ARTICLE 19

# Kenya: Contempt of Court Bill, 2013

January 2014

**Legal analysis**

# Executive summary

In this legal analysis, ARTICLE 19 examines the Kenyan Contempt of Court Bill, 2013 (the Bill) from the perspective of international human rights law and standards on freedom of expression, as well as comparative approaches to contempt of court.

The analysis aims to promote the adoption of legislation that both safeguards the judiciary from undue interference and allows key actors, in particular the media, to hold the judiciary to account.

ARTICLE 19 has serious concerns about the Bill and has made a series of recommendations so that its shortfalls may be appropriately addressed. In particular, we are concerned that:

1. If adopted, a number of terms which expand the types of expressions caught by the proposed legislation will undermine the right to freedom of expression in Kenya. Notably, references to terms such as the "dignity" of the court (which is protected), acts which "tend to interfere with the course of justice" (for which there is strict liability) and "temperate language" (which needs to be employed for reliance on certain defences) should be removed from the Bill.

2. "Scandalizing" the court, a judge or judicial officer should not be deemed to constitute contempt of court.

3. The threshold test for the application of the strict liability for contempt by publication – "the creation of a risk that will impede or prejudice the course of justice" – is too low and does not meet international and comparative standards.

4. The "public interest" defence to contempt of court is curtailed.

5. The provision on the protection of journalistic sources is limited and requires elaboration.

6. The regime of penalties makes no distinction between the powers of the superior and subordinate courts.

We remain open to engaging with parliamentarians and stakeholders in ensuring that the best possible version of the Bill is ultimately adopted.

### Summary of recommendations

1. The Bill should state that it is for an Act of Parliament "to amend the law relating to contempt of court and related matters." One of the "overriding objectives" of the Bill (Section 3 a)) should be to "uphold the authority and impartiality of the court." Further, Section 3 should state that the objectives of the legislation include the following: to "ensure the public's right to receive information and ideas about the administration of justice"; and to "safeguard media coverage of the administration of justice;"
2. The reference to "dignity" in section 4(1)(b) should be replaced with "impartiality;"
3. Section 5 should include a provision stating that its provisions might only be used in exceptional circumstances to interfere with the freedom of expression of counsel and

should in no circumstances be used to restrict them in their submission of arguments which they consider to be reasonably arguable;

4. Section 8(2)(a) should be deleted. Publications and other expressions that "scandalize or tends to scandalize the court" should not be deemed to constitute contempt of court or any other offence. The reference to "scandalizing a judge [or] judicial officer" in section 8(3) should be removed;
5. References to "temperate language" should be removed from Sections 9(a), (b) and (f). "Temperate language" should not be used as a criterion for conduct which will not be considered as contempt of court. Further, Section 9(c) should not require that a publication is a "substantially accurate report" but state that it simply needs to have an "accurate factual basis" in order for it to have a defence from an allegation of contempt;
6. Reference to conduct that "tends to interfere with …" should be deleted from section 10(1) and 13(1);
7. Section 11(1)(a) should indicate that the strict liability rule applies to publications only and where the publication creates a "substantial risk that the course of justice in relation to the proceedings in question will be seriously impeded or prejudiced;"
8. Section 13(5) should be deleted;
9. Section 18 should simply state that a "publication 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;"
10. Section 14(1) should state it is a defence to publish a report with an "accurate factual basis", rather than an "accurate report;"
11. Section 14(2) should state that the threshold for a court to order the postponement of a publication is "a substantial risk of serious prejudice to the administration of justice;"
12. The Bill should consider acknowledging the use of internet-enabled devices at court through provisions that respect with jurors' rights to freedom of expression as well as privacy;
13. Section 20 should be amended to indicate that a person is not guilty of contempt of court for refusing to disclose a source of information unless (a) the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence; (b) the information or similar information leading to the same result cannot be obtained elsewhere; (c) the public interest in disclosure outweighs the harm to freedom of expression; and (d) disclosure has been ordered by a court, after a full hearing;
14. Section 27(c) should be deleted in its entirety;
15. The regime of penalties in sections 27 and 28 should be amended to indicate that the superior courts are enabled to impose the maximum penalties for contempt of court of six months imprisonment and/or a fine not exceeding 200,000 shillings and the inferior courts are enabled to impose a prison sentence of up to one month and a fine not exceeding 250,00 shillings. Also, Sections 27 and 28 should provide that, insofar as they apply to corporate entities, media organisations should only be punished with a fine, unless the circumstances are exceptional.

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# Introduction

In this analysis, ARTICLE 19 examines the Kenyan Contempt of Court Bill, 2013 (the Bill) from the perspective of international human rights law and standards on freedom of expression, as well as comparative approaches to contempt of court.

The aim of the analysis is to promote the adoption of legislation that both safeguards the judiciary from undue interference and allows key actors, in particular the media, to hold the judiciary to account. It is written against the Kenyan judicial context which sees the Supreme Court as highly sensitive to critical comments made about its decision in the Presidential Elections Petitions of 2013, particularly by the Law Society of Kenya and ICJ-Kenya.[1] It is also written against a wider international backdrop which sees laws on contempt of court being used and abused by courts in an attempt to silence human rights organisations[2] and also lawyers who disagree with their positions.[3]

At the outset, ARTICLE 19 observes that there has been no legislation devoted to issues of contempt of court since the state gained independence, fifty years ago. There is however relevant legislation, namely the Judicature Act which in section 5(1) gives the High Court and Court of Appeal the same power to punish for contempt of court. This power has previously been used to by the Kenyan courts to prosecute and punish journalists and other commentators for criticising the court[4] and in doing so have negatively relied on Lord Atkin's opinion for the Privy Council in *Andre Paul Terrace Ambard v A-G for Trinidad & Tobago* from 1936.[5]

This legal analysis is intended to provide comprehensive guidance to key actors within Kenya with respect to the draft legislation, namely: legislators, particularly those in the Parliamentary Committee on Legal Affairs and Administration of Justice, in their consideration and expected redrafting of the Bill; civil society organisations that monitor the administration of justice in Kenya (such as Kituo cha Sheria, Kituo cha Katiba, the Legal Resources Foundation, the Federation for Women Lawyers and ICJ-Kenya) in developing their positions on the Bill and in their engagement with the committee; the professional bodies of the legal profession, notably the Law society of Kenya, in their responses to the Bill; as well as court reporters and other journalists in understanding the Bill and developing their own positions towards it.

[1] It was reported that the remarks of the chairman of the Law Society of Kenya, Eric Mutua, "were reckless and
[2] ICJ, "Bangladesh: withdraw contempt of court notice against Human Rights Watch, the ICJ says", 2 September 2013; "Another court ruling, another setback for freedom of expression in Fiji", Amnesty International, 12 August 2013 (in relation to accusations of contempt against Citizens' Constitutional Forum (CCF).
[3] In her recent report on her mission to the Maldives, the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, said that she was "seriously concerned about allegations that some courts use the threat of contempt of court and disbarment to impose their decisions and superiority over prosecutors" and about "reports regarding threats of contempt of court used to muzzle the freedom of expression of lawyers". Special Rapporteur on the independence of judges and lawyers, A/HRC/23/43/Add.3, 21 May 2013.
[4] *David Makali Bedan Mbugua, Independent Media Services and GBM Kariuki v Republic*, CA of Nairobi, Criminal Application No NAI 4 and 5 of 1994 (consolidated), reported in The Advocate (July 1994), at 14-28; *Republic v Gachoka* [1999] 1 EA 254 (Kenya CA, 20 August 1999).
[5] *Andre Paul Terence Ambard Appeal No. 46 of 1935 v The Attorney-General of Trinidad and Tobago (Trinidad and Tobago)* [1936] 1 All ER 704, [1936] 2 WWR 252, [1936] AC 322, [1936] UKPC 16.

We intend to share this legal analysis with other key players in Kenya, namely, the National Council of Administration of Justice, the Judicial Service Commission and the Attorney-General's Office. Our objective is to ensure that the provisions of the Bill that fall short of Kenya's international human rights obligations are identified and addressed *before* the Bill is adopted by the legislature, although we will continue to urge for actual compliance with international human rights law and standards irrespective of what model of legislation is eventually adopted.

At the outset of this analysis it is important to identify what is meant by "contempt of court". Black's Law Dictionary states that "contempt of court" is "conduct that defies the authority or dignity of a court or legislature." It goes on to state that the act "because such conduct interferes with the administration of justice, it is punishable usu. by fine or imprisonment".[6]

Three types of "contempt of court" may be identified:

- *First*, "contempt by publication" when a publication is deemed to interfere with the administration of justice;

- *Second*, "contempt by jurors" when the conduct of jurors (for example by deliberately and knowingly disobeying the direction of the judge not to undertake research on the internet) is deemed to undermine the administration of justice; and

- *Third*, "contempt in the face of court" which involves conduct which is abusive or disruptive to courtroom proceedings.[7]

[6] Black's Law Dictionary (9th edition, 2011).

[7] See Contempt of Court, Law Commission Consultation Paper 209. In the *St James' Evening Post* case, Lord Hardwicke LC identified three forms of contempt by publication: "One kind of contempt is scandalising the court itself. There may likewise be a contempt of this court, in abusing parties who are concerned in causes here. There may also be a contempt of this court, in prejudicing mankind against persons before the cause is heard..." (1742) 2 Atk 469, 26 ER 642, at 471, 684.

# International and regional standards

## International and regional standards on the right to freedom of expression

The right to freedom of expression is protected by a number of international human rights instruments that bind states, including Kenya, including Article 19 of the *Universal Declaration of Human Rights* (UDHR)[8] and Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).[9] As a result of ratifying the ICCPR, Kenya is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national legislation.

Kenya also ratified the 1983 *African Charter on Human and Peoples' Rights* (ACHPR) which guarantees the right to freedom of expression in Article 9.[10] Additional guarantees to freedom of expression are provided in the 2002 *Declaration of Principles on Freedom of Expression in Africa* (African Declaration) in Article II.[11] In Article XIII, on criminal measures, the African Declaration mandates states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. It also further affirms that freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

It is also notable that the *African Platform on Access to Information*[12] provide guidance to African states on the right to freedom of information, including the importance of battling corruption, protecting whistleblowers, to promote unhindered access to Information Communication Technologies, and access to electoral information.

### *The scope of freedom of expression*

*First*, international law protects the right to hold opinions as **an absolute right**. Article 19 of the ICCPR protects all forms of opinion "including opinions of a political, scientific, historic, moral or religious nature."[13] In General Comment No 34, the UN Human Rights Committee stated that:

[8] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[9] Article 19 of the ICCPR states: "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. 3. 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 necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967). Kenya acceded to the ICCPR on 1 May 1972.

[10] Article 9 of the ACHPR states: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law." Kenya ratified the African Charter on Human and Peoples' Rights on 23 January 1992.

[11] Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002. Article II states "1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."

[12] Adopted September 2011,; available at http://www.pacaia.org/images/pdf/apai%20final.pdf

[13] Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 11 September 2011, para 9.

> It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or impairment of the opinions they may hold, constitutes a violation of article 19, para 1.

*Second,* **international law defines the modes of expression covered by freedom of expression and freedom of information broadly**. In 2011, the Human Rights Committee re-affirmed the right includes "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse" as well as "commercial advertising", "expression that may be regarded as deeply offensive." Moreover, Article 19 of the ICCPR "protects all forms of expression and the means of their dissemination" including "spoken, written and sign language and such non-verbal expression as images and objects of art," "means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions" and "all forms of audio-visual as well as electronic and internet-based modes of expression."[14]

*Third*, although **freedom of expression may be limited, restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put into jeopardy the right itself**. Any restrictions on freedom of expression must be:

- *prescribed by law*: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible;
- *pursue a legitimate aim*, exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government;[15]
- *should be necessary* to secure the legitimate aim and meet the test of *proportionality*.[16] Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

## International and regional standards on contempt of court

This section highlights some important aspects of the right to freedom of expression as protected by international law which are relevant to contempt of court issues. Similar test for legitimate restrictions is incorporated in all regional human rights treaties and applied by international and regional human rights bodies.

The UN Human Rights Committee has expressly considered the issue of contempt of court in **General Comment No 34** where it has recognised that contempt of court orders may be

[14] *Ibid.*, paras 11 and 12.
[15] Concluding Observations of the Human Rights Committee on the Syrian Arab Republic CCPR/CO/84/SYR.
[16] *Ibid.*, paras 22-36.

justified on the grounds of public order, specifically in order to maintain order within courtrooms as long as there is no limitation on defence rights:

> 31. On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place.[17] Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings.[18] Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights.[19]

***Comparative standards***

ARTICLE 19 points out that, although not binding on Kenya, some guiding principles concerning contempt of the court have been developed in the jurisprudence of the European Court of Human Rights and include the following aspects:

- The media play a pre-eminent role in a democratic society as public watchdog, including of the administration of justice and courts: It was noted that "free speech serves the ends of justice since it plays an informing and scrutinizing role. The exercise of both roles by the media is generally viewed as enhancing the moral authority of the justice system. Restrictions on reporting aimed at ensuring the fairness of court hearings are intended to secure the integrity of the criminal or civil system, but the legal significance attached to the principle of open justice is also aimed at ensuring such integrity, and a key reason for insisting upon open justice is to allow for media scrutiny of the workings of the justice system."[20]
  It is important to note that political expression may also cover speech on matters of public concern, including allegations of bias against any court.[21] The UK Law Commission has recently pointed out the significance of this with respect to issues of contempt.[22]

- Law on contempt of court may amount to a interference with freedom of expression: Anything that "impedes, sanctions, restricts or deters expression constitutes an interference" with that right.[23] This includes any form of prior restraint which require particular scrutiny as "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[24] It also includes sanctions after publication even where they do not amount to a criminal conviction or financial penalty. Laws on contempt of court, which impede publications,

[17] See *Coleman v. Australia*, Communication No. 1157/2003.
[18] See *Dissanayake v. Sri Lanka*, Communication No. 1373/2005.
[19] General Comment No 34, *op.cit*.
[20] H Fenwick and G Phillipson, *op.cit.,* pp 167-168.
[21] *Barford v Denmark*, judgment of 22 February 1989.
[22] "Political expression is obviously of particular significance for contempt by publication because it is highly likely that reporting on matters which are relevant to or occur during court proceedings could amount to political expression. Indeed, imparting information to the public, and the public's right to receive information, about the operation of courts, civil and criminal justice policy, and the like, are clearly serious matters of public concern. Likewise, depending on the circumstances and the content of the disclosure, a breach … by a juror could amount to political expression." Law Commission, Consultation Paper No 209, *op.cit.*, para 5.
[23] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edition, Oxford: OUP, 2009)
[24] *Sanoma Uitgevers BV v The Netherlands*, judgement of 14 September 1990, para 70; *Sunday Times v UK,* judgment of 26 April 1979.

ban reporting on certain matters and deliberations or prevent jurors from undertaking research, would interfere with the right to freedom of expression.

- Law on contempt of court must meet test for permissible restrictions on freedom of expression: Any law on contempt must conform to the test for permissible restrictions on freedom of expression, articulated above. It is important to note that the concept of "maintaining the authority and impartiality of the judiciary", has been interpreted fairly broadly[25] and the European Court indicated that the protection of the justice system and not the protection of individual judges from criticism was the issue.[26]

- The media has a duty to impart information and ideas concerning matters that come before the courts just as in other areas of public interest: In the Sunday Times case, the European Court explicitly stated that

> [T]he courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

  Also, in *Worm v Austria*, the European Court emphasised the importance of media coverage of the administration of justice and noted that there could be discussion of court proceedings as they were taking place, and that reporting including comment on court proceedings contributes to their publicity.[27]

Given the ongoing influence of the Common Law in Kenya, it is instructive to look to UK law and the law of other common law and Commonwealth jurisdictions in developing Kenya's own legislation on contempt of court.

- ***The United Kingdom:*** The Contempt of Court Act 1981 preserves the common law strict liability rule for contempt.[28] However, the concept of "substantial prejudice" is now a fundamental requirement of this form of contempt.[29] There is also a defence if the

[25] The European Court has accepted that an injunction preventing publication was to protect a suspect's fair trial rights (entitlement to presumption of innocence) and therefore was within the scope of the legitimate aims of maintaint the authority and impartiality of the judiciary and of protecting the reputation or rights of others. See *News Verlags v Austria*, judgment of 11 January 2000, para/ 45.

[26] In *Worm v Austria*, Application No 83/1996/702/894, judgment of 29 August 1997, para 40, the Court stated that "the phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, the public at large have respect for and confidence in the courts' capacity to fulfil that function."

[27] *Ibid.*, para 50.

[28] Section 1.

[29] Section 2 provides: "2.— Limitation of scope of strict liability.
(1) The strict liability rule applies only in relation to publications, and for this purpose "publication" includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.
(2) 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.
(3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

publication was in good faith, contemporaneous, fair and accurate report of court proceedings held in public.[30]

Further, in *Attorney-General v MGN Ltd,* the Divisional Court was considering an application to commit a newspaper for breaching the strict liability rule by publishing an article about pending criminal proceedings before a jury.[31] Schiemann LJ summarised the principles governing the assessment of the risk of prejudice in the application of the strict liability rule, thus:

> (1) Each case must be decided on its own facts.
> (2) The court will look at each publication separately and test matters as at the time of publication (see Att.-Gen. v. English [1982] 2 All E.R. 903 at 918, [1983] 1 A.C. 116 at 141, per Lord Diplock and Attorney-General v. Guardian Newspapers Ltd [1992] 2 All E.R. 38 at 48–49, [1992] 1 W.L.R. 874 at 885); nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk. (It was common ground that there was no room for reading the singular word "publication" in section 2 of the 1981 Act as the plural in accord with section 6 of the Interpretation Act 1978).
> (3) The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication.
> (4) That risk must be substantial.
> (5) The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but seriously so.
> (6) The court will not convict of contempt unless it is sure that the publication has created this substantial risk of that serious effect on the course of justice.
> (7) In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial.

The key principle, embodied in Contempt of Court Act is that contempt by publication can only occur where the publication or broadcast creates *a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced*. This means that it is effectively impossible to commit a contempt by publication where the case will be tried by a judge. This is certainly so where the publication is merely a discussion of the issues in the case to which the judge will, in any event, be referred at the hearing. While it is arguable whether a judge might be influenced by media coverage of the issues before the hearing, the media organisation concerned will always be able to defeat it using the defence provided by Contempt of Court Act Section 5 if the publication/broadcast was part of a discussion in good faith of public affairs or matters of general public interest and the risk of prejudice is merely incidental to the

(4) Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.
(5) In this section "programme service" has the same meaning as in the Broadcasting Act 1990."

[30] Section 4(1). Further, Section 5 provides: "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 a 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." Schedule 1 para 12 provides: "Proceedings other than criminal proceedings and appellate proceedings are active from the time when arrangements for the hearing are made or, if no such arrangements are previously made, from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn; and for the purposes of this paragraph any motion or application made in or for the purposes of any proceedings, and any pre-trial review in the county court, is to be treated as a distinct proceeding."

[31] [1977] 1 All ER 456.

discussion. This defence ensures that UK law enables the media to impart information and ideas concerning matters that come before the courts just as in other areas of public interest, as required by the ECtHR in the *Sunday Times* case.

It should be noted that, the UK Law Commission has recently conducted a consultation and published reports on the issue of the contempt of court.[32] The Crown Prosecution Service has also published comprehensive guidance for prosecutors in the UK on the specific issue of "contempt of court and reporting restrictions"[33]

- ***Australia:*** The law of contempt of court exists at common law in Australia, in much the same form as it did in the UK before the Contempt of Court Act 1981. The High Court of Australia has formulated the test for a publication contempt in a way that brings the Australian law close to the substantial risk formulation in the UK's Contempt of Court Act s2(2).:

  > A finding of contempt...depends upon proof that the publication has, as a matter of practical reality, a real (or clear) and definite tendency to interfere with the administration of justice, that is, to prejudice a fair trial...[34]

  There have been a number of proposals for reform of the law on contempt in Australia but none have been implemented.

- ***Canada:*** contempt of court is the only surviving common law offence. Explicit constitutional protection has been given to freedom of speech and this means that it is no longer the case that the right to fair trial prevails over freedom of expression as previously under the common law test.[35] The Supreme Court of Canada overturned a prior restraint injunction preventing a public service broadcaster from broadcasting a fictional television drama series which had been granted on the ground that the broadcast of the series might influence jurors trying or due to try a series of criminal cases. The Supreme Court emphasised that the right of the television company to broadcast the series was protected in the Canadian Charter of Rights and Freedom (Section 2(b)) This being so, Lamer CJ stated:

  > I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a 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 a 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 the free expression of those affected by the ban. [36]

  This reasoning would have to be applied in any post-publication proceedings in contempt for breach of the strict liability rule. Publication contempt proceedings in Canada are only possible, therefore, where the publication has caused a real and substantial risk and the proceedings can be justified as a proportionate interference

[32] See http://lawcommission.justice.gov.uk/areas/contempt.htm
[33] See http://www.cps.gov.uk/legal/a_to_c/contempt_of_court/
[34] See *R v Glennon* [1995] 173 CLR 592.
[35] See *Dagenais v Canadian Broadcasting Corporation* [1995] 120 DLR [4th] 12. The common law test was presented in *RE Global Communications Ltd and A-G for Canada* (1984) 44 OR (2d) 609.
[36] Ibid.

with the free speech rights of the media. It is also interesting that Lamer CJ highlighted the problems associated with ordering a publication ban:

> It should be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.[37]

- ***India***: In India the relevant law is codified in the Contempt of Court Act 1971. Under s 13(a) of the 1971 Act, as amended by the Contempt of Court (Amendment) Act 2006, the power to sentence for a contempt is excluded save where "the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice". Section 13(b) provides for a "justification by truth" defence where this is in the public interest.

- ***South Africa***: The law in South Africa remains uncodified and generally accords with the common law. However, all forms of contempt require intent, i.e. to interfere with the administration of justice.[38] While in many common law countries, judges can issue a conviction for contempt of court in a mini-proceeding inside the main proceeding, immediately after the allegedly contemptuous statement has been made, or by way of summary proceedings before the judge or court to whom or which the statements relate, the South African Constitutional Court has ruled that this is a breach of the right to freedom of expression.[39]

[37] *Ibid.*
[38] See *Lewis v State* [2007] SCA 3 (RSA), para 5.
[39] See *State v Mamabolo*, 2001(3) SA 409.

# Analysis of the Contempt of the Court Bill, 2013

## General provisions

The Bill is divided over six parts, encompassing thirty-six sections, and a schedule.

The Bill is indicated as being "for – An Act of Parliament to define and limit the powers of courts in punishing for contempt of court and for connected purposes." Thus, in its attempt to set out the scope of the restrictions on contemptuous speech, the Bill may be seen as fulfilling the first limb of the test for permissible restrictions on freedom of expression under Article 19(3), namely that such restrictions should be "prescribed by law. However, interestingly, the Bill's focus at the outset is not to "set out" or "establish the law" on contempt of court as such; the attention is on the role of the courts. The limited focus of the legislation may explained by the fact that the intention of the drafters appears not to present a comprehensive law on the contempt of court of Kenya. This is demonstrated by Article 34, which states that the Bill is "in addition to and not in derogation of the provision of any other written law relating to contempt of court." While the law does not have to be or purport to be comprehensive, it would be preferable if the purpose of the Bill was not simply framed in terms of the judiciary. A broader framing for the Bill which does not impinge on any other provision could be achieved following the UK model of the Contempt of Court Act 1981 which simply states that it is an Act "to amend the law relating to contempt of court and related matters."

ARTICLE 19 observes that most of the objectives of the Bill, enumerated in **Section 3**,[40] seem laudable. However, while it is important that the public have confidence in the judicial branch of government, the term "dignity … of the court" should not be interpreted to curtail legitimate speech critical of the court or its judges: the protection of the justice system as a whole and not the protection of individual judges from criticism which should be the issue for this piece of legislation. Moreover, although the term "dignity of the courts" might be understood, from the perspective of human rights legal principles and terms, "dignity" should be used to apply to individuals. We therefore recommend that the term "dignity" is deleted and replaced with the term "impartiality" as in keeping with the ECHR discussed above, even though the term impartiality appears again in section 3(d).

Another concern with the Section 3 is that the other relevant values that should underpin the legislation are not identified and recognised: namely ensuring that the public have a right to receive information and ideas about the courts and the judicial system; and that the media has a responsibility to disseminate such information in the public interest. The legislation should indicate that its objectives include guaranteeing these aspects of the individual rights to freedom of information and responsibilities of the media to freedom of expression explicitly, which are in themselves crucial for maintaining public confidence in the administration of justice.

[40] Section 3 states that the overriding objectives of the Bill is to "(a) uphold the dignity and authority of the court; (b) ensure compliance with the directions of the court; (c) ensure the observance and respect of due process of the law; (d) preserve and effective and impartial system of justice; and (e) maintain public confidence in the administration of justice as administered by the court."

**Recommendations**

- The Bill should state it is for an Act of Parliament "to amend the law relating to contempt of court and related matters."
- Section 3(a) should state that one of the "overriding objectives of this Act" is to "uphold the authority and impartiality of the court.
- Section 3 should state that the objectives of the legislation include the following: to "ensure the public's right to receive information and ideas about the administration of justice"; and to "safeguard media coverage of the administration of justice".

## Jurisdiction of courts

The Bill includes four provisions on the "jurisdiction of the courts". **Section 4(1)** states that every "superior court" has the power to "(a) punish for contempt of court on the face of the court" and "(b) punish for contempt of court and uphold the dignity and authority of subordinate courts".

ARTICLE 19 points out that:

- As before, the reference to dignity here in section 4(1)(b) should be removed and replaced with the term "impartiality."
- The types of contempt of court are confusingly presented here and not properly identified here. It is unclear why the section 4(1) makes a distinction between contempt of court in general in section 4(1)(b) and contempt of court in the face of court in section 4(1)(a), as presumably the scope of section 4(1)(b) could cover what is covered by section 4(1)(a). Also, the appropriate term is "contempt of court *in* the face of the court" rather than "contempt of court *on* the face of the court".

The errors in the Bill in section 4 and 5 should be amended to reflect this.

**Section 5** indicates that subordinate courts have the authority to punish for contempt of court in the face of court. This power normally allows courts to enquire into and punish disruption in the courtroom itself.[41] This provision positively includes the requirement of intention, but it should not be used to give any court the power to make a finding of contempt in the face of the court for mere criticism of the court or proceedings, which would not be compliant with Article 19(3) of the ICCPR. While the courts should be empowered to "deal with intentional threats or insult and misconduct committed with the intention that proceedings will or might be disrupted", there should be a "sufficiently high threshold of both the mental element and the conduct element to ensure" compliance with freedom of expression.[42]

There is a danger that Section 5 may be relied upon to curtail the speech of defence advocates and, in doing, prevent them from defending their clients fearlessly as they should. We note that the European Court held that lawyers have a special position in the justice system and that it is legitimate for them to contribute to the guarantee of public confidence

[41] This section significantly states that the lower courts have the power to punish for such contempt where a person "(a) assaults, threatens, intimidates, or wilfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate"; (b); wilfully interrupts or obstructs the proceedings of a subordinate court in the court; or (c) wilfully disobeys an order or direction of a subordinate court in the court of the hearing of a proceeding."

[42] Law Commission, Consultation Paper No 209, *op.cit.*, p. 33.

in the administration of justice.[43] Moreover, it held that "it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential 'chilling effect' of even relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred".[44] Interference with defence counsel's freedom of expression would only be justified in the most exceptional of circumstances.[45] The UK Law Commission has made some observations about the situation of lawyers in the UK which ought to provide a useful reference point in the development of the law in Kenya on this issue.

> [I]n practice defence counsel would be afforded a very degree of latitude in making what they consider to be reasonably arguable submissions. Indeed, advocates could not be held in contempt when making reasonably arguable submissions because they would be professionally bound to make such submissions on behalf of their client.[46] The Lord Chief Justice in *Dallas*[47] explained that "it is never a contempt of counsel to advance submissions that he thinks are appropriate".[48]

To avoid the "chilling effect" on defence lawyers' speech, it is recommended that there is a caveat introduced into section 5 stating that the provision should not be used with that purpose or effect.

**Recommendations**

- The reference to "dignity" in section 4(1)(b) should be replaced with "impartiality".
- Section 4(1), on the jurisdiction of the superior courts, should be clarified given the confusion between subsections (a) and (b).
- All references to "contempt of court on the face of the court" in the Bill should be amended to contempt of court in the face of the court".
- Section 5 should include a provision stating that its provisions might only be used in exceptional circumstances to interfere with the freedom of expression of counsel and should in no circumstances be used to restrict them in their submission of arguments which they consider to be reasonably arguable.

## Constitution of and defence to contempt of court

Part III deals with the scope and meaning of the contempt of court, as well as the possible defences. This is the most important section of the Bill.

***Meaning of "contempt of court"***

ARTICLE 19 finds that provision on contempt by publication – enumerated in Section 8(2)[49] – is too broad and should be more narrowly tailored. While it covers a broad range of forms of

[43] *Nikula v Finland*, Application No 31611/96, judgment of 21 March 2002, para 45.
[44] *Ibid,* para 54.
[45] *Amihalachioaie v Moldova,* Application No 60115/00, judgment of 20 April 2004.
[46] Section 303(a) of the Bar Code of Conduct requires a barrister to "promote and protect fearlessly and by all proper and lawful means the lay client's best interests and [to] do so without regard to his own interests or to any consequences to himself or to any other person. See also principles 1 to 5 of the Solicitors Regulation Authority Code of Conduct 2011.
[47] *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.
[48] *Ibid*.
[49] Section 8(2) provides that, in the context of criminal proceedings "the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or doing of any other act which – (a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court; (b)

expressions, the real problem with the provision is the nature of the expressions that it encompasses within the concept of contempt of court. This includes expression which "lowers the judicial ... dignity of the court." We repeat our concern that the notion of "dignity" of the court should be revised and that the Bill should instead be focussed on "maintaining the authority and impartiality" of the court.

However, the major concern with this provision is the inclusion of expression which "scandalizes or tends to scandalize." This phrase suggests that such forms of expression do not actually need to have the effect of prejudicing or harming the authority or impartiality of the judicial proceedings. We note that in the UK, the offence of scandalizing the court was abolished through the Crime and Courts Act 2013 following a Law Commission recommendation to this effect.[50] Before this, the offence had become almost obsolete by the end of the 19th century in the courts of England and Wales: the last successful prosecution was in 1931.[51] The Law Commission's arguments for the abolition of the offence of scandalizing the court are instructive.

> The principal arguments discussed in the paper for abolishing the offence without replacement included the following: that it is not enforced at present and appears to be obsolescent, that prosecutions can have the effect of increasing the harm caused by the act complained of, and that it is counter-productive in that it conveys the impression that judges are protecting their own. The offence has also been criticized on the ground of freedom of expression, and it has been argued that judges do not need a special protection not given to any other public officials. The old argument that judges need protection because they cannot answer back has less force that it did.[52] [footnotes omitted]

Furthermore, it is doubtful whether the offence of "scandalizing the court" would meet the criteria for legitimate restrictions on freedom of expression to protect the authority (and impartiality) of the judiciary, namely: "legality" because its scope is uncertain, and "necessity" because it does not seem that this offence is "necessary" to protect that aim. It should be noted that the offence is also unacceptable from both a US and Canadian perspective on free speech.[53]

Another problematic aspect of the way in which "contempt of court" is conceived by section 8(2) is that it covers not only expression which actually scandalizes the court (a), prejudices or interferes with judicial proceedings (b) and also interferes with the administration of justice (c), but also expressions which "tend to" any of these things. This term means that courts – specifically judges – are given a wide discretion to make their own subjective assessments as to whether publications and other expressions have a *tendency* to scandalise, prejudice or interfere with proceedings. This reliance on the interpretation of individual judges increases uncertainty about the scope of the concept of contempt of court, and is thus also problematic from a human rights perspective.

Section 8(3) goes to state that any act, not relating to civil or criminal proceedings, which "is wilfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any Court, or to lower the authority of a court, or to scandalize a judge,

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prejudices or interferes or tends to interfere with, the due course of any judicial proceeding; or (c) interferences or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court."

[50] Law Commission, Contempt of Court, *op.cit.*

[51] *Colsey*, The Times, 9 May 1931.

[52] Law Commission, Contempt of Court, *op.cit.*, para 16.

[53] *Kopyto* (1986) 47 DLR (4th) 213 (Ont CA); *Garrison v Louisana* (1964) 379 US 64.

judicial officer in relation to any proceeding before the Court or any other manner constitutes contempt of court". For the reasons stated above, the reference to "scandalizing a judge ..." should be removed from Article 8(3).

**Recommendations**

- Section 8(2)(a) should be deleted. Publications and other expressions which "scandalize or tends to scandalize the court" should not be deemed to constitute contempt of court or any other offence.
- The reference to "scandalizing a judge [or] judicial officer" in section 8(3) should be removed.

***Defences***

There is one major issues with defences enumerated in **Section 9** of the Bill.[54] There are a number of conditions applied to the dissemination of information in the public interest – namely that they are "fair comment", "made in good faith" and "in temperate language."

Legislators may have good grounds for arguing that the "protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."[55] However, there should be no requirement that any publication should be expressed in "temperate language". The meaning of this term – rather like the term "tendency" discussed above – depends on the individual and subjective perspective of the presiding judge. What is "temperate", in the sense of being moderate and self-restrained, to one judge may not be to another.

Another problem with this phrase which appears in subsections (a), (b) and (f) is that there may be situations where "temperate" language might not do justice to the coverage of a particular issue concerning the administration of justice, where a journalist or commentator has good reason to criticise or condemn in extreme or strongest of terms a particular problem involving the judiciary or the courts system, such as would be the case of corruption or bribery involving judicial officials, and in doing reflect the public interest.

[54] Section 9 states that it would be a defence if the court is satisfied that the conduct at issue constitutes one of the following: "(a) "a fair comment on the general working of the court made in good faith in the public interest and in temperate language"; (b) "a fair comment on the merits of a decision of a court made in good faith and in temperate language; (c) "a publication of a fair and substantially accurate report of any judicial proceeding"; (d) "a publication of any matter amounting to contempt of court by reason of its being published during the pendency of judicial proceedings, by a person who had no reasonable grounds to believe that such judicial proceedings were pending at the time of the publication of the matter"; (e) "pertains to distribution of a publication containing any matter amounting to contempt of court by a person who had no reasonable ground to believe that the publication contained or was likely to contain any such matter"; (f) "a true averment made in good faith and in temperate language for initiation of action or in the court of disciplinary proceedings against a judge or judicial officer"; (g) "a plea of truth taken up as a defence in any contempt of court charge under this Act or any written law"; (h) "a relevant observation made in judicial capacity such as those by a superior court on an appeal or revision or application for transfer of a case or by a court in judicial proceedings against a judge or a judicial officer"; (i) "a remark made in an administrative capacity by an authority in the course of official business, including a remark connected with a disciplinary inquiry or in an inspection note or a character roll or confidential report"; (j) "pertains to any other matter exempted from constituting a commission of an offence of contempt of court under any other written law." Presumably, these defences apply to whether contempt of court takes place in civil or criminal proceedings.

[55] *Pedersen v Denmark*, Application No 49017/99, judgment of 17 December 2004, para 78.

There are other problematic phrases that potentially narrow the scope of defences which are available to an allegation of contempt of court. Notably, Section 9(c) requires that a publication is not only fair, but also a "substantially accurate report of any judicial proceeding", which is different and a higher threshold than having an "accurate factual basis".[56]

**Recommendations**

- References to "temperate language" should be removed from Sections 9(a), (b) and (f). "Temperate language" should not be used as a criterion for conduct which will not be considered as contempt of court.
- Section 9(c) should not require that a publication is a "substantially accurate report" but state that it simply needs to have an "accurate factual basis" in order for it to have a defence from an allegation of contempt.

***Strict liability***

Rule and limitation

Sections 10 and 11[57] set out the strict liability rule and limitations of it, and in doing so it appears to largely reflect on UK law under the Contempt of Court Act 1981. This does not present a problem from a human rights perspective.[58]

**Section 11(1)** then provides that "the strict liability rule applies to publications only and where – (a) the publication creates a risk that will impede or prejudice the course of justice in relation to the proceedings in question; and (b) the proceedings in question are active within the meaning of this section at the time of the publication." While other provisions on strict liability appear to draw on UK law, sections 10(1) and 11(1)(a) appear distinct. The UK law presents a different threshold for strict liability: it applies only to such a publications or communications "which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" (emphasis added). Together these two aspects or "benchmarks … make up one test which must do two things: it must help ensure adequate protection for defendants' fair trial rights, whilst also being the minimum interference necessary with the right to freedom of expression".[59] It is argued that this higher specified standard – ie at least of "substantial risk of serious prejudice", rather than simply "risk" in the ordinary – should be the standard that should be followed by section 11(a) as it is a higher and more likely to be compliant with freedom of expression standards.

Furthermore, reference to conduct that "tends to interfere with the course of justice …" should be omitted from the Bill for reasons indicated earlier.

Defence to the rule

Under **Section 13**(1) it is a defence under the strict liability rule if a person publishes "any matter which interferes or tends to interfere with, or [obstruct] or tend to [obstruct], the

[56] *Ibid*.

[57] Section 10(1) provides that "a person shall be strictly liable for contempt of court in any case where he or she does any act, which interferes or tends to interfere with the course of justice in relation to any judicial proceedings". Section 10(2) then states: "it is immaterial whether the interference was or was not intentional".

[58] In *Worm v Austria*, the ECtHR held that the conviction was compatible with Article 10 of the ECHR even though the law did not require intention to prejudice the proceedings to be demonstrated. *Worm v Austria*, Application No 83/1996/702/894, judgment of 29 August 1997, para 50.

[59] Law Commission, Consultation Paper No 209, *op. cit.*, para 21.

course of justice in connection with any civil or criminal proceedings pending at the time of publication, if at that time, that person had no reasonable grounds to believe that the proceeding was pending". We believe that the phrase "tends to interfere with" should be removed for reasons stated earlier.

Section 13(2) clarifies that "notwithstanding anything to the contrary contained in this Act or any other law, the publication of any matter referred to subsection (1) in connection with any civil or criminal proceeding which is not pending at the time of publication does not constitute contempt of court". A person is also not guilty of contempt if she/he "distributed a publication containing any matter referred to in subsection (1), if at that time of distribution that person had no reasonable ground to believe that it contained or was likely to contain any such matter. The burden of proof is on any person seeking to rely on one of the defences, under section 13(4). Section 13(5) qualifies subsection (3) by stating that it does not apply to the distribution of "(a) any publication which is a book or paper printed or published; or (b) any publication which is a newspaper published *other than in conformity with the Books and Newspapers Act"* (emphasis added). ARTICLE 19 finds that this latter provision which refers to a piece of legislation governing books and the press is likely to have a restrictive effect on the possibility of relying on the defence of innocent publication or distribution. It should therefore be removed.

It is positive that **Section 18** contains a public interest defence. However, the qualifying part of the provision, requiring that a defence is only available if the risk of impediment or prejudice is "merely incidental", restricts its scope unjustifiably and it should be removed. While it clearly almost identical on the equivalent provision in UK law, section 5 of the Contempt of Court Act 1981, it has been persuasively argued that this standard falls short of the human rights principle of proportionality. It:

> [D]oes not provide a means of weighing up the seriousness of the prejudice against the significance of the speech in question … it is not the equivalent of a proportionality test since it depends upon problematic determinations as to the central focus of a publication, as opposed to its peripheral aspects. The courts are being asked to engage in literary as opposed to legal analysis.[60]

We recommend that this qualifier be simply removed from section 18.

**Recommendations**

- Reference to conduct that "tends to interfere with …" should be deleted from section 10(1) and 13(1).
- Section 11(1)(a) should indicate that the strict liability rule applies to publications only and where the publication creates a "substantial risk that the course of justice in relation to the proceedings in question will be seriously impeded or prejudiced".
- Section 13(5) should be deleted.
- Section 18 should simply state that a "publication 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".

***Other defences***

**Section 14**(1) provides that it will not be contempt of court to publish "a fair and accurate report of a judicial proceeding held in open court if the report is published in good faith".

[60] H Fenwick and G Phillipson, *op.cit.*, p 282.

Section 14(2) empowers the court to order the postponement of the "publication of any report of the proceedings, or any part of the proceedings ... for such period as the court thinks necessary" to avoid "the risk of prejudice to the administration of justice in those proceedings."

ARTICLE 19 finds that these provisions would be improved if:

- Section 14(1) removed the requirement of an accurate report and instead required that the report had an "accurate factual basis"; and
- Section 14(2) indicated that the threshold for the postponement was a *substantial* risk of *serious* prejudice" in accordance with what has already been argued above.

**Section 17**(1) provides that a person "is not guilty of contempt of court for publishing a fair and accurate report of judicial proceedings before any court sitting in chambers or in camera" unless (a) "the publication is contrary to any law"; (b) "the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding or of information of the description which is published; (c) "the court sits in chambers or in camera for reasons relating to public order or national security, the publication of information relating to those proceedings; (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings". We believe that Section 17(1) would be improved if the requirement of an "accurate report" of judicial proceedings was removed and replaced with a requirement of report which had an "accurate factual basis".

**Recommendations**

- Section 14(1) should state it is a defence to publish a report with an "accurate factual basis", rather than an "accurate report"
- Section 14(2) should state that the threshold for a court to order the postponement of a publication is "a substantial risk of serious prejudice to the administration of justice".
- In Section 17(1), the requirement of an "accurate report" of judicial proceedings should be removed and replaced with a requirement of report which had an "accurate factual basis."

***Use of recording devices***

**Section 19** deals with the use of recording devices.[61] While there is nothing that appears to contradict freedom of expression standards in this provision, it is interesting to note that the Bill as it is currently drafted does not deal with the contemporaneous matter of jurors' possession and use of mobile phones and other internet-enable devices in court.

If the Kenyan legislators do decide to include a provision in this regard in a future draft of the Bill, they should bear in mind that the UK Law Commission has recently advised that

[61] Section 19(1) provides that an individual "is guilty of contempt if he or she – (a) uses in court any [visual or audio] recording device or instrument for recording proceedings tape recorder or other instrument for recording sound, except with the leave of court; (b) publishes a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or disposes of it or any recording so derived, with a view to such publication; or (c) uses any such recording in contravention of any conditions granted under paragraph (a)." Section 19(4) states that the section "shall not apply to the making or use of sound recordings for the purposes of official transcripts of proceedings."

> [I]nternet-enabled devices should not automatically be removed from jurors throughout their time in court, but that judges should have the power to require jurors to surrender such devices [... and] they should always be removed from jurors whilst they are in the deliberating room. [While] There may also be other times where the judge considers that he or she needs to use the discretion to remove such items whilst the juror is at court [...] We consider that [the right to privacy] may be engaged here in relation to the right to correspondence, given that the removal of jurors' internet-enabled devices will obviously prevent the jurors from making telephone calls and sending emails during the period that they are in the jury room.

However, according to the Law Commission, such restrictions would be for the legitimate aims of protecting fair trial rights and would only be for the period of deliberations. The drafters of the legislation may consider how to acknowledge the very live issue of the use of internet-enabled devices at court, and should do so in accordance with jurors' rights to freedom of expression as well as privacy.

**Recommendations**

- The Bill should consider acknowledging the use of internet-enabled devices at court through provisions that respect with jurors' rights to freedom of expression as well as privacy.

***Source protection***

It is positive that the Bill includes a provision on source protection in **Section 20**.[62]

This provision is important as journalists routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate or expose wrongdoing. In many cases, anonymity is the precondition upon which the information is provided to the journalist by the source; this may be motivated by fear of repercussions which might adversely affect their job security or even physical safety. That the media should enjoy a special privilege allowing them not to reveal confidential sources of information unless certain stringent conditions are met has been recognised by international authorities[63] and courts.[64] It is noteworthy that the African Commission's *Declaration on Principles on Freedom of Expression in Africa* states:

> Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
> - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> - the information or similar information leading to the same result cannot be obtained elsewhere;
> - the public interest in disclosure outweighs the harm to freedom of expression; and
> - disclosure has been ordered by a court, after a full hearing.

These principles should be incorporated into section 20 of the Bill.

**Recommendations**

[62] Section 20 states that a person is not guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which the person is responsible, unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of justice.
[63] See Recommendation No R (2000) 7 of the Council of Europe Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.
[64] *Sanoma Uitgevers BV v Netherlands*, Application No 38224/03 judgment of the Grand Chamber of the European Court of Human Rights of 14 September 2010, paras 88-92.

- Section 20 should be amended to indicate that a person is not guilty of contempt of court for refusing to disclose a source of information unless (a) the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence; (b) the information or similar information leading to the same result cannot be obtained elsewhere; (c) the public interest in disclosure outweighs the harm to freedom of expression; and (d) disclosure has been ordered by a court, after a full hearing.

## Offences and punishment

ARTICLE 19 is concerned about several aspects of the provisions on criminal offences, included in **Section 27**.[65] The inclusion of the terms "wilfully insults" (Section 27(a)) and "shows disrespect" may both be deemed to impinge on legitimate speech, including in a courtroom. As noted above, international human rights law protects also speech that shocks, offends or disturb. Shouting at a judge or distributing leaflets may be examples of insulting speech. While insulting expression may be punished, that punishment still needs to be proportionate to the circumstances of the case.[66] For this reason, the reference to expression that "wilfully insults" may be retained. In contrast, however, the reference to "showing disrespect" should be omitted because of the uncertainty of its scope and that it could be easily interpreted to encompass legitimate criticism of the judge in a case, including by lawyers. Section 27(c) should simply be deleted.

It is important to stress that the regime of penalties in **Sections 28 and 29**[67] should meet the test of proportionality under international human rights legal standards, in the sense that the

[65] Section 27 states that an offence is committed by any person who (a) assaults, threatens, intimidates, or wilfully insults a judge or judicial officer or witness, during a sitting or attendance in a court, or in going to or returning from the court; (b) wilfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding; (c) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken; (d) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such a room; (e) causes an obstruction or disturbance in the course of a judicial proceeding; (f) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding or calculated to lower the authority taken; (g) publishes a report of the evidence taken any judicial proceeding which has been directed to be held in private; (h) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence; (i) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; (j) wrongfully retakes possession of law any person who has recently obtained possession by a order of court; or (k) commits any other act of international disrespect to any judicial proceedings, or to any person before whom such proceeding is being heard or taken.

[66] *Skalka v Poland*, Application No 43425/98, judgment of 23 May 2003 at paras 34, 39 and 42.

[67] Section 28(1) states that a person found guilty of contempt "is liable to imprisonment for a term not exceeding six months, or to a fine not exceeding two hundred thousand shillings, or to both". A court can also order: under section 28(2), that the accused person "be detained in policy custody under the rising of the court"; under section 28(3), to "revoke an order of committal made under subsection (2) and, if the offender is in custody, order his discharge". Section 28(4) provides that an accused may be discharged upon "apology being made to the satisfaction of the court." Section 28(6) provides that "where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing that person to imprisonment, direct that the person be detained in civil jail for such a period not exceeding six months as the court may deem fit". This means that where a company has been found guilty of contempt of court, under section 28(7), "every person, at the time the contempt was committed, was in

punishment is not over-broad and that it is appropriate to achieve the function of protecting the aim of maintaining the authority and impartiality of the judiciary. It must be shown that the punishment is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

From this perspective, the punishments which are outlined in these sections may be deemed as too far-reaching, particularly with respect to the powers of the subordinate courts. It is noted that unlike the UK Contempt of Court Act which provides for different maximum penalties between the magistrates' court and the Crown Court, this Bill makes no distinction between Kenyan subordinate and superior courts when it comes to maximum penalties. It is argued that the Bill makes that distinction so that only the superior courts are enabled to impose the current maximum penalties for contempt of court of six months imprisonment and/or a fine not exceeding 200,000 shillings. The inferior courts should only be able to impose a prison sentence of up to one month (as in the UK) and/or a fine not exceeding 25,000 shillings.

It is important that nothing in Sections 28 or 29 is used to imprison journalists or media workers. This could have a real chilling effect on the reporting of court proceedings otherwise and in doing so undermine the objective of ensuring the public confidence in the administration of justice. ARTICLE 19 is concerned that sections 28(7) and 29(1) could be abusively relied upon with precisely this effect. It has been noted recently that it is extremely rare for publishers to be punished by anything more than a fine in the UK.[68] We therefore recommend that there is an additional safeguard for reporting on court proceedings inserted into both provisions.

**Recommendations**

- Section 27(c) should be deleted.
- The regime of penalties in sections 27 and 28 should be amended to indicate that the superior courts are enabled to impose the maximum penalties for contempt of court of six months imprisonment and/or a fine not exceeding 200,000 shillings and the inferior courts are enabled to impose a prison sentence of up to one month and a fine not exceeding 250,00 shillings.
- Sections 27 and 28 should provide that, insofar as they apply to corporate entities, media organisations shall only be punished with a fine, unless the circumstances are exceptional.

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charge of and was responsible to the company for the conduct of business of the company, as well as the company shall [be] deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail". According to Section 29(1) if the contempt has been "committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail." Similarly, under section 28(8), where a state body is found guilty of contempt, "the accounting officer shall be deemed guilty of contempt and … may be committed to civil jail" and if the contempt has been "committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer, such accounting officer shall also be deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail". It is unclear what this adds to what is provided in section 28(8). In addition, to the penalty of civil jail, the court may impose against a company or state body a "fine not exceeding Ksh 1,000,000." Furthermore, in addition to the committal to civil jail under sections 29(1) and (2), under section 29(3), the court "may impose against the director, manager, secretary or other officer of the company, or the accounting officer of the State organ, government department, ministry or corporation, as the case may be, a fine not exceeding Ksh 200,000."

[68] Law Commission, Consultation Paper No 209, *op.cit.*, at 16-17.

# About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at http://www.article19.org/resources.php/legal/.

If you would like to discuss this legal analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at barbora@article19.org For more information about the work of ARTICLE 19 in Kenya, please contact Henry Maina, Director of ARTICLE 19 East and Horn of Africa, at henry@article19.org.

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