



Note on Fijian Discussion Paper on Access to the Courts and Reporting of Proceedings by the Media

October 2005

This brief Note provides comments on a Discussion Paper titled, “Access to the Courts and Reporting of Proceedings by the Media”, forwarded by Gordon Ward, President, Fiji Court of Appeal, to the Fijian Human Rights Commission on 15 August 2005. The Discussion Paper was produced by a committee with joint media and judicial representation, which was set up to examine relations between the media and courts in Fiji. It consists mostly of a series of questions highlighting the key concerns identified by the committee. It would appear that the committee is open to receiving responses for two months from 15 August.

This Note should be read in conjunction with our paper of 2000 on the topic of contempt of court proceedings, which is appended hereto. This provides the general international law background for the comments contained herein.

As background to the specific discussion contained herein, we note that open justice, including open access to the courts, is a value of the greatest social importance. It is so important that, uniquely among public bodies in relation to this issue, it receives special attention in the *International Covenant on Civil and Political Rights* (ICCPR),¹ which provides that, outside of exceptional circumstances, court proceedings shall be public. Although the media and public may be excluded from a trial to protect certain interests, the ICCPR provides that the judgement shall still be public, outside of even more limited and exceptional circumstances (see Article 14(1)).

In practice, in modern democracies, complete exclusions from trials are extremely rare, particularly where children are not involved, and non-publication of decisions almost unknown. Sometimes, for example in trials involving children, the identity of the parties in the decision is suppressed by using initials. The Discussion Paper asks whether guidelines or rules regarding these matters should be developed. Such guidelines will promote consistency across the courts and, as long as they are progressive and aim to promote maximum openness taking into account legitimate administration of justice and privacy concerns, they would be welcome.

¹ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

One of the questions posed in the Discussion Paper is why the courts should be open when many other public bodies are not, at least as far as their meetings go. We note that it is clear from the ICCPR provisions noted above that courts are considered to be quite different from other public bodies. One of the reasons for this is that courts dispense justice, which must not only be done but be seen to be done. Openness of actual processes is thus central to the very judicial function, unlike most other public bodies.² Where overriding public or private interest justify some level of secrecy in relation to court proceedings, non-disclosure or gag orders are a far preferable, and less intrusive, approach than closing proceedings. While these do not protect against disclosure to those actually present, this is almost by definition a limited audience, which will largely mitigate the harm of publicity.

Various grounds are recognised under international law for restricting access to courts and, closely related to this, are the restrictions that international law permits on the right to freedom of expression. For current purposes, the most important of these are public order, the authority and impartiality of the judiciary, and privacy. Under well-established jurisprudence relating to freedom of expression, restrictions on this fundamental right are permitted only where the following three-part test is met:

- In the first place, any interference with free expression must be provided for by law. This means not only that there must be a piece of legislation enacted by a competent body; the law must also be as clear and precise as reasonably possible, so that citizens know in advance exactly which expressions are prohibited.
- Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive; no other aims are considered to be legitimate grounds for restricting freedom of expression.
- Finally, the restriction must be necessary to secure one of those aims. The word 'necessary' in Article 19(3) is understood to have a number of implications. First, if there exists an alternative measure which would be less intrusive to of the right to free expression but would nevertheless accomplish the same goal, the restriction is not in fact necessary. Second, the restriction must impair the right as little as possible and, in particular, not restrict legitimate speech. Lastly, the impact of restrictions must be proportionate; the harm to freedom of expression must not outweigh the benefits to the interest protected.

The rest of this Note addresses various specific issues raised by the Discussion Paper.

Media v. Ordinary Citizens

In various places, the Discussion Paper raises an issue as to whether media workers should be treated differently from ordinary citizens as regards access to the courts. The general answer to this is no. International guarantees of freedom of expression and access to the courts apply to everyone, not just media workers. Furthermore, it is very problematical to attempt to classify who qualifies as a media worker, at least as a matter

² All public bodies are required to operate in a transparent fashion and to provide public access to their documents but this is a more limited obligation than the one of operating in public, which applies to the courts.

of law. While journalists are free to organise themselves into associations which may 'accredit' their members as journalists, the State should not make such distinctions. Unlike lawyers or doctors, the practise of journalism is a human right which should not be subject to State control.

The result of this is, for example, that if cameras are allowed in court, everyone should be allowed to bring one in. Similar rules would presumptively apply to video or film cameras.

At the same time, various considerations may make it legitimate to differentiate between certain specially court-accredited media activities/individuals and the general public. Such differentiation may be based on time or space constraints, or constraints relating to disruption of the court, and is based on the assumption that ensuring the presence of at least certain media effectively ensures access of the public as a whole to court proceedings. Thus, in a very high-profile case where space is limited, it may be legitimate to ensure that court-accredited journalists are guaranteed entry, on the basis that they will ensure that the vast majority of the public, who may not actually be present, will at least hear an independent report of the case. Similarly, it may be legitimate to accredit one company to provide broadcast coverage of courts where this is allowed, as long as this company is required to provide this coverage on a fair and equitable basis to all broadcasters.

Where accreditation of this sort is in use, it should ideally be administered by the media themselves and, in a small country like Fiji, with an active Press Council, this should be possible. Regardless, it is essential that any accreditation process be fair and free of political or other bias. The Discussion Paper asks whether courts should be able to exclude 'undesirable' publications. It is clearly not for public officials to decide which publications are or are not desirable. Subject only to breach of legitimate laws, the right to freedom of expression should not be subject to content-related controls.

Positive Obligations on Courts to Disseminate Information

In many countries, access to information laws place a general obligation on all public bodies, often including the courts, to both provide access to the information they hold upon request, subject to certain exceptions, and to disseminate proactively key information. In some countries, the application of such rules is limited to the administrative functions of the courts while in others the rules cover all aspects of court work, subject to relevant exceptions, such as legal privilege, the detection and prosecution of crime and personal information.

In most modern democracies, an increasing range of court decisions is available over the Internet. At a very minimum, the decisions of senior courts should be put on the Internet, as well, of course, as being made available directly from the relevant court and in published journals.

The Discussion Paper asks whether such obligations extend to altering court procedure to ensure that the media can, for example, see written evidence that is not read out in court.

It is not necessary to change the procedural manner in which courts operate to accommodate the media, as this would disrupt court proceedings and render few benefits in terms of better access. However, the idea of establishing a court media or press office to ensure accurate and informed reporting on court proceedings, as well as to provide the media with information in advance about such proceedings is a good one, which is in place in many countries.

The Discussion Paper also raises the issue of judges speaking directly to the media. The trend in modern democracies is for judges increasingly to exercise their own right to freedom of expression, even on issues relating to their work, as long, of course, as they do not, or do not appear, to compromise their independence in relation to any specific case that may be or have been before them. It is appropriate for judges to talk directly to the media in relationship to a specific case, as long as care is taken to preserve neutrality and where this would enhance public understanding of the case.

Cameras and other Recording Devices in Courts

This raises difficult issues as the Discussion Paper notes. The practice in most countries remains fairly hostile to allowing cameras or other recording devices into courtrooms, largely because of their potential to disrupt the proceedings but also because of concerns relating to privacy and perhaps even accuracy of reporting. ARTICLE 19 believes that such restrictions should be reconsidered carefully. Outside of certain very high-profile cases, or cases where overriding secrecy interests should prevail, recording devices have not proven to lead to the feared results in those jurisdictions where they are allowed, notably in the United States. Where the risk of such results is a particular concern, such as in cases involving children, these devices can be prohibited on a case-by-case basis, which is surely preferable to a complete ban.

The Discussion Paper raises the issue of playing to the cameras; litigants who do this are likely to place their legal case at risk since such an approach is unlikely to coincide with their best legal strategy. It is assumed that judges will be able to avoid such behaviour. It is possible that in some cases the presence of cameras may dissuade witnesses from providing evidence, for example where the witness is a victim of a sexual assault. Where such a risk is serious, temporary measures may be necessary. However, in many cases, a witness who is prepared to testify in open court will not be affected significantly by the presence of cameras. The Discussion Paper also raises the issue of inadmissible evidence. Generally, the question of admissibility of evidence in court is driven by a number of concerns that do not apply to media reporting and this set of standards cannot be applied to media reporting, even of courts. Where reporting might expose jurors to inadmissible evidence that they would not otherwise hear, there may be a case for exclusion but this will be rare. Inadmissible witness testimony will already have been heard by the court prior to exclusion (including jurors, if it is a jury trial), so media reporting will not lead to the undesired effect. As regards accuracy, see the comments below.

At the same time, courts have a clear right to ensure that recording devices do not disrupt their proceedings and certain rules may be legitimate in this context, such as banning

flashes on cameras, ensuring lawyers are able to consult with their clients in private and so on.

Concerns of Accuracy and Privacy

The Discussion Paper raises a number of concerns about the accuracy of court reporting. At heart, this is not an issue which should concern the court, or which should provide justification for restrictions on access to the courts. Historically, the use of official restrictions to promote accuracy has been fraught with mistakes and, worse yet, attempts at control, and such efforts have almost never lead to greater overall accuracy. Instead, accuracy is best promoted by openness and the development of positive, transparent relations between courts and the media. Furthermore, in many countries, including Fiji, the media have put in place self-regulatory systems to promote professional reporting, including accuracy. These are, where effective, far preferable to restrictions imposed by public officials.

The Discussion Paper raises other content-related concerns, such as the exposure of evidence of a remote control bomb or modified gun. In the first place, such information is easily available over the Internet. Secondly, any general restrictions on reporting such matters (apart from as they relate to defamation) will continue to apply to court reporting. If one may generally publish on how to make a remote control bomb, why should it be prohibited from reporting this in connection with a court case?

Privacy is a more serious concern and there may be cases, in particular involving minors, where some measures to promote privacy may be warranted. It is common, for example, to suppress the identity of minors who are victims of crimes, particularly sexual crimes.

At the same time, care must be taken not to overstate this concern. The Discussion Paper asks what legitimate interest the public may have in certain types of cases. This is not an appropriate question; as with accuracy, it is not for public officials to determine what the public should or should not be interested in. Rather, the principle of openness should be the starting point and closure (of the case as a whole or via a non-disclosure order) very much the exception, as justified by the exceptional nature of the case.

Regardless, a number of considerations militate in favour of openness as against privacy in all but the most exceptional cases. First, the overall public interest in open justice must be taken into account. Practically every case will involve some exposure of information which one of the parties or other participants would not have wished for. This cannot justify closure of cases. It may be noted, for example, that most countries apply a rule in relation to defamation whereby media are protected against potential defamation liability for fair and accurate reporting of court proceedings. If individuals' interest in protecting their reputation must, as this rule implies, give way to open court reporting, why should different rules apply in situations involving privacy?

Second, in many cases, the parties have opted to use a public mechanism for resolving their problems, namely the courts, and they must accept the consequences of this. Third, in many cases, the eventual resolution of the case or final decision will also be attended

with publicity, which will often counter any negative publicity during the case. Thus, a wrongly accused person will be absolved of guilt, and a person wrongly brought to court in a civil case similarly exonerated. Victims of crimes are in a different position, of course, but in such cases the overall public interest in open justice is normally of greater importance than the privacy interest involved.

Given these important considerations, courts should decide to impose non-disclosure orders only in exceptional cases and complete closure even more exceptionally. As noted above, rules or guidelines on this will promote consistency and are therefore useful, as long as they are founded on the presumption of open justice.

Background Paper
on
Freedom of Expression and Contempt of Court

for the

International Seminar on
Promoting Freedom of Expression
With the Three Specialised International Mandates

Hilton Hotel
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I. Introduction

Contempt of court is a broad, common law doctrine. It was described by Joseph Moscovitz, in an often quoted article in the *Columbia Law Review*, as “the Proteus³ of the legal world, assuming an almost infinite diversity of forms.”⁴

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

[A]lthough criminal contempts 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.⁵

In common law jurisdictions, contempt of court has traditionally been classified as either *in facie curiae* (in front of the court) or *ex facie curiae* (outside the court), or as criminal or civil. The latter distinction can be confusing because it has nothing to do with whether the proceedings are criminal or civil.

³ A mythological sea god capable of changing shape at will.

⁴ J. Moskovitz, ‘Contempt of Injunctions, Civil and Criminal’ (1943) 43 Col. LR 780.

⁵ *AG v. Levenson Magazine Ltd.* [1979] AC 440, p. 449.

Criminal contempt occurs when there is interference with or disruption of criminal or civil court proceedings. Examples include yelling in the court room, publishing matters which may prejudice the right to a fair trial (“trial by media”), or criticisms of courts or judges which may undermine public confidence in the judicial system (“scandalizing the court”).

Civil contempt occurs when a person disobeys a court order and is subject to sanctions, such as a fine or imprisonment. The purpose of civil contempt is not only to enforce court orders, but also to maintain public confidence in the judicial system “since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”⁶

As Lord Scarman has pointed out, the distinction between the two may have less relevance today, but it still useful for classification purposes:

The distinction between ‘civil’ and ‘criminal’ contempt is no longer of much importance, but it does draw attention to the difference between on the one hand contempts such as ‘scandalizing the court’, physically interfering with the course of justice, or publishing matters likely to prejudice a fair trial, and on those other contempts which arise from non-compliance with an order made, or undertaking required in legal proceedings.⁷

This paper is primarily concerned with contempt of court as it affects freedom of expression, namely contempt laws which restrict comment on pending judicial proceedings and criticism of judges and courts. It should be noted that there is a third freedom of expression issue related to the contempt of court doctrine—when a journalist is held in contempt for refusing to obey a court order to disclose a source. This issue has been analysed in great detail elsewhere,⁸ and will not be examined in this paper.

The common law doctrine of contempt of court does not exist in civil law jurisdictions in such a broad, encompassing sense,⁹ but there are undoubtedly functional equivalents, particularly in matters relating to freedom of expression. In France, for example, Article 9-1 (Protection de la presumption d’innocence) of the Civil Code deals with publications which allegedly prejudice the presumption of innocence. There are also laws restricting the criticism of courts and judges in many civil law jurisdictions.¹⁰

II. International Law and Standards

⁶ *AG v. Times Newspaper Ltd.* [1974] AC 273, p. 308.

⁷ *Home Office v. Harman* [1983] 1 AC 280, p. 310.

⁸ See ARTICLE 19 and INTERRIGHTS, Protection of Journalists’ Sources: Comparative Law and Jurisprudence, Written Comments Submitted to the European Court of Human Rights in the Case of *William Goodwin v. The United Kingdom* (April 1995); Y. Cripps, ‘Judicial Proceedings and Refusals to Disclose the Identity of Sources of Information’ [1984] CLJ 266; S. Palmer, ‘Protecting Journalists’ Sources: S.10, Contempt of Court Act 1981’ [1992] PL 61; T.R.S. Allan, ‘Disclosure of Journalists’ Sources, Civil Disobedience and the Rule of Law’ [1991] CLJ 131.

⁹ See M. Chesterman, ‘Contempt: In the Common Law, but not the Civil Law’ (1997) 46 ICLQ 521.

¹⁰ See M.K. Addo, *Freedom of Expression and Criticism of Judges* (Ashgate Publishing, 2000).

Before examining the legal framework regulating freedom of expression and the administration of justice in different countries, it is useful to look at their status under international law.

The major international and regional human rights instruments on civil and political rights — the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and People’s Rights (ACHPR) — 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 the international and regional instruments, but the ECHR is more explicit than the others in setting out the protection of the administration of justice as a legitimate exception. 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 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 even 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 the ICCPR, restrictions must meet a strict three-part test.¹¹ 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.”¹² 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 is similar under the ECHR, as the following passage demonstrates:

- (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 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”.¹³

At the level of international and regional judicial bodies, it appears that only the European Court of Human Rights has discussed the relationship between freedom of expression and the administration of justice in any detail. As will be discussed later in this paper, the Court has generally found that restrictions are “prescribed by law” and that ensuring a fair trial or maintaining the authority of the judiciary are “legitimate aims”.

¹¹ See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No.458/1991, para. 9.7.

¹² *The Sunday Times v. United Kingdom*, 26 April 1979, Series A No. 30, 14 EHRR 229, para. 49.

¹³ *Sunday Times v. UK* (No.2), 26 November 1991, Series A No. 217, 14 EHRR 229, para. 50.

The crux of the issue has been whether the restrictions are “necessary in a democratic society.”

III. Commenting on Pending Judicial Proceedings

The Sub Judice Rule

In common law jurisdictions, perhaps the most significant role of contempt of court law is the application of the *sub judice*¹⁴ 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.*,¹⁵ 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.¹⁶

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 prejudges the issues in a case, such as declaring that the accused is guilty before the trial is over.

In the United Kingdom, this form of contempt of court is regulated by the Contempt of Court Act 1981 and is a strict liability offence. The liability test is set out in s.2(2) which states:

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]

¹⁴ The term *sub judice* is derived from the Latin phrase *adhuc sub judice li est*, which means “the matter is still under consideration”.

¹⁵ [1973] 2 All ER 54.

¹⁶ *Ibid.*, p. 72.

The Contempt of Court Act 1981 was passed at least partly in response to the decision of the European Court of Human Rights in *Sunday Times v. United Kingdom*.¹⁷ In that case, a United Kingdom 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 settlement negotiations.

The European Court applied the relevant three part test and found that the interference with freedom of expression was “prescribed by law”¹⁸ and had a “legitimate aim” (maintaining the authority of the judiciary),¹⁹ but was not “necessary in a democratic society.”²⁰ The Court rejected the Government’s submission that it was a matter of “balancing” the public interest in freedom of expression and the public interest in the fair administration of justice. Rather, the proper approach was as follows:

The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.²¹

The Court reasoned that there was a public interest in knowing about the case which was not outweighed by a social need which was sufficiently pressing:

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”....

[T]he 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.²²

It is important, however, to read the rest of the case, which shows that the Court was far from stating that laws protecting the administration of justice would always be in violation of the right to freedom of expression. Most notably, the Court made it clear that the protection of the authority of the judiciary extended beyond the rights of individual litigants and included the administration of justice as a whole:

[I]nsofar as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase “maintaining the authority and impartiality of the judiciary”: the rights so protected are the rights of individuals in their capacity as litigants, that is as persons involved in the machinery of justice, and the authority

¹⁷ *The Sunday Times v. United Kingdom*, 26 April 1979, Series A No. 30, 14 EHRR 229.

¹⁸ *Ibid.*, para. 52.

¹⁹ *Ibid.*, para. 57.

²⁰ *Ibid.*, para. 67.

²¹ *Ibid.*, para. 65.

²² *Ibid.*, paras. 66-67.

of that machinery will not be maintained unless protection is afforded to all those involved or having recourse to it.²³

More generally, the Court also stated:

If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.²⁴

In *Worm v. Austria*,²⁵ the Court considered the case of a journalist in Austria who had been convicted under Section 23 of the *Media Act*, which prohibited the publication of matters considered capable of influencing the outcome of criminal proceedings. The journalist had published an article which strongly suggested that a government minister who was on trial for tax evasion was guilty. In this case, the Court held that there was no violation of the right to freedom of expression.

In reasoning that the interference with freedom of expression pursued a legitimate aim, the Court reaffirmed its statements in *Sunday Times* about the fundamental importance of maintaining the “authority and impartiality of the judiciary”:

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 disputes and for the determination of a person’s guilt or innocence on a criminal charge; further that the public at large have respect for and confidence in the courts’ capacity to fulfil that function....

It follows that, in seeking to maintain ‘the authority and impartiality of the judiciary’, the Contracting States are entitled to take account of considerations going — beyond the concrete case — to the protection of the fundamental role of courts in a democratic society.²⁶

The Court reasoned further that the interference with freedom of expression was “necessary in a democratic society” in order to protect the right to a fair trial and to maintain public confidence in the administration of justice:

[P]ublic figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice.²⁷

²³ Ibid., para. 56.

²⁴ Ibid., para. 63.

²⁵ 29 August 1997, Application 22714/93, 25 EHRR 454.

²⁶ Ibid., paras. 40-41.

²⁷ Ibid., para. 50.

In Australia and New Zealand, which do not have contempt of court statutes, the English common law test is still applicable. It is arguably less strict than the statutory test requiring a “real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing.”²⁸ In *Glennon*,²⁹ the High Court of Australia the test was formulated in a slightly different way but to the same effect:

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.³⁰

Under common law, *mens rea* is generally an essential element of criminal offences, but under this form of contempt of court it appears that an *intent* to interfere with the administration of justice is not required. In the English case of *Odhams Press Ltd., ex p. Attorney-General*,³¹ the Divisional Court stated: “The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result.”³² Likewise in *John Fairfax & Sons Proprietary Ltd. v. McRae*,³³ the High Court of Australia stated: “The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published.”³⁴

By contrast, in the United States, the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a “clear and present danger” to the administration of justice.³⁵ The test requires that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”³⁶ In practice, this has allowed the media to report on pending judicial proceedings with little or no restriction and provide extensive (and often controversial) coverage of high profile cases.³⁷

The American experience appears to contradict the speculation by the European Court that long-term exposure to the “spectacle of pseudo-trials in the news media” will result in a rejection of the courts as “the proper forum for the settlement of legal disputes.” The American public has now been subject to such exposure for decades, but there is no evidence to suggest that people are rejecting the courts as the proper forum for settling

²⁸ *Duffy, ex p. Nash* [1960] 2 All ER 891, p. 896.

²⁹ (1992) 173 CLR 592.

³⁰ *Ibid.*, p. 605.

³¹ [1957] 3 All ER 494.

³² *Ibid.*, p. 497.

³³ (1955) 93 CLR 351.

³⁴ *Ibid.*, p. 371.

³⁵ *Bridges v. California*, 314 US 252 (1941); *Pennekamp v. Florida*, 328 US 331 (1946); *Craig v. Harney* 331 US 367 (1946); *Wood v. Georgia* 370 US 375 (1962).

³⁶ *Bridges*, *Ibid.*, p. 263.

³⁷ M. Chesterman, ‘O.J. and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America’ (1997) XLV AJCL 109.

legal disputes. In fact, Americans continue to be perhaps the most litigious people in the world.

In Canada, the leading case is *Dagenais v. Canadian Broadcasting Corporation*,³⁸ 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 began by rejecting the traditional common law rule, which tipped the balance in favour of a fair trial. Lamer CJC stated:

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). It would be inappropriate for the courts to continue to apply a common-law rule that automatically favoured the right protected by s.11(d) over those protected by s.2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.³⁹

The Supreme Court of Canada, like the European Court on Human Rights, 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.⁴⁰

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 dires during jury selection, and providing strong judicial direction to the jury.⁴¹

The approach set out in *Dagenais*, however, was explicitly rejected by the New Zealand Court of Appeal in *Gisborne Herald Co. Ltd. v. Solicitor General*.⁴² As such, the

³⁸ (1995) 120 DLR (4th) 12.

³⁹ *Ibid.*, p. 37.

⁴⁰ *Ibid.*, p. 38.

⁴¹ *Ibid.*, p. 40.

traditional common law rule still applies, despite the passage of a Bill of Rights Act in 1990, which protects both freedom of expression and the right to a fair trial. The basis for the rejection appears to be partly based on cultural relativism. Richardson J. reasoned:

[T]he complex process of balancing the values underlying free expression may vary from country to country, even though there is a common and genuine commitment to international human rights norms. The balancing will be influenced by the culture and values of the particular community... The result of the balancing process will necessarily reflect the Court's assessment of society's values.⁴³

Richardson J. was also reluctant, in the absence of empirical data, to reject traditional assumptions about the effect prejudicial publications have on juries:

[T]he absence of current empirical data to support a long-standing assumption in public policy is not, in our view, adequate justification for shifting policy ground in favour of another approach which is also deficient in supporting policy data and analysis. The present rule is that, where on conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.⁴⁴

Finally, Richardson J. was sceptical about the effectiveness of the alternative measure set out in *Dagenais*:

[I]n the absence of any adequate empirical data, we are not persuaded that the alternative measures suggested by Lamer CJC in *Dagenais* should be treated as an adequate protection in this country against the intrusion of potentially prejudicial material into the public domain.⁴⁵

In Australia — which does not have a bill of rights — the traditional common law rule also still applies. In the leading case of *Hinch v. Attorney-General (Victoria)*,⁴⁶ Deane J. of the High Court stated:

The right to a fair trial and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of criminal law. Indeed, it is a touchstone of the existence of the rule of law.⁴⁷

Despite the development in recent years of an implied constitutional guarantee of freedom of political communication in Australia, this approach was affirmed by the New South Wales Court of Appeal in *John Fairfax Publications Pty. Ltd. v. Doe*,⁴⁸ where Kerby P stated:

⁴² [1995] 3 NZLR 563.

⁴³ *Ibid.*, p. 575.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ (1987) 164 CLR 15.

⁴⁷ *Ibid.*, p. 58.

⁴⁸ (1995) 37 NSWLR 81.

[I]t would be a complete misreading of the recent development of constitutional law in Australia to suggest that the implied constitutional right of free communication deprives courts such as this of the power and, in the proper case, the duty to protect an individual's right to a fair trial where it is, as a matter of practical reality, under threat. Whatever limitations may be imposed by the constitutional development protective of free communication upon certain matters upon the law of contempt... I could not accept that the constitutional implied right has abolished the longstanding protection of fair trial from unlawful or unwarranted media or other intrusion. Fair trial is itself a basic right in Australia.⁴⁹

In common law jurisdictions, the conventional wisdom is that, because of professional training, a judge is far less susceptible to being influenced by prejudicial publications than a jury. In the English case of *Vine Products Ltd. v. MacKenzie & Co. Ltd.*,⁵⁰ Buckley J explained: "It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case."⁵¹

Likewise, in the Nigerian case of *Akinrinsola v. Attorney-General of Anambra State*,⁵² the court held that a statement that was regarded as contempt in a jury trial would rarely be contempt in a trial by judge-alone. In most civil law jurisdictions, cases are only tried by judges, but sometimes lay judges, who are roughly comparable to jurors, are used.

It is important to note, however, that there is an argument to be made that jurors are also capable of disregarding potentially prejudicial publications. For example, in *Kray*,⁵³ 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 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.⁵⁴

Public Interest Defence

In some common law jurisdictions, there is a limited public interest defence which balances the risk to the due administration of justice with the public interest in knowing about and discussing public affairs. In the United Kingdom, the Phillimore Committee, which was established by the government in 1971 to study and recommend changes to contempt of court laws, used the following basic example to support its recommendation for such a defence:

⁴⁹ Ibid., pp. 110-11.

⁵⁰ [1965] 3 All ER 58.

⁵¹ Ibid., p. 62.

⁵² (1980) 2 NCR 17.

⁵³ (1969) 53 Cr. App. Rep. 412.

⁵⁴ Ibid., p. 414.

If, for example, a general public debate about fire precautions in hotels is in progress, the debate clearly ought not to be brought to an halt simply because a particular hotel is prosecuted for breach of fire regulations.⁵⁵

In Australia, the courts have held that the defence will be established if, in the balancing exercise, the risk to the administration of justice is an incidental and unintended by-product of the discussion of public affairs.⁵⁶ In the leading 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 criticized 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.⁵⁷

Although the test was reaffirmed in the Australian case, *Hinch v. Attorney General (Vict.)*,⁵⁸ the High Court made it clear that the defence was limited, particularly if there was a risk of prejudice to a fair trial. Mason CJ stated: “The public interest in free discussion... does not require disclosure of prior convictions with the prejudice that is likely to cause to a fair trial.”⁵⁹ Deane J also stated: “[O]n no approach could countervailing public interest considerations be seen as justifying... the clear inference... that Glennon was guilty of the very charges involved in the pending committal proceedings.”⁶⁰

In the United Kingdom, there is a form of public interest defence in section 5 of the Contempt of Court Act 1981, which states:

⁵⁵ Phillimore Committee report, para. 142.

⁵⁶ *Ex parte Bread Manufacturers Ltd., Re Truth & Sportsman Ltd.* (1937) 37 SR (NSW) 242; *Hinch v. Attorney General (Vict.)* (1987) 164 CLR 15.

⁵⁷ *Bread Manufacturers*, *Ibid.*, pp. 249-50.

⁵⁸ *Hinch*, Note 54.

⁵⁹ *Hinch*, Note 54, p. 27.

⁶⁰ *Hinch*, Note 54, p. 58.

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 set out in the case of *Attorney-General v. English*,⁶¹ 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:

[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....⁶²

Issues for Discussion:

- *Should there be any restriction on the publication of matters relating to pending judicial proceedings?*
- *If so, what should the test be? What sort of balance should there be between freedom of expression and the administration of justice?*
- *How useful are the alternatives set out in Dagenais?*
- *Should a different test be applicable to trial by jury as opposed to trial by judge-alone?*
- *Is the public interest defence in common law jurisdictions too narrow?*
- *Should there be any other defences?*

IV. Criticizing Judges and Courts

Scandalizing the Court

In common law jurisdictions, criticism of a judge or court may be punished if it "scandalizes the court". 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, as its

⁶¹ [1983] 1 AC 116.

⁶² *Ibid.*, pp. 142, 144.

aim is more general: to prevent the undermining of public confidence in the administration 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*,⁶³ 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....⁶⁴

In a modern 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.⁶⁵

Likewise, in a modern Australian case, the High Court described the rationale as follows:

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts and judges.⁶⁶

While few would disagree that maintaining public confidence in the administration of justice is important, the courts’ underlying assumptions about “the public” have sometimes been less than enlightened. Thus, in the nineteenth century case of *McLeod v. St. Aubyn*,⁶⁷ the Privy Council argued that although committals for scandalizing the court were obsolete in England, the doctrine was needed to maintain respect for English courts in non-white colonies:

Committals for contempt of court by scandalizing the court itself have become obsolete in this country.... But it must be considered that *in small colonies, consisting principally of coloured populations*, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.⁶⁸ [Emphasis added]

⁶³ (1765) 97 ER.

⁶⁴ *Ibid.*, p. 100.

⁶⁵ *Chokolingo v. AF of Trinidad and Tobago* [1981] 1 All ER 244, p. 248.

⁶⁶ *Gallagher v. Durack* (1983) 152 CLR 238, p. 243.

⁶⁷ [1899] AC 549.

⁶⁸ *Ibid.*, p. 561.

While it may be easy to dismiss the reasoning in this case as reflective of a by-gone colonial era, consider the reasoning used by the Privy Council in the recent case of *Ahnee & Ors v. Director of Public Prosecutions*, where, in an appeal from the Supreme Court of Mauritius, one of the issues was whether the offence of scandalizing the court was reasonably justifiable in a democratic society:

In England such proceedings are rare and none has been successfully brought for more than sixty years. But it is permissible to take into account that *on a small island such as Mauritius* the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalizing the court on a small island is greater.⁶⁹ [Emphasis added]

Furthermore, in the postcolonial era, some judges in former colonies have used similar reasoning, albeit in class- rather than race- or colonial-based language. For example, in the Nigerian case of *Atake v. The President of the Federation and Ors*,⁷⁰ Amigolu JSC stated:

To allow people to insult, belittle or make caricature of the courts or judges presiding therein is to expose the administration of justice to the grave danger of inhibiting the appreciation of our people of our courts, and the necessity of people confidently having recourse to our courts, for the settlement of their disputes. Against the background of *a largely illiterate society* any diminution of the authority and respect of the courts is an invitation to chaos and disorder. [Emphasis added]

In these cases, the courts simply saw it as self-evident that the offence of scandalizing the court is more essential in jurisdictions where much of the population is “coloured” or “illiterate” or which are “small”. Although judges are usually not so explicit in their reasoning, in much of the case-law justifying the offence of scandalizing the court, it is not difficult to find strains of elitism.

Nonetheless, there have been judicial attitudes to the contrary, which, not surprisingly, reach very different conclusions about the need for an offence of “scandalizing the court”. Thus, in the Australian case of *Attorney-General for NSW v. Munday*, Hope J stated:

There is no more reason why the acts of courts should not be trenchantly criticized than the acts of public institutions, including parliaments. The truth is of course that public institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command the respect and confidence of the community; *if their conduct justifies the respect and confidence of a community they do not need the protection of special rules to protect them from criticism.*⁷¹ [Emphasis added]

This is a strong argument and perhaps the only credible counter-argument to it is the fact that, unlike other public authorities, judges cannot respond to criticisms and engage in

⁶⁹ [1999] 2 WLR 1305, p.1313.

⁷⁰ (unreported) SC 5/1981-November 26, 1982.

⁷¹ [1972] 2 NSWLR 887, p. 908.

public debate. In *In Re: Patrick Anthony Chinamasa*, a recent judgment of the Supreme Court of Zimbabwe which held that the offence of scandalizing the court is reasonably justifiable in a democratic society, Gubbay CJ stated:

Unlike other public figures, judges have no proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardizing their impartiality. This is why protection should be given to judges when it is not given to other important members of society such as politicians, administrators and public servants.⁷²

In the United Kingdom, Australia and New Zealand, the common law test of liability requires a real risk, as opposed to a remote possibility, that public confidence in the judicial system would be undermined.⁷³ By contrast, in the United States, the offence of “scandalizing the court” has been limited in application for several decades. The Supreme Court has made it clear, in a series of cases, that the publication must create a “clear and present danger” to the administration of justice.⁷⁴

In Canada, the common law principle has been substantially changed to bring it in line with s.2(b) of the Charter of Rights and Freedoms (1982), which protects freedom of expression. The leading case is *R. v. Koptyo*,⁷⁵ where a barrister had been charged with contempt of court following remarks made by him to a newspaper reporter after a court decision against his client:

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.⁷⁶

The five justices of the Ontario Court of Appeal were divided as to the exact application of the “scandalizing the court” principle, but there appeared to be a majority consensus that the Crown is required to prove that there was a “clear and present” or “imminent” danger to the administration of justice. Cory JA reasoned:

As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will 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

⁷² S.C. 113/2000, 6 November 2000, p. 24.

⁷³ See e.g. *Solicitor-General v. Radio Avon Ltd.* [1978] 1 NZLR 225, p. 234.

⁷⁴ *Bridges v. California*, 314 US 252, 270-71 (1941); *Pennkamp v. Florida*, 328 US 331 (1946); *Craig v. Harney*, 331 US 367 (1947); *Wood v. Georgia*, 370 US 375 (1962).

⁷⁵ (1987), 62 OR (2d) 449.

⁷⁶ *Ibid.*, p. 455.

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.⁷⁷

The Canadian position is now very close, if not parallel, to the American position.

The European Court of Human Rights has considered at least three cases dealing with offences similar to “scandalizing the court”. In all three cases, the Court held that the restriction was “prescribed by law” and had a “legitimate aim” (maintaining the authority of the judiciary), but the results differed over whether the restriction was “necessary in a democratic society”.

In *Barford v. Denmark*,⁷⁸ the applicant was convicted for defamation of character because of an article he wrote in which he alleged that two Greenland lay judges were biased in favour of their employer (the local government). The Court held that the restriction on freedom of expression was “necessary in a democratic society”, reasoning that the State had a legitimate interest in protecting the reputation of judges and that the applicant had attacked the judges personally and had not submitted evidence to support his allegation of bias:

The State’s legitimate interest in protecting the reputation of the two lay judges was accordingly not in conflict with the applicant’s interest in being able to participate in free public debate on the question of the structural impartiality of the High Court..... The lay judges exercised judicial functions. The impugned statement was not a criticism of the reasoning in the judgment of 28 January 1981, but rather... a defamatory accusation against the lay judges personally, which was likely to lower them in the public esteem and put forward without any supporting evidence.⁷⁹

In *Prager and Oberschlick v. Austria*,⁸⁰ the applicant was also convicted for defamation because of an article he wrote in which he claimed, among other things, that Judge J. was “arrogant” and “bullying” in his performance of duties and treated accused persons as if they had already been convicted. Again, the Court held that the restriction on freedom of expression was “necessary in a democratic society”, reasoning that the judiciary must be protected against unfounded attacks and that the statements were excessive and lacked a factual basis:

Regard must... be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying....

[T]he evidence shows that the relevant decisions were not directed against the applicant’s use as such of his freedom of expression in relation to the system of justice or even the fact that he had criticized certain judges whom he had identified

⁷⁷ Ibid., p. 469.

⁷⁸ 22 February 1989, Series A No. 149, 13 EHRR 393.

⁷⁹ Ibid., at paras. 34-35.

⁸⁰ 26 April 1995, Series A No. 313, 21 EHRR 1.

by name, but rather the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial.⁸¹

The Court did, however, find a breach of freedom of expression in the most recent case of *De Haes and Gijssels v. Belgium*,⁸² where the applicant journalists were penalised for several articles attacking 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 Court held that the restriction on freedom of expression was not “necessary in a democratic society”, because, in contrast to *Prager and Oberschlick v. Austria*, 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; in that respect the present case differs from the *Prager and Oberschlick* case....

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.⁸³

There are also conflicting positions in different countries on the requisite state of mind or *mens rea*, if any, that is required to establish liability. In the United Kingdom, actual intent to interfere with the administration of justice does not seem to be required. The leading case is *R. v. Editor of New Statesman, ex parte DPP*,⁸⁴ where Lord Hewart CJ ruled that liability did not require proof of intent. This case has been cited in several other common law countries, most recently in Singapore in 1995, when the High Court found the author, editor, publisher, printer and distributor of an article imputing bias to the judiciary were all guilty of contempt of court, reasoning that intent was not required.⁸⁵

By contrast, in South Africa, the leading case of *State v. Van Niekerk*⁸⁶ clearly established that intent is required to establish liability. In that case, an academic had imputed racial bias to judges in the application of the death penalty, but the court held that he had not committed contempt of court. 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.⁸⁷

In common law jurisdictions, the doctrine of “scandalizing the court” has taken a number of different forms. The term “scurrilous abuse” has its roots in the early English case of

⁸¹ Ibid., paras. 34, 37,

⁸² 24 February 1997, 25 EHRR 1.

⁸³ Ibid., paras. 47-48.

⁸⁴ (1928) 44 TLR 301.

⁸⁵ *Attorney-General v. Lingle* [1995] 1 SLR 696.

⁸⁶ [1970] 3 SA 655 (T).

⁸⁷ Ibid., p. 657.

Gray,⁸⁸ where a newspaper editor took exception to a judge's warning not to publish indecent matter and described him as an "impudent little man in horsehair, a microcosm of conceit and empty-headedness." The Divisional Court found Gray in contempt of court on the basis that his comments were "personal scurrilous abuse of a judge as a judge."⁸⁹

Since the purpose of this branch of contempt law is to maintain public confidence in the administration of justice, it seems logical that criticisms of judges as individuals, rather than as judges, should not be subject to contempt of court proceedings. This was confirmed in *In the Matter of a Special Reference from the Bahama Islands*,⁹⁰ where 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.⁹¹ In such cases, the judge could, of course, use defamation or libel laws to remedy any damage to his personal reputation.

As the case-law developed, however, it became clear that "scurrilous abuse" referred in large part to the *manner* of criticism directed at a judge or the court. In *R. v. Metropolitan Police Commissioner, ex parte Blackburn*,⁹² Salmon LJ explained 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."⁹³

In a recent case in Hong Kong,⁹⁴ a newspaper which attacked the local judiciary by, among other things, describing judges as "swinish whites-skinned judges", "pigs", and "judicial scumbags and evil remnants of the British Hong Kong government" was found in contempt of court in part because the comments were "scurrilous abuse".⁹⁵

The imputation of bias or lack of impartiality has also constituted grounds for contempt of court. The leading English case is *R. v. Editor of New Statesman, ex parte DPP*,⁹⁶ where a newspaper was found in contempt of court after it published an article implying that the religious beliefs of the judge made it inevitable that he would rule against a woman who was a birth control advocate. Lord Hewart CJ reasoned:

It imputed unfairness and lack of partiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.⁹⁷

Likewise, in the Indian case of *EMS Namboodivipad v. TN Nambiar*,⁹⁸ the Chief Minister of Kerala made a public statement accusing judges of class bias:

⁸⁸ [1900] 2 QB 36.

⁸⁹ *Ibid.*, p. 40.

⁹⁰ [1893] AC 138.

⁹¹ *Ibid.*, p. 144.

⁹² [1968] 2 QB 150.

⁹³ *Ibid.*, p. 155.

⁹⁴ *Secretary for Justice v. Oriental Press Group Ltd.* [1998] 2 HKC 627.

⁹⁵ *Ibid.*, p. 666.

⁹⁶ (1928) 44 TLR 301.

⁹⁷ *Ibid.*, p. 303.

⁹⁸ AIR 1970 SC.

Marx and Engels considered the judiciary an instrument of oppression and even today... it continues so.... Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well dressed pot-bellied man and a poor ill-dressed and illiterate person the Judge instinctively favours the former.⁹⁹

The Supreme Court upheld his conviction for contempt of court, reasoning that “the likely effects of his words must be seen and they have clearly the effect of lowering the prestige of Judges and Courts in the eyes of the people.”¹⁰⁰

By contrast, in the Australian case of *Attorney-General for NSW v. Munday*, Hope J. suggested that an imputation of bias is not necessarily contempt of court:

It does not necessarily amount to a contempt of court to claim that a court or judge had been influenced, or too much influenced whether consciously or unconsciously, by some particular consideration in respect of a matter which has been determined. Such criticism is frequently made in academic journals and books and the right cannot be limited to academics....¹⁰¹

However, the principle was recently reaffirmed in Singapore in the case of *Attorney-General v. Lingle*,¹⁰² where a newspaper article referred to politicians in Asia who were bankrupting opposition politicians through defamation suits with the assistance of a “compliant judiciary”. The High Court of Singapore held that the article was scandalous of the judiciary in Singapore because it impugned the integrity and impartiality of the judicial system.¹⁰³

Finally, the imputation that a court has been influenced by outside pressures has been found to scandalize the court. In the Australian case of *Gallagher v. Durack*,¹⁰⁴ a trade union leader had been found in contempt for making the following statement about an earlier acquittal for contempt:

I'm very happy to [sic] the rank and file of the union who has shown such fine support for the officials of the union... by their actions in demonstrating in walking off jobs.... I believe that has been the main reason for the court changing its mind.

The High Court of Australia rejected his appeal on the basis that his statement had the tendency to undermine confidence in the administration of justice:

The statement by the applicant that he believed that the actions of the rank and file of the Federation had been the main reason for the court changing its mind can only mean that he believed that the court was largely influenced in reaching its decision by the action of the members of the union in demonstrating as they had done. In other words, the applicant was insinuating that the Federal Court had bowed to

⁹⁹ Ibid., p. 215-16.

¹⁰⁰ Ibid., p. 2024.

¹⁰¹ [1972] 2 NSWLR 887, P. 910.

¹⁰² [1995] 1 SLR 696

¹⁰³ Ibid., p. 712.

¹⁰⁴ (1983) 152 CLR 238.

outside pressure in reaching its decision.... What was imputed was a grave breach of duty by the court. The imputation was of course unwarranted.¹⁰⁵

Likewise, in a recent case in Malaysia, an appeals court upheld the contempt conviction of a Canadian journalist for “scandalizing the court”, apparently for imputing that a court had been influenced, at least in part, by outside pressures. The appellant had written an article which stated that a case where the plaintiff was the wife of a judge had moved through the judicial system with unusual speed. The appellant became the first journalist in fifty years to be jailed for contempt of court in the Commonwealth, proving that the offence is far from dead.¹⁰⁶

Defences

The similarities between this branch of contempt law and defamation law raise the issue whether defences such as truth and fair comment should be available for a person charged with scandalizing the court.

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 criticizing 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.¹⁰⁷

Nonetheless, there is very little case-law supportive of the proposition that truth is a defence. In the New Zealand case, *Attorney-General v. Blomfield*,¹⁰⁸ William J. looked at the possibility of allowing truth as a defence. He agreed that with the basic principle, but rejected it as lacking a basis in law:

If a person is charged with making imputations on a judge beyond the bounds of criticism and fair comment...it should certainly be open to the accused to bring forward evidence in justification, and to show whether and how far his imputations were justified.... [However,] that has never been done and cannot be done in summary proceedings for contempt. The Court does not sit to try the conduct of the Judge.¹⁰⁹

¹⁰⁵ Ibid., pp. 243-44.

¹⁰⁶ Justice in Malaysia, *The Wall Street Journal*, 13 September 1999; Human Right Watch, *Justice in Malaysia, Imprisonment of Murray Hiebert*, 17 September 1999.

¹⁰⁷ [1936] AC 322, p. 335.

¹⁰⁸ (1914) 33 NZLR 545.

¹⁰⁹ Ibid., p. 563.

The High Court of Australia took a different approach in *Nationwide News Pty. Ltd. v. Willis*,¹¹⁰ where it suggested that truth could be a defence if the comment was also 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.¹¹¹

In addition, the European Court of Human Rights has made statements which suggest that the Court will uphold the doctrine of scandalizing the court, if there is a defence of truth. In *De Haes and Gijssels v. Belgium*, the Court stated: “The courts — the guarantors of justice, whose role is fundamental in a State based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are *unfounded....*”¹¹² [Emphasis added]

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.¹¹³ By contrast, however, the Law Commission of Canada stated that truth should not be available as a defence on the basis that it may result in “guerrilla warfare” against the judiciary.¹¹⁴

It appears, however, that in at least some common law jurisdictions, a defence of fair comment is available to a person charged with scandalizing the court. The leading case in Australia is the decision of the High Court in *Nicholls*,¹¹⁵ 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 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.¹¹⁶

There is also support for this principle in the United Kingdom. In *Metropolitan Police Commissioner, ex parte Blackburn*,¹¹⁷ Lord Denning MR stated:

¹¹⁰ (1992) 177 CLR 1, 38.

¹¹¹ *Ibid.*, p. 39.

¹¹² 24 February 1997, 25 EHRR 1, para. 37.

¹¹³ Report of the Committee on Contempt of Court (Cmnd 57994, 1974), para.166.

¹¹⁴ *Contempt of Court* (1982), p.26.

¹¹⁵ (1911) 12 CLR 280.

¹¹⁶ *Ibid.*, p. 286.

¹¹⁷ [1968] 2 QB 150.

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.¹¹⁸

Similarly, in a modern Australian case *Nationwide News Pty. Ltd. v. Willis*, the High Court of Australia stated:

[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.¹¹⁹

Issues for Discussion:

- *Should the offence of “scandalizing the court” be abolished? Should any of the forms of “scandalizing the court”, namely scurrilous abuse, imputation of bias or lack of impartiality, or imputation of susceptibility to outside pressure, be abolished?*
- *If no, what should be the test be?*
- *Should truth be a defence to the offence of scandalizing the court?*
- *Should fair comment be a defence?*
- *Should there be any other defences?*

V. Conclusion

As the above analysis illustrates, there is a significant tension between freedom of expression and the administration of justice because of the high public interest in maintaining and protecting both principles. There is also a clear difficulty in finding functional equivalents between the contempt of court principles which exist in common law systems and the disparate principles which exist in civil law and other jurisdictions. One hopes that this paper has demonstrated that there is both a need and a basis to develop international standards in this area.

¹¹⁸ *Ibid.*, p. 155.

¹¹⁹ (1992) 177 CLR 1, pp. 38-39.