rights of others” referred to in Article 19(3)(a) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence. Article 10(2) of the ECHR goes further, explicitly mentioning the maintenance of the authority and impartiality of the judiciary:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing disclosure of information received in confidence, or *for maintaining the authority and impartiality of the judiciary*. [Emphasis added]

Under international law, restrictions on freedom of expression must meet a strict three-part test.¹² First, the interference must be provided for by law. The law must be accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹³ Second, the interference must pursue one of the legitimate aims listed in Article 19(3). Third, the interference must be necessary to secure that aim. The test under the ICCPR is similar to that under the ECHR, elaborated in the following passage:

- (a) Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
- (b) These principles are of particular importance as far as the press is concerned. While it must not overstep the bounds set, inter alia, in the ‘interests of national security’ or for ‘maintaining the authority of the judiciary’, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas; the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.
- (c) The adjective ‘necessary’, within the meaning of Article 10(2), implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.
- (d) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their

¹² See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, Communication No.458/1991, para. 9.7.

¹³ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 14 EHRR 229, para. 49 (European Court of Human Rights).

power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”.¹⁴

It should be noted that the common law doctrine of contempt of court does not exist in civil law jurisdictions in such a broad, encompassing sense¹⁵ but there are undoubtedly certain more limited functional equivalents, particularly in matters relating to freedom of expression. In France, for example, Article 9-1 (Protection de la présomption d’innocence) of the Civil Code deals with publications which allegedly prejudice the presumption of innocence. There are also laws restricting criticism of the courts and judges in many civil law jurisdictions.¹⁶

III. Contempt of Court

The Sri Lankan law of contempt, which is based on English law, was well known from early British times. The English law of contempt, modified to some extent in its application in Sri Lanka, was in operation immediately prior to the coming into force of the 1978 Democratic Socialist Republican Constitution. Previously, it had been preserved by the earlier Republican Constitution of 1972.

In the subordinate courts, any person accused of contempt of court may be forthwith committed to jail for severe interference with court proceedings. The Civil Procedure Code (from section 792 onwards) sets out the summary procedure to be followed in such cases. A day shall be appointed for the hearing of the charge and consequent to the court asking whether the accused person admits the truth of the charge, it shall record all evidence, including the minute of the judge as to the person’s behaviour at the time that the contempt was allegedly committed. Thereafter, if the person is found guilty, a conviction is made out, reciting the reasons for such conviction and containing an adjudication of the material facts of the accused person’s behaviour and language which amounted to contempt of court. The Supreme Court and the Court of Appeal have the power under the Constitution to punish for contempt of itself, whether committed in the court or elsewhere.

The case law in Sri Lanka can broadly be categorised into three areas of contempt, consistent with those referred to in the *St. James Evening Post* case,¹⁷ namely commenting on ongoing legal proceedings, criticism of courts and judges and expression in court.

Commenting on Ongoing Legal Proceedings

In common law jurisdictions, perhaps the most significant role of contempt of court

¹⁴ *Sunday Times v. UK (No.2)*, 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 50.

¹⁵ See M. Chesterman, “Contempt: In the Common Law, but not the Civil Law” (1997) 46 ICLQ 521.

¹⁶ See M.K. Addo, *Freedom of Expression and Criticism of Judges* (2000, Ashgate Publishing).

¹⁷ Note 5.

law is the application of the *sub judice*¹⁸ rule: no one should interfere with legal proceedings which are pending. In practice, this rule is usually used to prohibit publication of matters which are likely to prejudice the right of a fair trial when legal proceedings are pending, or in a more colloquial sense, to prevent “trial by media”.

The rationale behind this rule was explained in the leading English case of *Attorney-General v. Times Newspaper Ltd.*, where Lord Diplock stated:

The due administration of justice requires first that all citizens have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.¹⁹

Examples of possible violations of the *sub judice* rule are a publication which abuses or pressures a party to a proceeding to the extent that he or she is deterred from attending court; a publication about matters which are not admissible as evidence in court, and may create bias in a jury, such as previous convictions of the accused which are not relevant to the case at hand; or a publication which prejudices the issues in a case, such as declaring that the accused is guilty before the trial is over.

The primary target of such restrictions is to prevent possible bias to jurors, or in some cases witnesses. The belief is that such individuals may be subject to influence, in particular from media reporting on a case. Judges, on the other hand, are normally considered to be sufficiently professional and objective to withstand such reporting.

The concept of *sub judice* has been used in the past in Sri Lanka not only to limit freedom of the media in reporting and commenting on matters relevant to on-going court proceedings, sometimes curtailing legitimate public interest and discussion, but also to stifle discussion about Parliament. A case in point is the abduction and killing of the journalist Richard de Zoysa, whose body was found on the beach at Moratuwa in late 1989. The parliamentary discussion of the whole episode, even after the magisterial proceedings had been concluded, was prohibited on the grounds of *sub judice* as the suspect police officers had filed civil actions claiming damages from De Zoysa’s mother.

Criticising Judges

In contrast to the *sub judice* rule, which is only applicable to pending legal proceedings, this form of contempt of court is applicable at any time. Its aim is more general, namely to prevent the undermining of public confidence in the administration

¹⁸ The term *sub judice* is derived from the Latin phrase *adhuc sub judice lis est*, which means “the matter is still under consideration”.

¹⁹ Note 6, p. 72.

of justice. It has traditionally been used where there has been (1) “scurrilous abuse” of a judge or court, (2) an imputation of bias or partiality made against a judge or court, or (3) an imputation that a judge or court has been influenced by outside pressures.

As with other forms of common law contempt of court, the doctrine of “scandalizing the court” is rooted in English common law. The primary rationale for this form of contempt law is the maintenance of public confidence in the administration of justice. In the early case of *R. v. Almon*, Wilmot J. stated:

[Criticism of judges] excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men’s allegiances to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever....²⁰

In a more recent English case, the rationale was explained in the following way:

Scandalizing the court’ is a convenient way of describing a publication which, although it does not relate to any specific judge, is a scurrilous attack on the judiciary as whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.²¹

In *Ex parte Fernandez*, Erie, C.J. said:

There are many ways of obstructing the Court. Endeavours are not wanting either to disturb the Judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods according to the emergency of the occasion to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free; powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible. It is this obstruction which is called in law contempt, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes, they have been exercised for the good of the people.²²

This reflects an outdated and unrealistic view of the role played by judges in society. Numerous examples from countries all over the world have clearly demonstrated that judges, like all of use, are manifestly human and fallible. The idea that they can fairly assess criticism, even directed at themselves, assumes that they have an almost superhuman level of intellectual objectivity, a notion which history and common sense shows is not warranted.

The right to publish material critical of judges and their conduct was brought into issue in the case of *Hewamanne v. de Silva*.²³ In that case, the editor and publisher of *The*

²⁰ (1765) 97 ER, p. 100.

²¹ *Chokolingo v. AF of Trinidad and Tobago*, [1981] 1 All ER 244, p. 248.

²² 30 L.J.C.P. 321, p. 332.

²³ [1983] 1 SLR 1.

Daily News newspaper and others were found liable for contempt of court when they published in their daily newspaper of 7 March 1983 notice of a motion relating to the judiciary found on the order paper of Parliament the next day. The news item was a verbatim reproduction of the said notice except for the two headlines.

In *Re Garumunige Tilakaratne*,²⁴ a newspaper reporter was held guilty of contempt of court when a report of a speech made by a Member of Parliament at a political meeting was published almost verbatim in a newspaper.

A minister, S.B. Dissanayake, was charged with contempt of court for statements he had made about the judiciary in a speech where he reportedly said Parliament and the courts would be closed down if proposed constitutional reforms were not passed with a two-thirds majority. The Supreme Court accepted his apology and the matter was not pursued.

Expression in Court

It is well-established, and fairly obvious, that courts need to be able to sanction those who obstruct their processes, for example by shouting in the courtroom or other unruly behaviour. Questions have been raised, however, about the process by which such cases are judged, as well as sentences in some such cases.

The need for legislative reform in Sri Lanka in relation to this branch of the law of contempt was highlighted in the recent case of Michael Anthony Fernando. Mr. Fernando filed an appeal before the Supreme Court of Sri Lanka against the joining of two previous fundamental rights petitions. The appeal was heard, among others, by Chief Justice Sarath N. Silva, one of those who had decided to join the earlier petitions. Upon realising this conflict of interest, Mr. Fernando protested. The Court asked him to stop and, when he refused, he was summarily tried and convicted for contempt of court the same day, again before the Chief Justice, and sentenced to one year's imprisonment.

Not only was there a failure on the part of the Supreme Court to observe a fundamental tenet of justice, namely that one cannot sit in judgement in one's own case, both in relation to the appeal and in relation to the contempt hearing, but the sentence meted out was also grossly disproportionate to the harm done. It is clear that a far less oppressive sanction in this case, such as removal from the Court or even a fine, would have been sufficient. Imprisonment for peaceful expression of views in court could be justified, if at all, only in the most serious cases of gross and repeated abuse. These abuses of Mr. Fernando's rights were exacerbated by the fact that he was not given an opportunity to obtain legal advice or to prepare his defence. This case, which attracted significant international criticism²⁵ highlights the need to limit the powers of the Supreme Court in contempt cases.

The Constitution

The Supreme Court derives its powers in this area from Article 105(2) of the

²⁴ [1999] 1 SLR 134.

²⁵ UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy's press release dated 28 May 2003; ARTICLE 19 press release, 'Supreme Court of Sri Lanka abuses contempt powers' dated 26th February 2003.

Constitution. Read in conjunction with Article 136 of the Constitution, which states that “subject to the provisions of the Constitution and of any law the Chief Justice with 3 judges of the Supreme Court nominated by him may ... make rules regulating generally the practice and procedure of the court including, *inter alia*, rules for procedure for having appeals, proceedings in the Supreme Court etc.”, this gives the Supreme Court wide rule-making powers.

The present Constitution also has a chapter on fundamental rights, including freedom of speech and expression, which circumscribe the powers of the Supreme Court in relation to contempt.

The need to clarify the scope of the offence of contempt of court and codify the law was brought to the forefront by the recent Supreme Court decision in the case of Michael Anthony Fernando. The case brought into stark relief the wide powers given to the Supreme Court to deal with contempt in meting out a seemingly excessive sentence for Mr. Fernando’s alleged misconduct, by the same judges who had been criticised. However, statutory reform of the area of contempt of court may be enhanced through a constitutional amendment, given the wide ambit of rule-making powers allocated to the Supreme Court.

IV. Analysis

A. Contempt as a Restriction on Freedom of Expression

As noted above, under international law restrictions to freedom of expression must meet a strict three-part test.²⁶ The law must be accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁷ This is a fundamental consideration in codifying contempt of court rules and a problem with the law as it presently stands, given that it is excessively vague. The offence should be clearly specified and the law should also set out the procedure to follow in the event of an act of contempt, mitigating circumstances, defences and so on.

Furthermore, careful consideration should be given to what specific legitimate aims are being protected. Ensuring a fair trial is clearly a legitimate aim, but maintaining the authority of the judiciary may be legitimate only if a failure to do so will lead to a situation where individuals fail to rely on the courts as the final arbiters of disputes. In essence, it does not really matter whether or not the public hold the courts in high esteem; what is relevant is whether attitudes towards courts are so negative that people are reluctant, or lack the confidence, to use them to settle their disputes. The situation in the United States, United Kingdom and Canada, where the offence of criticising judges and courts is effectively a dead letter, suggests that criticism of the courts does not actually undermine their authority as final decision makers.

Finally, a careful balance needs to be maintained in these cases between freedom of expression and the legitimate aim in question. Any restriction must be justified as necessary in a democratic society.

²⁶ See *Mukong v. Cameroon*, note 12, para. 9.7.

²⁷ *The Sunday Times v. United Kingdom*, note 13, para. 49.

It may be noted that traditional rules relating to contempt of court have successfully been challenged in many countries on the basis that they were developed during a time when inadequate protection and importance was accorded to the right to freedom of expression. For example, in a leading constitutional case, the South African Constitutional Court held:

Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: So that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the judiciary by the Constitution.

However, such vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary.²⁸

The Supreme Court of Canada has adopted similar reasoning, rejecting the traditional common law rule which favoured fair trial rights over freedom of expression:

The pre-Charter common-law rule governing publication bans emphasized the right to a fair trial over the expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss.2(b) and 11(d) [protecting freedom of expression and a fair trial].²⁹

B. Commenting *Sub Judice*

In some countries, there have in the past been very strict rules about commenting on ongoing legal proceedings, and particularly about pre-judging the outcome of cases. It is now clear that such rules are not compatible with the guarantee of freedom of expression. In particular, such restrictions can be justified only where there is a very substantial risk of prejudice and serious harm, alternative means are inadequate to avoid the risk and there is a form of proportionality between the measures taken and the aim pursued by the restriction, taking into account the public interest.

In assessing the risk of harm, it is not appropriate to rely on outmoded or hypothetical notions of the inability of jurors to withstand media reporting. Experience in countries where more liberal rules apply to commenting on ongoing legal proceedings, as well as some academic studies, suggest that jurors are not as likely to be prejudiced as is normally assumed. This is supported by caselaw as well. For example, in *Kray*, Lawton J. stated:

[T]he mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias against jurors empanelled in a later case. I have

²⁸ *S v. Mamabolo*, 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC), paras 29-30.

²⁹ (1995) 120 DLR (4th) 12, p. 37.

enough confidence in my fellow-countrymen to think that they have got newspapers sized up... and they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper.³⁰

In practice, the court process, although it excludes certain types of evidence, is an intense one, where legal representatives of the opposing sides can be expected to use the full extent of their wiles to convince jurors of the justice of their arguments. It seems unlikely that jurors will, absent special circumstances, be so influenced by media reporting as to override this.

The issue of commenting on ongoing legal proceedings was at issue in a case from the United Kingdom before the European Court of Human Rights, *Sunday Times v. United Kingdom*.³¹ In that case, a UK court had granted an injunction to prevent a newspaper from commenting on the responsibility of a company for thalidomide-related birth deformities while there were ongoing legal settlement negotiations. The European Court applied the relevant three-part test and found that the interference with freedom of expression was “prescribed by law”³² and had a “legitimate aim” (maintaining the authority of the judiciary)³³ but was not “necessary in a democratic society.”³⁴ The Court rejected the Government’s submission that the law as applied presented an appropriate balance between the public interest in freedom of expression and the public interest in the fair administration of justice. The Court reasoned that there was a public interest in knowing about the case which was not outweighed by a sufficiently pressing need to protect the administration of justice:

In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared that its diffusion would have presented a threat to the “authority of the judiciary”....

The Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10(2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.³⁵

The UK Contempt of Court Act 1981 was passed at least partly in response to this decision. Section 2(2) of the Act limits the strict liability test, providing:

The strict liability rule applies only to a publication which creates a *substantial risk* that the course of justice in the proceedings in question will be *seriously impeded or prejudiced*. [Emphasis added]

³⁰ (1969) 53 Cr. App. Rep. 412, p. 414.

³¹ Note 13.

³² *Ibid.*, para. 52.

³³ *Ibid.*, para. 57.

³⁴ *Ibid.*, para. 67.

³⁵ *Ibid.*, paras. 66-67.

This means that a remote or tangential risk is not sufficient to engage the rule, and that the risk must be of serious harm.

In Canada, the leading case is *Dagenais v. Canadian Broadcasting Corporation*,³⁶ where a provincial court had issued a publication ban on a fictional television program dealing with the sexual and physical abuse of children in a Catholic orphanage while the trials of four members of a Catholic order charged with similar crimes was in progress or pending. The Supreme Court of Canada held that the ban could not be upheld.

The Court set out the crux of the issue as being whether a restriction on freedom of expression was “necessary in a democratic society”. Lamer J stated:

[T]he common law must be adapted so as to require a consideration of both the objectives of the publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:

A publication ban should only be ordered when:

- (a) Such ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban.³⁷

Lamer CJC then set forth a number of alternative measures to a publication ban, which could reduce the prejudicial effect of media coverage:

Possibilities that readily come to mind, however, include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and voir dire during jury selection, and providing strong judicial direction to the jury.³⁸

An interesting aspect of this case is the requirement that potential alternative measures be taken into account. This reflects the idea that it is not acceptable for the State to restrict rights to protect social interests where the same result may be achieved through alternative measures which do not limit human rights.

In the United States, there are no general restrictions on commenting on legal proceedings, outside of certain restrictions imposed on judges and lawyers. Others, including parties to proceedings and the media, may only be restricted through the imposition of a specific gag order.

In 1976, the United States Supreme Court, in *Nebraska Press Association v. Stuart*,³⁹ all but eliminated gag orders that directly restrained the press as opposed to orders directed at gagging participants in the trial from talking to the press. The case arose in the context of a preliminary hearing in which state judges had prohibited the publication of certain kinds of prejudicial information such as the defendant’s

³⁶ Note 29.

³⁷ *Ibid.*, p. 38.

³⁸ *Ibid.*, p. 40.

³⁹ 427 U.S. 539 (1976).

confession and any other facts strongly implicative of the suspect. The order required the press to delete any mention of the existence of a confession in their publications. The Supreme Court held the order to be in breach of the right to free speech and ruled out gag orders which did not meet three strict criteria. First, there must be a reasonable chance of intense and pervasive publicity. Second, it must be shown that no other alternative measure, such as a change of venue, continuance or extensive voir dire questioning, would be likely to lessen the impact of the pre-trial publicity. Third, the order itself must have a reasonable chance of effectively preventing the prejudicial material from reaching potential jurors. These three criteria are rarely met. The first criteria, the need for pervasive media coverage, reflects the idea that jurors are unlikely to be influenced by occasional media reports, no matter how biased.

C. Scandalising the Court

In the United Kingdom, Australia and New Zealand, the common law test of liability requires under this branch of the law of contempt requires a substantial risk, as opposed to a remote possibility, that public confidence in the judicial system would be undermined.⁴⁰ In practice, however, at least in the UK, there are few reported cases of the courts punishing for scandalising the court in these countries. Indeed, there do not appear to be any reports of the courts exercising the power to punish for scandalising in the UK since *Colsey* in 1931.⁴¹ In a 1968 case, *Metropolitan Police Commissioner, ex parte Blackburn*,⁴² the court held that a robust attack on a decision of the Court of Appeal did not constitute a contempt. In 1985, Lord Diplock, in *Secretary of State for Defence v. Guardian Newspapers Ltd.*, considered the offence to be ‘virtually obsolescent’.⁴³

In the United States, the offence of “scandalising the court” has been limited in application for several decades. In practice, it is no longer applicable to ordinary citizens or the media and the Supreme Court has made it clear, in a series of cases, that even where the criticism is by lawyers, the publication must create a “clear and present danger” to the administration of justice.⁴⁴

A similar test is applicable in India, where contempt of court is regulated, among other things, by the Contempt of Courts Act, 1971 (1971 Act). Section 13 of the 1971 Act provides:

Contempts not punishable in certain cases. – Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.

In Canada, the common law principle has been substantially changed to bring it in line

⁴⁰ See, for example, *Solicitor-General v. Radio Avon Ltd.*, [1978] 1 NZLR 225, p. 234.

⁴¹ *The Times*, 9 May 1931. The principal cases are: *Gray*, [1890] 2 QB 36; 82 LT 534, 64 JP 484; *S.B. Sarbadhicary* (1906) 23 TLR 180; *Vidal, The Times*, 14 October 1922; *Freeman, The Times*, 18 November 1925; *R v. Editor of New Statesman, ex p DPP*, (1928) 44 TLR 301; and *Wilkinson, The Times*, 16 July 1930.

⁴² [1968] 2 QB 150.

⁴³ [1985] AC 339, 347A.

⁴⁴ See *Bridges v. California*, 314 US 252 (1941) and *In re Sawyer*, 360 U.S. 622 (1959).

with the guarantee of freedom of expression in the Charter of Rights and Freedoms. Cory JA, in the leading case of *R. v. Kopyto*, reasoned:

As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy.... The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions.⁴⁵

That case involved the following comments by a lawyer in front of the public and media representatives, after losing a case:

This decision is a mockery of justice. It stinks to high hell. It says that it is okay to break the law and you are immune so long as someone above you said to do it. Mr. Dowson and I have lost faith in the judicial system to render justice.

We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue.⁴⁶

Despite the extreme nature of these comments, made by a lawyer, the Court held that no liability should ensue.

In a case before the European Court of Human Rights, *De Haes and Gijssels v. Belgium*,⁴⁷ the applicant journalists were penalised for several articles criticising judges of the Antwerp Court of Appeal for awarding custody of the children in a divorce case to a father accused of incest and abuse. The European Court held that the restriction on freedom of expression was not “necessary in a democratic society” because the statements were not excessive and there was proportionality:

Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance;

Although Mr. De Haes and Mr. Gijssels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles.⁴⁸

Since the justification for this branch of the law of contempt is to maintain public confidence in the administration of justice, it seems clear at a minimum that criticism of judges as individuals, rather than as judges, should not attract liability. This was confirmed in *In the Matter of a Special Reference from the Bahama Islands*,⁴⁹ where

⁴⁵ (1987), 62 OR (2d) 449, at 469.

⁴⁶ *Ibid.*, p. 455.

⁴⁷ 24 February 1997, Application No. 19983/92, 25 EHRR 1.

⁴⁸ *Ibid.*, paras. 47-48.

⁴⁹ [1893] AC 138.

the Privy Council ruled that criticisms of the Chief Justice which were not directed at him in his official capacity as a judge were not contempt.⁵⁰ In such cases, the judge could, of course, use defamation or libel laws to remedy any damage to his personal reputation.

Furthermore, some jurisdictions have established that an intent to cause harm to the judiciary is necessary before contempt for criticising the courts or judges is established. In the South African case of *State v. Van Niekerk*, an academic had imputed racial bias to judges in the application of the death penalty, but the court held that this did not establish a contempt. Classen J. reasoned:

[B]efore a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the Judges in their judicial capacity into contempt or casting suspicion on the administration of justice.⁵¹

This was confirmed in the case of *S v Harber and Ano*.⁵²

In the recent case of *Mamabolo*, the Constitutional Court adopted a very narrow definition of the offence of scandalising the court, as follows:

Now that we do have the benefit of a constitutional environment in which all law is to be interpreted and applied, there can be little doubt that the test for scandalising, namely that one has to ask what the likely consequence of the utterance was, will not lightly result in a finding that the crime of scandalising the court has been committed. Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court is now even higher than before the super-imposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.⁵³

ARTICLE questions whether it is appropriate in a modern democracy to maintain this branch of the law of contempt of court. It may be necessary, in extreme cases, to contain criticism by lawyers and judges, as court officials, but this can be achieved through professional measures and potential disbarment, rather than the criminal law. Courts are public bodies and it is of the greatest public interest for them, like all public bodies, to be subject to open public criticism.

⁵⁰ *Ibid.*, p. 144. See also the Indian Supreme Court case, *Perspective Publication (P) Ltd. v State of Maharashtra*, AIR 1971 SC 221.

⁵¹ 1970 (3) SA 655 (T), p. 657.

⁵² 1988 (3) SA 396 (A).

⁵³ *S v Mamabolo*, note 28, para 45 (footnotes omitted). The Court considered it to be unwise to attempt to circumscribe what language or conduct would constitute scandalising the Court. It acknowledged that there remained a “narrow category of egregious cases where the crime in question will still be found to have been committed.” See paras. 46-47.

D. Defences for Contempt of Court

1. 'Public Interest' Defence

Jurisdictions around the world are recognising that the scope of the offence of contempt of court requires that there be a defence when it was in the public interest for the statements to be made. Legal cases often raise, or bear on matters of great public interest and all public discussion of such matters cannot be prohibited simply because a case is pending.

In the leading Australian case, *Ex parte Bread Manufacturers Ltd., Re Truth & Sportsman Ltd.*, the court explained:

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.⁵⁴

In the United Kingdom, a form of public interest defence was introduced in Section 5 of the Contempt of Court Act 1981, which states:

A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

The scope of Section 5 was established in the case of *Attorney-General v. English*,⁵⁵ where a journalist faced contempt proceedings for publishing an article about a disabled pro-life candidate at the same time as the trial of a doctor for euthanasia was pending. The House of Lords held that, although there was a risk of prejudice to a fair trial, the defence under Section 5 had been established because (1) there was a discussion in good faith of public affairs and matters of general interest, and (2) the risk of prejudice to the trial was merely incidental to the discussion. Lord Diplock explained:

⁵⁴ (1937) 37 SR (NSW) 242, pp. 249-50.

⁵⁵ [1983] 1 AC 116.

[The publication was] made, in undisputed good faith, as a discussion of public affairs, viz. Mrs Carr's candidature as an independent 'pro-life' candidate in North-West Croydon by-election for which the polling day was in one week's time. It was also part of a wider discussion on a matter of general public interest that had been proceeding intermittently over the last three months, upon the moral justification of mercy killing and in particular of allowing newly-born hopelessly handicapped babies to die....

To hold [that the risk of prejudice to the trial was not merely incidental to the discussion] would have prevented Mrs. Carr from putting forward and obtaining publicity for what was a main plank in her election programme and would have stifled all discussion in the press upon the wider controversy about mercy killing....⁵⁶

2. Defences of Truth and Fair Comment

As a general rule, it is well-established in common law jurisdictions that reasoned or legitimate criticism of judges or courts is not contempt of court. The leading case is *Ambard v. Attorney-General for Trinidad and Tobago*, where a local newspaper had been found in contempt by the Supreme Court for criticising discrepancies in sentencing in two attempted murder cases. The Privy Council overturned the ruling, holding that reasoned or legitimate criticism was legal:

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 exercising 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 the respectful even though outspoken comments of ordinary men.⁵⁷

The defences of truth and fair comment should render any criticism immune from prosecution for contempt. The High Court of Australia, in *Nationwide News Pty. Ltd. v. Willis*, suggested that the defamation defences of truth and fair comment could be a defence if the statements were also for the public benefit:

[A] public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit....

[T]he revelation of truth – at all events when its revelation is for the public benefit – and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court of public confidence.⁵⁸

Another leading case in Australia is the decision of the High Court in *Nicholls*, where Griffith J. stated:

I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I

⁵⁶ *Ibid.*, pp. 142, 144.

⁵⁷ [1936] AC 322, p. 335.

⁵⁸ (1992) 177 CLR 1, 38, pp. 38-39.

think that, if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel.⁵⁹

There is also support for this principle in the United Kingdom. In *Metropolitan Police Commissioner, ex parte Blackburn*, Lord Denning MR stated:

It is the right of every man, in Parliament or out of it, in the Press or over 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.⁶⁰

The Court of Appeal in this case also made it clear that “scurrilous abuse” refers in large part to the *manner* of criticism directed at a judge or the court. Lord Denning MR noted that “no criticism of a judgment, however vigorous, can amount to contempt of court if it keeps within the limits of reasonable courtesy and good faith.”⁶¹

The Phillimore Committee on contempt of court in the United Kingdom also recommended that truth should be a defence if the publication was for the public benefit.⁶²

In South Africa, fair comment constitutes a defence to a contempt action.⁶³ No South African case has yet decided whether truth constitutes a defence to a charge of scandalising the Court but, given the constitutional backdrop by which the offence must now be measured, it seems very likely that truth would be accepted as a defence.

The defence of fair comment is also recognised in India, where Section 5 of the 1971 Act reads:

Fair criticism of judicial act not contempt. – A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.

E. Process Issues

One of the most criticised aspect of the law of contempt of court is the process by which such cases are often judged, which raises serious conflict of interest and other fair trial issues. It is common, in cases of contempt involving expression in the courtroom, for judges to summarily convict defendants then and there. In other situations, the case may be heard later but still by the same judge or it may otherwise lack due process guarantees. Then there is the more general issue that contempt cases involving criticism of judges or courts are problematical inasmuch as there will always be some tendency for the judiciary to ‘stick together’ in the face of perceived attack.

⁵⁹ (1911) 12 CLR 280, p. 286.

⁶⁰ Note 42, p. 155.

⁶¹ *Ibid.*

⁶² Report of the Committee on Contempt of Court (Cmnd 57994, 1974), para.166.

⁶³ *S v Van Niekerk* 1972 (3) SA 711 (A).

This latter problem cannot easily be addressed.

This issue came to the fore in the South African constitutional case of *Mamabolo*.⁶⁴ In that case, the Constitutional Court considered that in cases of contempt by scandalising the court in relation to completed cases, “there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them, there is no reason why the ordinary mechanism of the criminal justice system cannot be employed”.⁶⁵ The Court considered that “it is inherently inappropriate for a court of law, the constitutionally designated primary protector of personal rights and freedoms” to employ a summary contempt procedure save where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable.⁶⁶ Although this case was concerned with scandalising the court, it seems clear that the holding would also apply to comment in relation to pending proceedings.

V. Recommendations

A. Constitutional Matters

- Consideration should be given to amending the relevant constitutional provisions to make it clear that the powers of the Supreme Court may be limited by the proposed statutory reforms to the law of contempt of court.

B. Definition and Scope of Offence

- The various offences of contempt of court should be clearly and narrowly defined in the law.
- The law should not only define the scope of the offence, but also list any legitimate aims which the offence serves, which should be limited to the following:
 - preventing prejudice to ongoing legal cases; and
 - ensuring the integrity of court procedures.

C. Freedom of Expression

- The law should explicitly establish that the rules relating to contempt of court should be interpreted consistently with the guarantee of freedom of expression and, in particular, that any measures which would lead to a disproportionate restriction on freedom of expression cannot be justified.

D. Commenting on Ongoing Legal Proceedings

- There should be no general rule restricting the right of ordinary individuals, including those working for the media, from commenting on ongoing legal proceedings.
- The law should instead allow courts to make orders restricting comment (gag orders) for specific purposes where there is a substantial risk of

⁶⁴ Note 28.

⁶⁵ *Ibid.*, para 57.

⁶⁶ *Ibid.*, para 58.

serious prejudice in the specific case at hand.

- Such orders will normally be justifiable only in the context of pervasive media coverage of the case.
- In making such orders, courts should be required to take into account the possibility of alternative measures which do not restrict rights, or which result in less intrusive restrictions on rights.
- No such order may be imposed unless it would be effective in limiting the prejudice to the case.

E. Scandalising the Court

- No liability should ensue for criticising judges or courts. Any excessive criticism by court officials, including lawyers, should be dealt with as a professional matter.
- If such a rule is retained, it should apply only to criticism presented in a grossly inappropriate manner, totally lacking any legitimate basis, made with an intention to cause harm and posing a clear and present danger to the administration of justice.
- The defences of truth and fair comment should apply to any offence of scandalising the court.

F. General Defences

- There should be a public interest defence for all charges of contempt of court. This defence should be made out if the statements in question were on a matter of public interest and the defendant acted in good faith.

G. Process

- Judges should not adjudicate cases of contempt of court in which they are directly implicated, either personally or in relation to a case in which they were or are involved.
- Where necessary to prevent the immediate or ongoing disruption of a case, judges may take such action as may be required to prevent the disruption from continuing. Normally, removal of the individual causing the disruption should be sufficient to achieve this objective.