IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Criminal Original No. 256/2019

In Re.: W.P. No. 3716/2019

The State **Petitioner**

Versus

1. Hamid Mir (Block 87, East A.K. Fazl-ul-Haq Rd, G-6/3, Blue Area, Islamabad, GEO News, Islamabad)
2. Amir Mateen (18 Mauve Area, G-7/1, Islamabad, APP News, Islamabad)
3. Muhammad Malik (Plot No. 2A, Gerry's Centre, Khayaban-e-Suhrwardy, 7th Ave., G-6/1, Islamabad, Hum News, Islamabad)
4. Kashif Abbasi (F-7/4, Islamabad, ARY News, Islamabad)
5. Sami Ibrahim (Ataturk Ave, G-6/3, Islamabad, BOL News, Islamabad)

Respondents

CRIMINAL PROCEEDINGS UNDER THE CONTEMPT PETITION UNDER CONTEMPT OF COURT ORDINANCE, 2003.

Amicus Curiae Brief
Submitted by
The Institute for Research, Advocacy and Development (IRADA)
with the technical support of
The Centre for Law and Democracy (CLD)

Respectfully Sheweth:

1. Interest and Expertise of Authors

(1) The Institute for Research, Advocacy and Development (IRADA) is an independent Pakistani research and advocacy organization, registered under the Companies Act, 2017, which focuses on social

development and civil liberties. IRADA aims to strengthen: democracy through inclusivity and pluralism; governance through accountability; and justice through fundamental rights. IRADA has conducted a comprehensive review of the legal framework governing media in Pakistan.[1]

(2) The Centre for Law and Democracy (CLD) is an international human rights organisation based in Halifax, Canada, which focuses on law and policy issues relating to foundational rights for democracy, including freedom of expression. In relation to this case, CLD's expertise lies in its knowledge of international and comparative law standards on freedom of expression and the administration of justice, or the standards relating to the rules of contempt of court.[2]

2. Statement of Facts

(3) In October 2019, when a Divisional Bench of the Honourable Islamabad High Court, consisting of Justice Athar Minallah, Chief Justice of Islamabad High Court, and Justice Mohsin Akhtar Kayani, was seized with the adjudication of bail petition of former Prime Minister Nawaz Sharif, two senior television anchors, namely, Mr. Sami Ibrahim and Mr. Mohammad Maalik, on Bol TV and Hum TV, respectively, anchored their television shows on October 25, 2019. Mr. Sami Ibrahim, in his programme, commented that the Courts can be influenced by the pressure of political heavyweight and three-time Prime Minister Mr. Nawaz Sharif and can decide the matter in his favour. Mr. Maalik, in his programme, gave the impression that bails to Nawaz Sharif family were being granted under a deal and called this deal as "judicial NRO".

(4) The Honourable Divisional Bench of the Islamabad High Court, which was hearing the bail petition of Mr. Nawaz Sharif, took notice of the television programmes and directed the Registrar of the Islamabad

[1] www.iradapk.org
[2] http://www.law-democracy.org/

High Court to submit a preliminary report in this regard before the Court.

(5) In a first proceeding, on October 26, 2019, the Honourable Divisional Bench, after perusing the transcripts of the programmes and the preliminary report prepared by the Registrar of the High Court, concluded “that, prima facie, the content of the programme telecast by senior anchor Mr. Sami Ibrahim on Bol TV tantamount to obstruction in the course of administration of justice which appears to attract the provision of the Contempt of Court, 2003.”

(6) The Honourable Divisional Bench directed the Office of the Registrar of Islamabad High Court to issue show-cause notice to Mr. Sami Ibrahim and the Chief Executive of Bol TV and to fix the matter before a Single Bench of the Court on November 13, 2019 for further adjudication.

(7) In a second ruling, on October 29, 2019, the Single Bench of the Islamabad High Court, consisting of the Honourable Chief Justice of Islamabad High Court, directed Bol TV and Hum TV – another television channel that aired the television programme “Breaking News with Maalik” anchored by Mr. Mohammad Maalik on October 25, 2019, wherein Mr. Hamid Mir, Mr. Amir Mateen, Mr. Kashif Abbasi were sitting as panellists and analysts, to submit recordings of the respective programmes.

(8) The Court also directed Mr. Mohammad Maalik, Mr. Hamid Mir, Mr. Amir Mateen and Mr. Kashif Abbasi to submit their written replies regarding the programme “Breaking News with Maalik”.

(9) The Court, “keeping in view the importance of the questions raised in these contempt proceedings and the consequences in the context of fundamental rights guaranteed under Article 19 and 19 – A of the Constitution of Islamic Republic of Pakistan, 1973,” appointed Mr. I A Rehman, senior journalist, Mr. Javed Jabbar, Mr. Zia ud Din, senior journalist, and the presidents of the Pakistan Federal Union of

Journalists (PFUJ) and the Pakistan Broadcasters Association (PBA) as amici in the proceedings.

(10) The amici were requested "to assist this Court, inter alia, regarding scope of Article 19 and 19-A in the context of administration of justice and matters which are *sub judice* before the Court. They will also assist regarding enforcement of code of conduct prescribed in Schedule A of the Pakistan Electronic Media Regulatory Authority (PEMRA) Rules 2009."

(11) On November 18, 2019, the Court reasserted that "the content of the programmes, prima facie, could entail prejudging the rights to a fair trial.

(12) The Court also noted that "protecting press freedom and freedom of speech is of paramount importance for strengthening the democratic process and upholding rule of law. Media wields immense power and influence and it can either contribute or undermine the integrity of administration of justice. Preserving and securing the integrity of system of justice and people's confidence in the judiciary is definitely the fundamental premise and object of the law of contempt. Prejudicing or abstracting justice in case of pending proceedings has nexus with safeguarding the fairness, impartiality and access to judicial decision-making process. Pre-trial or during the trial proceedings publicity is likely to impairment of the right to a fair trial of a litigant."

(13) This amicus curiae brief seeks to assist the Court by providing an assessment of the issues raised in the case based on international and constitutional standards relating to freedom of expression. The focus is primarily on international law and national legal rules and their interpretations from other countries. It may be noted that it is incumbent upon Pakistan to interpret its Constitution and laws so as to be consistent with its international law obligations, insofar as this is reasonably possible.

(14) The Court, in this context, formulated following the questions for consideration by the parties and amici:

(a) The scope of press/media freedom in the context of the law of criminal contempt.

(b) The balance between the right of freedom of expression and preserving the integrity of the system of justice and upholding public confidence in judiciary.

(c) The scope of right to fair trial of a litigant and restrictions on the right of freedom of expression and right to information.

(d) The obligation and responsibilities of a reporter, publisher, broadcaster and editorial management regarding pending proceedings and the restrictions required to be observed in order to ensure that pending proceedings are not prejudiced or pre-trial or during trial publicity does not lead to creating prejudice amongst the public against a litigant.

(e) The standards required to be observed by a journalist, publisher, broadcaster and the editorial management so that the integrity of the legal system is maintained and fairness of the legal process for the litigant is safeguarded.

(f) Whether publicity during trial or prejudging the outcome of a hearing or trial amounts to criminal contempt under the Contempt of Court Ordinance, 2003.

(g) Whether the regulatory framework is effective enough to ensure that the sanctity and integrity of legal proceedings remains protected.

(h) Whether the content of the programmes to which these proceedings relate amounts to committing criminal contempt under the Contempt of Court Ordinance, 2003.

3. International Standards

a. International Human Rights Law as a Source of Authority for Pakistani Courts

Pakistan ratified the International Covenant on Civil and Political Rights (ICCPR)[3] in 2010. Although it made a reservation relating to Article 19, which protects freedom of expression, along with a number of other articles, it withdrew this reservation in 2011.

Parties to a treaty are bound by that treaty and must meet their obligations under it in good faith.[4] Obligations under the ICCPR apply to all branches of government, including the judiciary, and while it is up to States to decide how to meet their obligations under the ICCPR, they cannot justify a failure to meet the ICCPR's human rights obligations by referring to internal structures or domestic constitutional law.[5]

Pakistan, like all State Parties to the ICCPR, is therefore responsible for taking steps ensure that the rights articulated in the ICCPR are respected domestically.[6] Pakistan does not directly incorporate international treaties such as the ICCPR into domestic law, so that the ICCPR is not directly enforceable in Pakistani courts.[7] However, in interpreting domestic law, including provisions of the Constitution, Pakistani courts should adopt the (reasonable) interpretation that best gives effect to Pakistan's human rights obligations. As noted by the Supreme Court, international treaties "have a persuasive value and command respect."[8]

When it comes to most constitutionally guaranteed rights, and certainly freedom of expression, there is a lot of leeway to interpret their precise meanings and, in particular, the scope of any restrictions on those rights. In deciding exactly how to strike an appropriate balance between competing public interests in the context of deciding on the permissible restrictions on freedom of expression, which is the essential subject matter of most of the

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[3] International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#36.
[4] Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January 1980, Article 26. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf.
[5] Vienna Convention on the Law of Treaties, note 4, Article 27; and Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 10, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.
[6] General Comment No. 31, note 5, para. 13.
[7] See, for example, *Societe Generale De Surveillance S.A. v. Pakistan*, 2002 SCMR 1694, para. 28. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10368.pdf.
[8] *Shehla Zia v. WAPDA*, PLD 1994 Supreme Court 693, para. 9. Available at: https://www.escr-net.org/sites/default/files/caselaw/zia_v.wapda_transcript.pdf.

questions posed by the Court, international law can provide very important guidance.

b. The Right to Freedom of Expression and Permissible Restrictions

The right to freedom of expression, as protected under the ICCPR applies to speech in any form and in any place, including in a courtroom. It extends to the expression of all sorts of statements, without exception, including those related to the judiciary and legal proceedings. This includes even "deeply offensive" speech, subject only to the regime of restrictions on free speech.[9] The right also protects all means of expressing opinions, including the different types of media, ranging from broadcasting and publishing to new forms of digital communications. Legal submissions also constitute a form of protected expression.[10]

The scope of the right to freedom of expression is therefore expansive but it may permissibly be restricted under certain circumstances. The ICCPR sets out these circumstances through a precise three-part test. This test is designed to strike an appropriate balance between protecting the right while also ensuring protection of other important social values. It is, however, based on the core idea that restrictions are the exception and that they cannot become the norm or jeopardise the right itself. [11]

The test for whether a restriction on freedom of expression is permissible is described in Article 19(3) of the ICCPR, commonly articulated as the following three-part test:

1) The restriction must be provided by law.
2) The aim of the restriction must be to respect the rights or reputations of others, or to protect national security, public order, public health or public morals.
3) The restriction must be necessary to achieve that aim.

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[9] UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/GC/34, para. 11. Available at: http://undocs.org/ccpr/c/gc/34.
[10] *Ibid.*, para. 12.
[11] *Ibid.*, para. 21.

The rule that any restriction must be provided by law means not only that the restriction should be set out in domestic law but also that the restriction should be "concrete, clear and unambiguous".[12] In other words, it must be "formulated with sufficient precision to enable the citizen to regulate his conduct".[13] In determining what constitutes an adequate level of precision, the European Court of Human Rights uses a test of whether the limitation imposed by the restriction is reasonably foreseeable. In other words, can a person reasonably foresee in advance whether his or her conduct is prohibited by the restriction?[14]

The restriction must also seek to protect one of the specified legitimate aims, namely the rights or reputations of others, national security, public order, public health or public morals. This list is exclusive (i.e. cannot be extended) and any restriction needs to be directly related to the stated aim.[15]

The third prong of the test requires a restriction to be strictly necessary to protect the legitimate aim. If an alternative means of protecting that aim exists which is less harmful to freedom of expression, then the necessity part of the test will not be met. The necessity part of the test also includes the following:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[16]

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[12] Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, 20 April 2010, UN Doc. A/HRC/14/23, para. 79. Available at: http://undocs.org/A/HRC/14/23.
[13] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6537/74, para. 49 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-57584. See also General Comment No. 34, note 9, para. 25.
[14] *Sunday Times*, note 13, para. 49.
[15] General Comment No. 34, note 9, para. 22.
[16] *Ibid.*, para. 35.

The United Nations Human Rights Committee has elaborated further on the necessity part of the test as follows: restrictions "must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected".[17]

In evaluating the necessity of a restriction on freedom of expression, it is important to consider whether the expression is of a type which demands especially strong protection. Some forms of expression should have heightened protection, such as debate on government policies or politics, human rights reporting, discussion of government corruption, peaceful demonstrations, debate about public figures or public institutions, expressions of dissent and expressions of religion or belief.[18]

4. Substantive issues: freedom of expression and contempt of court

a. The right to freedom of expression and permissible restrictions based on the need to preserve the administration of justice

Questions of the Court:

"(a) The scope of press/media freedom in the context of the law of criminal contempt"

"(b) The balance between the right of freedom of expression and preserving the integrity of the system of justice and upholding public confidence in judiciary"

"(c) The scope of right to fair trial of a litigant and restrictions on the right of freedom of expression and right to information"

i. International Standards

This section starts with a description of the general standards regarding contempt of court insofar as it restricts freedom of expression and then goes on to delve into more detail regarding two issues, namely balancing

[17] *Ibid.*, para. 34 (citing to General Comment No. 27).
[18] Resolution 12/16, Freedom of Opinion and Expression, 12 October 2009, U.N. Doc. A/HRC/RES/12/16, para. 3(p)(i). Available at: http://undocs.org/ A/HRC/RES/12/16; and General Comment No. 34, note 9, para. 34.

freedom of expression and fair trial rights and the issues which arise in the context of protecting the authority of the judiciary.

1. General Standards on Criminal Contempt of Court and Permissible Restrictions on Freedom of Expression

The term “contempt of court” refers to actions courts may take in response to a range of behaviour which disrupts or harms the administration of justice. Contempt of court includes civil contempt, which typically refers to non-punitive sanctions designed to ensure compliance with court orders. This brief focuses on criminal contempt, which relates to acts which interfere with the administration of justice.

The application of contempt of court laws must conform to the three-part test described above.

First, contempt of court rules, procedures and sanctions must be provided by law. The law should offer the media, lawyers and others clear guidance on what kind of conduct is prohibited. In this context, the common law rules on contempt may meet this standard, even in the absence of legislation.[19] However, the rules must be clear and precise and avoid sweeping references to concepts such as the integrity or authority of the judiciary. In light of the frequent examples of abuse of contempt of court rules, the United Nations Special Rapporteur on the Independence of Judges and Lawyers noted: “Legislation should be enacted to define a clear and precise scope for the offence of contempt of court, identifying behaviour constituting contempt of the court, and setting up a procedure to deal with such cases.”[20]

Second, contempt of court laws should be limited in scope to circumstances where they protect a legitimate aim. Concerns with maintaining public order may justify the use of criminal contempt to ensure

[19] *Sunday Times*, note 13, para. 47; General Comment 34, note 9, para. 24.
[20] Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers – Ms. Mónica Pinto on the Official joint visit to Sri Lanka – 29 April to 7 May 2016, 7 May 2016. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19942&LangIE.

order in the courtroom.[21] Similarly, contempt of court laws may restrict freedom of expression in order to protect the rights of others; specifically, fair trial and due process rights, or rights related to privacy and confidentiality for participants in a legal proceeding. However, restrictions aimed at protecting reputation fall into the realm of defamation law and are not a legitimate aim for a contempt law because reputations do not extend to public institutions, which should always be open to public criticism and debate.[22] At the same time, where there is a genuine risk to the authority of the judiciary, this may again justify contempt measures, once again under the rubric of protecting public order.

Third, criminal contempt penalties must be necessary to protect a legitimate interest. The necessity part of the test will not be met where judges have recourse to other measures to resolve a problem that are less harmful to freedom of expression. As a result, criminal contempt should be relied upon only when there is no less intrusive other means of ensuring the fair administration of justice. As stated in the Commentary on the Bangalore Principles of Judicial Conduct:

> Because it carries penalties that are criminal in nature and effect, contempt should be used as a last resort, only for legally valid reasons and in strict conformity with procedural requirements. It is a power that should be used with great prudence and caution.[23]

Criminal contempt penalties may, on their own, be disproportionate in relationship to the stated aim. In *Dissanayake v. Sri Lanka*, a Member of Parliament made a statement at a public meeting that he would not accept any "disgraceful decision" of the Sri Lankan Supreme Court. The UN Human Rights Committee found that a sentence of two years' imprisonment for this offence was disproportionate to any legitimate aim.[24] Similarly, the European Court of Human Rights found that criminal

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[21] General Comment No. 34, note 9, para. 31.
[22] *Ibid.*, para. 38.
[23] Judicial Integrity Group, Commentary on The Bangalore Principles of Judicial Conduct, United Nations Office on Drugs and Crime, September 2007. Available at: https://www.un.org/ruleoflaw/files/publications_unodc_commentary-e[1].pdf.
[24] *Dissanayake v. Sri Lanka*, Communication No. 1373/2005, 22 July 2008, U.N. Doc. CCPR/C/93/D/1373/2005, para. 8.3 (Human Rights Committee).

sanctions on a lawyer for comments made while cross-examining a witness were disproportionate, particularly given the importance of a lawyer's ability to defend his client.[25]

2. Protecting the Right to a Fair Trial and the Rights of Litigants

Contempt of court may serve to protect the rights to a fair trial and the presumption of innocence, which are also fundamental human rights. Article 14 of the ICCPR provides: "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." Fair trial rights are especially important in criminal cases.

However, it is very important to ensure that any limitations on freedom of expression are justified. As the then three special international mandates (special rapporteurs) for freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Special Representative on Freedom of the Media – stated in their 2002 Joint Declaration:

> No restrictions on reporting on ongoing legal proceedings may be justified unless there is a substantial risk of serious prejudice to the fairness of those proceedings and the threat to the right to a fair trial or to the presumption of innocence outweighs the harm to freedom of expression.[26]

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[25] *Kyprianou v. Cyprus*, 27 January 2004, Application No. 73791/01, paras. 172-175 (European Court of Human Rights). Available at: http://www.worldlii.org/eu/cases/ECHR/2004/43.html.

[26] 2002 Joint Declaration, 10 December 2002. Available at: https://www.osce.org/fom/39838?download=true. The special international mandates, now four with the addition of the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have adopted a Joint Declaration on a freedom of expression theme every year since 1999.

Furthermore, judicial proceedings involve heightened freedom of expression and access to information interests. Freedom of expression is important for parties involved in a proceeding, for example to advocate for their interests. In addition, the general public has a heightened interest in information related to judicial proceedings. For this reason, Article 14 of the ICCPR provides generally for public access to trials, as indicated in the citation above, subject to certain exceptions:

> 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 the guardianship of children.

Similar considerations are articulated in the 2002 Joint Declaration of the special international mandates for freedom of expression:

> Courts and judicial processes, like other public functions, are subject to the principle of maximum disclosure of information which may be overcome only where necessary to protect the right to a fair trial or the presumption of innocence.[27]

Like any restriction on freedom of expression, restrictions to protect fair trial rights should conform strictly to the three-part test articulated above. In addition, in applying this test, consideration should be given to the public interest in accessing information relating to judicial processes. The remainder of this section examines how the three-part test applies in the context of the three categories of criminal contempt which raise particularly challenging questions about the right to freedom of expression and fair trial rights: 1) contempt proceedings for commenting on ongoing proceedings in

[27] *Ibid.*

a manner that may prejudice them; 2) contempt proceedings which seek to protect the privacy and confidentiality of ongoing proceedings; and 3) contempt proceedings for contemptuous action in the courtroom, particularly by lawyers.

First, some countries rely on contempt of court provisions to sanction public statements about ongoing proceedings on the basis that this could have a prejudicial impact on the proceedings. However, as noted above, criminal contempt penalties for this are only appropriate if there is a "substantial risk of serious prejudice" to the fairness of the legal proceedings and "the threat to the right to a fair trial or the presumption of innocence outweighs the harm to freedom of expression".[28] Given the requirement of necessity in the three-part test, criminal contempt proceedings will rarely be appropriate in the context of comments on ongoing proceedings.

For example, criminal contempt sanctions would normally be inappropriate where there is a high public interest in information about a case. This is evidenced by the well-known Sunday Times case before the European Court of Human Rights. The case involved the publication of an article criticising proposed settlements related to lawsuits over birth defects caused by thalidomide. The Court found that the families of victims had a "vital interest" in knowing underlying facts related to the case and that the thalidomide disaster raised fundamental public interest questions about compensation for injuries from the tragedies.[29] The high public interest in the information outweighed concerns about the impact on administration of justice.[30] In making this finding, the Court articulated the importance of public discussion about judicial matters:

> There is general recognition of the fact that the 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

[28] *Ibid.*
[29] *Sunday Times*, note 13, para. 61.
[30] *Ibid.*, para. 67.

> 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…[31]

The Sunday Times case also suggests that commentary couched in moderate terms is very unlikely to negatively impact the administration of justice. A moderate article presenting multiple sides of an argument would impact various readers differently and therefore creates less risk of prejudicing the legal proceedings.[32] This does not mean that an inflammatory, one-sided article would automatically trigger contempt of court proceedings; the three-part test for any restriction on freedom of expression always applies. However, contempt of court laws should make it clear that commentary about court proceedings which considers multiple perspectives and/or is moderate in tone will not be treated as biasing the proceedings.

In addition, when there is no jury trial, even highly inflammatory speech about ongoing proceedings is unlikely to cause a "substantial risk of serious prejudice". In *Worm v. Austria,* the European Court of Human Rights accepted the legitimacy of a contempt of court fine imposed on the author of an article commenting on an ongoing case, because the article expressed in absolute terms that a conviction was inevitable, allowing for "no other interpretation".[33] However, this was only justified because of the potential prejudicial impact on the Austrian lay judges (who are similar to jurors). The Court also noted that in Austria, unlike the situation in many other countries, no steps are taken to insulate lay judges from external influences during the proceedings, which again was part of the justification of the sanction in this unique case.[34]

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[31] *Ibid.*, para. 65.
[32] *Ibid.*, para. 63.
[33] *Worm v. Austria*, 29 August 1997, Application No. 22714/93, para. 52 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/fre?i=001-58087.
[34] *Ibid.*, paras. 46, 53-54.

Accordingly, in non-jury contexts, contempt of court proceedings should not restrict commentary on ongoing court procedures on the grounds that the commentary may bias or prejudice the proceedings. The responsibility for acting free from bias lies with judges themselves, not with the media or the general public. Judges are expected to maintain strict standards of impartiality and are not so susceptible to influence that they will be easily swayed by sensational media articles. As stated in the Commentary on the Bangalore Principles of Judicial Conduct:

> A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family.[35]

By their nature, judges should have a disposition that is not "too susceptible or too fragile".[36] In any case, judicial impartiality is mostly unlikely to be impacted by a single statement or publication, even a very strong one. This may change where criticism is very widespread and consistent over time, although history suggests that where this happens, the problem often lies with the judiciary and not with those making the criticisms.

Second, protecting confidential information related to ongoing legal investigations or proceedings, as well as the privacy of participants, may be a valid reason to restrict freedom of expression through contempt of court proceedings. For example, in *Lovell v. Australia*, the UN Human Rights Committee found that a contempt conviction for interference with the administration of justice was proper where confidential documents relating to the case had been shared with the press. In that case, the documents

[35] Commentary on The Bangalore Principles of Judicial Conduct, note 23, para. 28.
[36] *Ibid.*, para. 30.

were part of the discovery process, had not been made public, and had not been shared with anyone beyond the litigants and their lawyers. A contempt conviction had the proper aim of protecting the right of confidentiality of a party to the proceedings.[37]

In contrast, if information is already partially or fully in the public domain, criminal contempt sanctions are inappropriate, as confidentiality is no longer relevant as a concern, it having already been defeated. The European Court of Human Rights, for example, found fault with a contempt conviction under Swiss law, which found that merely communicating information relating to a judicial investigation constituted an offence. The Court noted that where the information in question is no longer confidential, a restriction on freedom of expression could no longer be justified as necessary given that confidentiality no longer existed.[38]

Similarly, where media are acting in good faith to share information in the public interest, courts should use caution in applying criminal contempt, as it may be disproportionate. For example, human rights standards establish that people who make good faith disclosures about wrongdoing or human rights violations, for example, should not be subject to sanctions for those disclosures.[39] Similarly, in the context of secrecy legislation, journalists who receive secret or confidential information but are not responsible for the breach of secrecy in the first place should not be held liable.[40] These standards should also guide courts in deciding whether criminal contempt sanctions are necessary.

A third category of criminal contempt responds to expressions made in the courtroom. Such contempt of court proceedings may meet the public order aim under the three-part test by allowing the judge to maintain order in the courtroom. However, the penalty must still be proportionate and must "be

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[37] *Lovell v. Australia*, Communication No. 90/2000, para. 9.4 (Human Rights Committee). Available at: https://undocs.org/CCPR/C/80/D/920/2000.
[38] *Weber v. Switzerland*, 22 May 1990, Application No. 11034/84, paras. 50-51 (European Court of Human Rights).
[39] African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, adopted at the 32nd Session, 17-23 October 2002, available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html; and Special international mandates for freedom of expression, 2004 Joint Declaration, available at: https://www.osce.org/fom/99558?download=true.
[40] Special international mandates for freedom of expression, 2004 Joint Declaration, note 39.

shown to be warranted in the exercise of a court's power to maintain orderly proceedings."[41]

Criminal contempt sanctions against lawyers in the courtroom is a particularly sensitive area because these sorts of contempt proceedings, if used improperly, may themselves directly threaten the fairness of the trial. In particular, contempt of court proceedings "should not in any way be used to restrict the legitimate exercise of defence rights"[42] and restrictions on the freedom of expression of defence counsel should be limited to exceptional cases.[43]

Similarly, the rights of lawyers to advocate freely inside and outside the courtroom should be respected.[44] While lawyers do not have unlimited rights of expression in the courtroom, they must feel free to advocate for their client and fear of custodial sentences could have a "chilling effect" on them which could impact negatively on their client's right to a fair trial.[45] In contrast, a "free and even forceful exchange" between parties in a courtroom promotes the fair administration of justice by ensuring "equality of arms" between parties.[46]

Even where it is necessary to sanction misconduct by a lawyer in a courtroom, criminal contempt may not be the least restrictive option and/or may be disproportionate. For example, judges have a duty to prevent lawyers from engaging in racist or sexist behaviour or other inappropriate conduct. However, this should not automatically trigger contempt proceedings since a "polite correction may be sufficient". Contempt of court proceedings would normally only be appropriate after repeated misconduct following a warning and in accordance with domestic contempt of court law.[47]

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[41] General Comment No. 34, note 9, para. 31.
[42] *Ibid.*
[43] *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-60333.
[44] *Morice v. France*, 23 April 2015, Application No. 29369/10, paras. 134 and 138 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-154265.
[45] *Kyprianou v. Cyprus*, note 25, para. 175.
[46] *Nikula v. Finland*, note 43, para. 49.
[47] Commentary on The Bangalore Principles of Judicial Conduct, note 23, para. 191.

3. Protection for the Authority and Independence of the Courts

Protections for the authority and independence of the courts have been applied to protect a number of different interests. To the extent that these are understood as protecting the ability of courts to ensure the smooth conduct of legal proceedings, to maintain order and to protect the fair administration of justice, this has already been described in the previous section of this brief.

These sorts of rules are also sometimes applied to respond to attacks on (harsh criticism of) the judiciary or judges. Historically this has included offences such as "scandalising the court", which varied depending on the jurisdiction, but generally punished statements which were deemed to go beyond accepted limits of criticism vis-à-vis the judiciary or judges. Globally, however, an increasing number of jurisdictions have abolished this offence entirely or substantially limited it (see Part 4(a)(ii)).

Under international human rights law, it is clear that, in general, criticism of courts and judges is not only permissible but often beneficial and it is not legitimate for criminal contempt laws to prohibit such criticism. Public criticism of judicial performance serves to promote accountability, and "the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts."[48] As the special international mandates (special rapporteurs) for freedom of expression noted in their 2002 Joint Declaration: "Special restrictions on commenting on courts and judges cannot be justified; the judiciary play a key public role and, as such, must be subject to open public scrutiny."[49] This extends to the ability to criticise and comment on judicial decisions.

However, unduly harsh and, in particular intense, criticism can undermine the administration of justice in two ways. First, as discussed above, this may, in exceptional cases, affect the ability of decision-makers, especially

[48] Commonwealth Secretariat, Commonwealth Parliamentary Association, Commonwealth Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association, Commonwealth (Latimer House) Principles on the Three Branches of Government, February 2009. Available at: http://www.cpahq.org/cpahq/cpadocs/Commonwealth%20Latimer%20Principles%20web%20version.pdf.
[49] 2002 Joint Declaration, note 26.

juries or lay-judges, to decide cases fairly. This has also been addressed above.

Second, it is possible that certain statements or publications, if they go beyond mere criticism and represent attacks, may have a negative impact on the authority of the judiciary. It is, however, important to understand what, ultimately, is being protected here. It is not important for the public to hold the judiciary in high esteem merely for its own sake, anymore than this is necessary in relation to the executive, which is very far from being respected in many countries and yet manages to operate perfectly successfully. What is necessary, however, is that the public continue to have enough trust in the judiciary that citizens continue to use the courts as the final arbiters of disputes in society, rather than reverting to other means to settle them.

In this regard, public trust in the judiciary is strongly influenced by a number of factors, primarily the integrity of the judicial system itself. This can be negatively influenced by many factors such as perceived unresponsiveness of the judiciary to societal needs, judicial corruption, lack of transparency in the operations of courts and insufficient judicial accountability.[50] Such systematic concerns will have a much deeper impact on public perception than individual statements, even on the part of respected media outlets. In most cases, criminal contempt is not a necessary or proportionate response to criticism on the grounds of protecting this value.

Furthermore, as a practical matter, bringing criminal contempt proceedings to prevent criticism is unlikely to strengthen the authority of the judiciary. As stated in the Commentary on the Bangalore Principles of Judicial Conduct:

> While the right to criticize a judge is subject to the rules relating to contempt, these are invoked more rarely today than they were formerly to suppress or punish criticism of the judiciary or of a particular judge. The better and wiser course is to ignore

[50] Report of the Special Rapporteur on the independence of judges and lawyers, 16 July 2019, U.N. Doc. A/74/176, para. 90. Available at: https://undocs.org/A/74/176.

> any scandalous attack rather than to exacerbate the publicity by initiating contempt proceedings.[51]

In addition, any restriction on criticising the judiciary must strictly conform to the three-part test. Vague references to impugning or harming the authority of the judiciary will not meet the "provided by law" requirement. A contempt conviction must be strictly necessary, meaning that there must be no alternative means of protecting the court's authority, and it must be proportionate, taking into account that where the expression relates to matters of public interest, it should enjoy heightened protection. As part of the necessity requirement, the European Court of Human Rights has suggested that to warrant sanction, the sole intent of the speaker must be to insult a court or its members.[52] Another decision of the European Court suggests that criticisms of courts should only be sanctioned when they constitute "gravely damaging attacks that are essentially unfounded".[53]

It is also important to distinguish here between criticism directed against judges in their personal capacity versus as representatives of the court. Criminal contempt is not generally an appropriate remedy for judges' reputation when they are insulted in their personal capacity, since other remedies (such as under defamation law) are available. However, the European Court of Human Rights has demonstrated some tolerance for restrictions on free speech in the context of personal attacks on judges, although the jurisprudence on this overlaps strongly with the law of defamation.[54] The primary argument for special rules in such cases is that judges are unable to defend themselves in public in the same way as other persons because of their duty of discretion.[55]

However, another line of argument suggests that, as public officials, judges should be expected to tolerate a higher degree of criticism than private

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[51] Commentary on The Bangalore Principles of Judicial Conduct, note 23, para. 137.
[52] *Slomka v. Poland*, 6 December 2018, Application No. 68924/12, para. 64 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-187940.
[53] *Radobuljac v. Croatia*, 28 June 2016, Application No. 51000/11, para. 59 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-164315.
[54] The Court took a position of this sort in the case of *Barfod v. Denmark*, although, strictly speaking, that was a defamation, not a contempt of court case, and it involved lay judges, which invokes a different analysis. *Barfod v. Denmark*, 22 February 1989, Application No. 11508/85 (European Court of Human Rights). Available at: https://menneskeret.dk/sites/menneskeret.dk/files/1989-02-22_11508.85_barfod_v._denmark.pdf.
[55] See, for example, *De Haas and Gijsels v. Belgium*, 26 April 1995, Application No. 19983/92, para. 37 (European Court of Human Rights). Available at: http://hudoc.echr.coe.int/eng?i=001-58015.

persons, based on the inherent value of public debate regarding public figures.[56] Recent cases from the European Court of Human Rights support this conclusion. The Court has noted that judges acting in their official capacity must tolerate more criticism than ordinary persons. Criticism of the manner in which court proceedings are conducted or matters relevant to a case should, in particular, enjoy heightened protection, even in instances where the comments are "discourteous".[57]

Criminal contempt laws which restrict legitimate criticism of the judiciary are not legitimate. Where criticism rises to a level that it really does threaten the authority of the judiciary, in particular in the sense that they undermine the proper role of the judiciary in society as the final arbiters of disputes, criminal contempt measures may be warranted. However, in most societies this is an extremely high bar for the use of these measures which is very rarely met. As the next section shows, courts have found a number of ways to limit this type of contempt power.

ii. Approaches of Other Jurisdictions

This section provides a survey of three major approaches in other common law countries to the relationship between contempt of court and freedom of expression. Each section focuses on two key categories of criminal contempt which raise significant challenges in this area: criticism of the judiciary or "scandalising the judiciary" (for the international human rights approach, see 4(a)(ii)); and commentary on ongoing legal proceedings (see 4(a)(i)).

1. United Kingdom

Criminal contempt law in the United Kingdom has evolved significantly in the last few decades, following the Sunday Times case in the European

[56] General Comment No. 34, note 9, para. 34. See also Special international mandates for freedom of expression, 2010 Joint Declaration on Current Challenges to Media Freedom, available at: https://www.osce.org/fom/99558?download=true (in the context of defamation); and *Fontevecchia and D'Amico v. Argentina*, 29 November 2011, Series C, No. 238, para. 59 (Inter-American Court of Human Rights), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf (in the context of privacy rights).
[57] *Radobuljac v. Croatia*, note 53, para. 59; *Kyprianou v. Cyprus*, note 25, para. 179.

Court of Human Rights as well as a comprehensive review of contempt of court by the Law Commission in 2012.[58]

In the United Kingdom, contempt of court as it relates to publications or statements about particular legal proceedings is known as the "strict liability rule".[59] This offence still exists but it has been narrowed and limited under the Contempt of Court Act 1981. First, criminal contempt will only apply when there is a serious risk that the publication will obstruct the administration of justice:

> 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**.[60] [emphasis added]

In addition, the rule only applies if the "publication" (defined to include both oral and written statements) is addressed to the public and if it is published when the proceedings in question are active.[61] The Act also provides for several defences. For example, a publication will not constitute contempt if the alleged contemnor was not aware that the legal proceedings in question were ongoing, despite having taken reasonable care.[62] Fair and accurate reports of legal proceedings, made in good faith and in public, and published contemporaneously, are not included in the scope of contempt of court.[63] Good faith discussions about public affairs and matters of general public interest will also not constitute contempt if "the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion."[64]

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[58] The relevant outcome documents can be found at United Kingdom Law Commission, Contempt of Court. Available at: https://www.lawcom.gov.uk/project/contempt-of-court/.
[59] Contempt of Court Act 1981, 1981 c. 49, s. 1. Available at: http://www.legislation.gov.uk/ukpga/1981/49?view=extent.
[60] *Ibid.*, s. 2(2).
[61] *Ibid.*, ss. 2(1) and 2(3). The precise times at which a proceeding is deemed to be "active" are described in Schedule 1.
[62] *Ibid.*, s. 3(1).
[63] *Ibid.*, s. 4(1).
[64] *Ibid.*, s. 5.

The United Kingdom has abolished the offence of "scandalising the court", following the recommendations of the 2012 review.[65] In recommending abolition, the Law Commission explained that the "offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification."[66]

The Commission could not find such a justification. Prosecutions for the offence, or a similar one, were likely to have "undesirable effects" including "re-publicising the allegations, giving a platform to the contemnor and leading to a trial of the conduct of the judge concerned."[67] The Commission also identified other statutory rules that already covered more serious forms of judicial criticism. Specifically, civil defamation proceedings would be applicable in cases of false accusations against judges of misconduct or corruption.[68] Furthermore, the Commission noted that the offence no longer reflected current social attitudes and that original justifications for the offence offered by British courts, such as keeping a "blaze of glory" around judges and maintaining universal perceptions of judicial impartiality,[69] were no longer persuasive:

> Preventing criticism contributes to a public perception that judges are engaged in a cover-up and that there must be something to hide. Conversely, open criticism and investigation in those few cases where something may have gone wrong will confirm public confidence that wrongs can be remedied and that in the generality of cases the system operates correctly.[70]

Although the offence of "scandalising the court" has been abolished, the consultation paper leading up to the 2012 report did consider, in the alternative, a modified version of the offence. The Commission suggested that to ensure compliance with European human rights law, at a minimum, the offence would have had to be modified to: 1) apply only where there

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[65] Crimes and Courts Act 2013, 2013 c. 22, s. 33. Available at: http://www.legislation.gov.uk/ukpga/2013/22/section/33.
[66] Law Commission, Contempt of Court: Scandalising the Court, No. 335, 2012, para. 93(1). Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc335_scandalising_the_court.pdf.
[67] *Ibid.*, paras. 93(7)-(8).
[68] *Ibid.*, para. 93(11).
[69] *Ibid.*, para. 25 (citing the 1765 case of *R. v. Almon*) and para. 93(8).
[70] *Ibid.*, para. 27

was a “substantial risk of serious harm to the administration of justice”; 2) apply only if the statements made were untrue; 3) clarify the intent requirement (which was uncertain under British common law); and 4) clarify the defence of “fair comment on a matter of public interest”.[71]

2. The United States and Canada

The United States approach to criminal contempt is highly protective of freedom of expression. The Supreme Court has confirmed that contempt proceedings may only restrict freedom of expression if there is a “clear and present danger”, meaning “the substantive evil must be extremely serious, and the degree of imminence extremely high”.[72] This applies to various forms of contempt proceedings, including those involving statements which are critical of the judiciary or which may bias ongoing proceedings.[73]

While the United States has a unique history of strong deference to the right of freedom of expression, Canada, which represents a more middle-of-the-road common law approach, has also taken an increasingly strong approach to protecting freedom of expression in the specific context of contempt of court. This has most clearly occurred in relation to the offence of “scandalising the judiciary”, as addressed by the Ontario Court of Appeals in *R. v. Kopyto*.[74] A majority of the judges favoured either the “clear and present danger” test of the United States or a similar formulation, namely that the publication posed a substantial and imminent threat. Judge Cory suggested that a “scandalising the judiciary” charge would only be a justifiable limit on freedom of expression to protect the judiciary if:

> [A]n act was done or words were spoken with the intent to cause disrepute to the administration of justice or with reckless disregard as to whether disrepute would follow in spite of the

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[71] Law Commission, Contempt of Court: Scandalising the Court, A Consultation Paper, No. 207, 2012, para. 85. Available at: http://www.lawcom.gov.uk/app/uploads/2015/06/cp207_Scandalising_the_Court.pdf.
[72] *Bridges v. California*, 314 U.S. 252, 313 (1941) (United States Supreme Court). Available at: https://supreme.justia.com/cases/federal/us/314/252/#tab-opinion-1937189.
[73] See, for example *Bridges v. California*, *Ibid.*; *Pennekamp v. Florida*, 238 U.S. 331 (1946) (United States Supreme Court), available at: https://supreme.justia.com/cases/federal/us/328/331/; and Wood v. Georgia, 270 U.S. 275 (1962) (United States Supreme Court), available at: https://supreme.justia.com/cases/federal/us/370/375/.
[74] *R. v. Kopyto*, 62 O.R. (2d) 449 (1987) (Ontario Court of Appeals). Available at: https://www.canlii.org/en/on/onca/doc/1987/1987canlii176/1987canlii176.html?autocompleteStr=Kopyto&autocompletePos=1.

> reasonable foreseeability that such a result would follow from the act done or words used; that the evil consequences flowing from the act or words were extremely serious; and as well demonstrate the extreme imminence of those evil consequences so that the apprehended danger to the administration of justice was shown to be real, substantial and immediate.[75]

Judge Houlden expressed scepticism about the necessity of the offence at all:

> I feel confident that our judiciary and our courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be. I feel equally confident that the Canadian citizenry are not so gullible that they will lose faith and confidence in our judicial system because of such criticism. If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them.
>
> … I appreciate that by the very nature of their office, judges and courts cannot respond to criticism of what they have done. I do not believe, however, that this is sufficient justification for putting courts and judges in a different position from other public bodies, such as parliament, provincial legislatures, municipal governments and the police.[76]

Technically, Kopyto only applies in the province of Ontario and has not been officially extended to the rest of Canada but following this case scandalising the court is effectively a “dead letter law” in Canada.[77]

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[75] *Ibid.*
[76] *Ibid.*
[77] Galia Schneebaum & Shai J. Lavi, The Riddle of *Sub-judice* and Modern Law of Contempt, Critical Analysis of the Law 2(1), 2015, footnote 36. Available at: https://cal.library.utoronto.ca/index.php/cal/article/view/22521.

In terms of publications which may prejudice ongoing proceedings, Canada has not adopted the United States "clear and present" danger test, but it has shifted towards a strongly speech-protective approach. The leading Supreme Court case on the issue is *Dagenais v. Canadian Broadcasting Corporation*, which addressed the relationship between freedom of expression and fair trial concerns in the specific context of publication bans. The Court found that the protection for freedom of expression requires an adaption of the traditional common law approach to publication bans related to ongoing trial proceedings. Specifically:

> [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.[78]

The court also stressed that the judge applying a ban should consider all other options and find no reasonably and effective alternative, limit the ban as far as possible and weigh the objectives of the ban and its likely effects against the importance of the expression in question.[79]

3. South Africa

South Africa's judiciary has narrowed the scope of the common law offence of scandalising the judiciary although it has not fully abolished it. There are several major limits on the applicability of the offence.

First, a "fair comment" defence is available.[80] Second, unlike in some common law jurisdictions, the offence includes a *mens rea* requirement:

> [B]efore a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must

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[78] *Degenais v. Canadian Broadcasting Corp*., 3 S.C.R. 835 (1994), p. 878 (Supreme Court of Canada). Available at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1204/index.do.
[79] *Ibid.*, p. 840.
[80] *S. v. Van Niekerk* 1972 (3) SA 711 (A), as cited in Article 19, Submission on Contempt of Court in Sri Lanka, August 2003. Available at: https://www.article19.org/data/files/pdfs/analysis/sri-lanka.contempt.03.pdf.

> also be made with the intention of bringing the judges in their judicial capacity into contempt or casting suspicion on the administration of justice. For this type of intention it is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of court and was reckless as to the result.[81]

Third, while the South African courts have not gone so far as to establish "clear and present danger" or "imminence" requirements for the potential harm to the administration of justice, they have made it clear that there must be a real risk of damaging the administration of justice, and that this will be an unusual occurrence. The key case is *S v. Mamabola*, which related to a criminal contempt conviction of a spokesperson of the Department of Correctional Services who criticised a judge's decision to grant bail.[82]

The Constitutional Court accepted that retaining the offence was necessary to uphold the administration of justice, but also acknowledged the importance of "free and frank debate about judicial proceedings" and "vocal public scrutiny" of the judiciary, which can serve as a means of judicial accountability.[83] Further, the "reason behind it being a crime is not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalising the court."[84]

Accordingly, the Court in Mamabola found that "the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection". It went on to explain that the "threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common law principles; prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity".[85] The Court then confirmed that

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[81] *S. v. Van Niekerk* 1970 (3) SA 655 (T), as quoted in Ireland Law Reform Commission, Consultation Paper on Contempt of Court, July 1991. Available at: https://www.lawreform.ie/_fileupload/consultation%20papers/cpContempt.htm.
[82] S. v. Mamabolo, 2001 (3) SA 409 (South Africa Constitutional Court). Available at: http://www.saflii.org/za/cases/ZACC/2001/17.html.
[83] *Ibid.*, paras. 29-30.
[84] *Ibid.*, para 25.
[85] *Ibid.*, para 45.

the test for scandalising the court should not relate to the reputation of judges, but rather "whether the offending conduct, viewed contextually, was really likely to damage the administration of justice".[86] Applying this test to the facts, the Court found that the conduct in question did not constitute contempt regardless.[87]

Finally, in terms of commentary about ongoing legal proceedings, the South African Constitutional Court has not addressed the *sub judice* rule. However, the Supreme Court of Appeal, as in Canada, has issued a major judgment regarding publication bans, which has had an important impact on the interpretation of the applicability of criminal contempt. Specifically, in *Midi Television v. DPP*, the Court stated:

> In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.[88]

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[86] *Ibid.*, para. 45.
[87] *Ibid.*, para. 61. This was in addition to its finding that the summary judgment procedure violated the rights of the defendant, due to the same court that was criticised issuing the contempt decision.
[88] Supreme Court of Appeal of South Africa, Midi Television (Pty) Ltd v. Director of Public Prosecutions (Western Cape), 3 All SA 318 (SCA) (2007), para. 19. Available at: http://www.saflii.org/za/cases/ZASCA/2007/56.html.

b. Administrative regulation as a means of addressing media reporting on the administration of justice

Questions of the Court:

> *"(d) The obligation and responsibility of a reporter, publisher, broadcaster and editorial management regarding pending proceedings and restrictions required to be observed in order to ensure that pending proceedings are not prejudiced or pre-trial or during publicity does not lead to creating prejudice among the public against a litigant"*
>
> *"(e) The standards required to be observed by a journalist, publisher, broadcaster and the editorial management so that the integrity of the legal system is maintained and fairness of the legal process for the litigant is safeguarded"*

i. International Standards

Administrative regulation of the media in this context refers to the idea of a system whereby members of the public may bring complaints about media content or behaviour before external decision-makers with the aim of obtaining some sort of redress. Many administrative regulation systems also allow for *suo moto* assessments by the administrative body which oversees the system of whether media outlets are respecting the rules, which are normally set out in a code of conduct or ethics.

International standards in this area are not very developed, in part because it is not easy for complaints on this issue to come before international courts. Certainly it is legitimate for there to be administrative systems of complaints, judged against codes of conduct, which apply to different media sectors and, in particular, broadcasters. These are in place in one way or another in most countries, including established democracies. However, these systems, at least where they are imposed by the State, for example through law, must meet the three-part test for restrictions on freedom of expression, like any other restriction on this right.

There are some statements which suggest that such systems should be available (i.e. that there is some obligation to create them). For example, the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration) states very clearly, at Principle IX(1):

> A public complaints system for print or broadcasting should be available in accordance with the following principles:
>
> - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
> - the complaints system shall be widely accessible.[89]

In practice, there are three main approaches to providing for an administrative complaints system. In many countries, the print media, in particular, have come together to form their own self-regulatory systems for addressing complaints from members of the public that the media have acted in unprofessional and harmful ways. These systems are run entirely by the media sector, and normally involve the adoption of a code of conduct, setting out relevant standards for media behaviour, as well as the establishment of a body to receive and decide upon complaints. Where a media outlet is found to have breached the code, it will normally be required to publish a statement recognising the wrong.

Where an effective self-regulatory system exists, States should not impose a statutory complaints system. This is derived from the test of necessity of restrictions on freedom of expression and its requirement that the least intrusive (effective) means of addressing a problem is used. Self-regulation is almost by definition the least intrusive means, given that it is run by the media themselves. As Principle IX(3) of the African Declaration notes:

> Effective self-regulation is the best system for promoting high standards in the media.[90]

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[89] Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[90] *Ibid.*

In a similar vein, albeit referring to online expression, the special international mandates for freedom of expression noted in their 2011 Joint Declaration on Freedom of Expression and the Internet:

> Self-regulation can be an effective tool in redressing harmful speech, and should be promoted.[91]

However, in some cases the media are unable to come together to create a self-regulatory complaints system and, in this case, a statutory system may be warranted. There are two types of statutory systems. The first, often referred to as co-regulation, is where a law provides binding force to the system but the operation of the system is dominated by media actors. A good example of this is the Indonesian Press Council, which is established by law but has its members appointed exclusively by the media. Specifically, three members are appointed by journalists' associations, three by media owners and another three, representing the general public, by journalists and owners working together. The Council has only limited powers of sanction, namely to require media outlets to carry statements recognising that they have operated in breach of the rules.

The other approach is purely statutory regulation, along the lines of the system in Pakistan where a statutory regulator decides on complaints (see below). Such systems are in place in many countries for broadcasters. Indeed, overall, most democracies have self- or co-regulatory systems for the print media and co- or purely statutory regulatory systems for the broadcast media. For either type of statutory system, the complaints body should, as with all regulatory bodies, be independent (see section 4(e)).

For all administrative systems of media regulation, complaints should be assessed against a pre-established code of conduct, which has been developed in consultation with all interested stakeholders. For statutory systems, this corresponds to the requirement that restrictions should be prescribed by law.

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[91] Adopted 1 June 2011. Available at: http://www.osce.org/fom/66176.

All three types of complaints systems should apply to media outlets as opposed to individual journalists. The decision to publish or broadcast content is a collective one, made by the media outlet rather than any particular individual. Furthermore, any negative impact is caused by the decision to publish or broadcast and the subsequent circulation of the content to a wide audience, rather than just the writing of the piece by the journalist.

The main benefits of administrative regulatory systems are that they are far more accessible than the courts for ordinary citizens, most of whom cannot afford the cost of a court proceeding when they feel they have been harmed by media reporting. However, these systems do not provide the procedural and other fairness guarantees of the courts, and they are not intended to operate as parallel systems of liability. As a result, they should only provide for limited sanctions. From the perspective of the media, these systems provide appropriate (quick and light) redress for citizens and help promote professionalism in the media, without exposing them to the risk of heavy sanctions. In addition, due to the light nature of the sanctions associated with them, it is possible for administrative systems to take a more nuanced position, based on the context of the specific media they cover, with respect to restrictions than would be legitimate in a criminal law context.

In some countries, the status of administrative regulation as an alternative to court resolution of issues is formalised in law. Thus, in Indonesia, complaints against the press that are covered by the mandate of the Press Council must go first to the Council before they may be heard by a court. This has the benefit of providing appropriate redress for citizens (quick and light redress before the Press Council with the option of continuing to the courts should this not be sufficient) and of providing good protection for media freedom (since it relieves them of the cumbersome and expensive burden of court proceedings, except in the most serious cases).

The codes under these administrative regulation systems almost universally call on the media to strive for accuracy in news and current

affairs programming. As an example of this, Clause 5 of the Canadian Association of Broadcasters Code of Ethics provides:

> It shall be the responsibility of broadcasters to ensure that news shall be represented with accuracy and without bias. Broadcasters shall satisfy themselves that the arrangements made for obtaining news ensure this result. They shall also ensure that news broadcasts are not editorial.[92]

Several provisions in the Indonesian Press Council's Journalism Code of Ethics refer to accuracy in the news, including the following:

> Article 1: The Indonesian journalist is independent and produces news stories that are accurate, balanced and without malice.
>
> Article 4: The Indonesian journalist refrains from producing false, slanderous, sadistic and obscene news stories.[93]

It may be noted that these standards do not impose an absolute requirement of accuracy, which is not realistic for the media, especially given tight news cycles, but, instead, require the media to exercise due diligence in ensuring that news is accurate. Obviously, these standards apply to reporting on courts as they do to all types of news.

In some cases, codes go beyond references to accuracy and refer directly to reputation. Thus, Principle 4 of the Press Council of Ireland and Office of the Press Ombudsman's Code of Practice states:

> Everyone has constitutional protection for his or her good name. Print and online news media shall not knowingly publish matter based on malicious misrepresentation or unfounded

[92] Available at: https://accountablejournalism.org/ethics-codes/Canada-CAB.
[93] Available at: https://accountablejournalism.org/ethics-codes/indonesian-press-council-journalism-code-of-ethics.

> accusations, and must take reasonable care in checking facts before publication.[94]

A number of codes also include direct rules on the presumption of innocence and/or the right to a fair trial. Thus, Article 3 of the Indonesian Code states:

> The Indonesian journalist always verifies information, conducts balanced reporting, does not mix facts with biased opinion, and upholds the presumption of innocence principle.

The Irish Code devotes the whole of Principle 7 to Court Reporting:

> Print and Online news media shall strive to ensure that court reports (including the use of images) are fair and accurate, are not prejudicial to the right to a fair trial and that the presumption of innocence is respected.

The Code of Ethics of Radio France Internationale provides that it is committed to:

> Not violating the private life, nor the presumption of innocence.[95]

The British Independent Press Standards Organisation's Editors' Code of Practice has detailed provisions on payments to witnesses (clause 15) and to criminals (clause 16).

We can thus see that a variety of different administrative regulation systems provide protection for accuracy, sometimes also reputation, and the presumption of innocence and/or the right to a fair trial. What these codes do not provide, however, is for special treatment of the courts, or matters that are *sub-judice*, beyond these specific requirements. In particular, the common law concept of scandalising the court is not

[94] Available at: https://accountablejournalism.org/ethics-codes/code-of-ethics-ireland-press-council.
[95] Available at: https://accountablejournalism.org/ethics-codes/France-RFI.

represented in these codes, just as it is no longer applied by the courts in a large number of common law countries.

These systems can bolster protection for these rights by providing citizens with a more accessible means of obtaining redress. They can also serve in general to promote higher standards in the media, given the negative implications of being found to be in breach of a code of conduct.

ii. Approach in Pakistan

In Pakistan, section 19(5) of the Pakistan Electronic Media Regulatory Authority Ordinance-2002, As Amended by the PEMRA (Amendment) Act, 2007, calls on the statutory regulatory, PEMRA to develop a code of conduct:

> The Authority shall devise a Code of Conduct for programmes and advertisements for compliance by the licensees.

Licensees are bound to respect the terms of a licence in accordance with section 20:

> A person who is issued a licence under this Ordinance shall.-
> …
> (f) comply with the codes of programmes and advertisements approved by the Authority and appoint an in-house monitoring committee, under intimation to the Authority, to ensure compliance of the Code.

It may be noted that, according to this provision, each licensee needs to appoint an in-house committee to ensure compliance with the codes. To supplement this, the Ordinance also calls for a number of Councils of Complaints to consider complaints from citizens and recommend action to PEMRA, with section 26(5) stating:

> The Councils may recommend to the Authority appropriate action of censure, fine against a broadcast or CTV station or

> licensee for violation of the codes of programme content and advertisements as approved by the Authority as may be prescribed.

In August 2015, the Electronic Media (Programmes and Advertisements) Code of Conduct, 2015 was adopted by regulatory instrument.[96] Clause 3(1) calls on licensees to ensure that no content is aired that:

> (j) contains aspersions against the judiciary or armed forces of Pakistan;
> (l) is defamatory as defined in the law for the time being in force;

Clause 4(1) calls on news and current affairs programmes to present information in an "accurate and fair manner". Clause 4(3) states:

> Programmes on sub-judice matters may be aired in informative manner and shall be handled objectively:
> Provided that no content shall be aired, which tends to prejudice the determination by a court, tribunal or any other judicial or quasi-judicial forum.

Generally, these provisions are in line with international standards and the practice in other countries. One outlier is Clause 3(1)(j), which prohibits casting "aspersions" on the judiciary. Unless this is interpreted very narrowly to cover only inaccurate or wildly unfair allegations, it is clearly not in line with the principles noted in section 4(a) of this brief, which highlight that the judiciary, as public actors, need to be open to strong criticism. The legitimacy of Clause 4(3) according to international standards also depends on it being interpreted narrowly so that criticism of ongoing trials which does not undermine the right to a fair trial, even if it is very strong, is not prohibited. And, for this, the standard of tending to prejudice court determinations needs to be read so as to cover only content which is likely to have that effect.

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[96] SRO No. 1(2)/2012-PEMRA-COC, 19 August 2015.

c. The Contempt of Court Ordinance, 2003 and the current regulatory framework

Questions of the Court:

> *"(f) Whether publicity during trial or prejudging the outcome of a hearing or trial amounts to criminal contempt under the Contempt of Court Ordinance, 2003?"*
>
> *"(g) Whether the regulatory framework is effective enough to ensure that the sanctity and integrity of legal proceedings remains protected"*

i. Law

To assess the question "whether publicity during trial or prejudging the outcome of a hearing or trial amounts to criminal contempt under the Contempt of Court Ordinance, 2003", requires an analysis of how the Ordinance defines "criminal contempt"?

The general notion of contempt of court is defined in Section 3 of the Ordinance, which states:

> Whoever disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey; or commits a willful breach of a valid undertaking given to a Court; or **does any thing which is intended to or tends to bring the authority of a court or the administration of law into disrespect or disrepute, or to interfere with or obstruct or interrupt or prejudice the process of law or the due course of any judicial proceedings, or to lower the authority of a court or scandalize a judge in relation to his office**, or to disturb the order or decorum of a court is said to commit "contempt of Court" the Contempt is of three types, namely; the "Civil contempt" "criminal contempt" and "judicial contempt." [emphasis added]

Each of the three types of contempt are defined separately in section 2, with section 2(b) defining "**criminal contempt**" as "the doing of any act

with intent to, or having the effect of, obstructing the administration of justice."

Section 6 of the Ordinance then goes on to elaborate in further detail on when criminal contempt is committed, stating:

> A criminal contempt shall be deemed to have been committed if a person-
> (a) attempts to influence a witness, or proposed witness, either by intimidation or improper inducement, not to give evidence, or not to tell the truth in any legal proceeding;
> (b) offers an improper inducement or attempts to intimidate a judge, in order to secure a favourable verdict in any legal proceedings;
> (c) commits any other act with intent to divert the course of justice.

Also relevant here is Section 18 of the Ordinance, which stipulates, in part: "(1) No person shall be found guilty of contempt of court, or punished accordingly, unless the court is satisfied that the contempt is one which is **substantially detrimental to the administration of justice** or scandalizes the court or other wise tends to bring the court or judge into hatred or ridicule."

Civil contempt under the Ordinance largely covers the refusal to obey a court order while judicial contempt covers statements which scandalise a court or involve personal criticism of judges.

It may be noted that there is an apparent contradiction between section 6, for which all of the sub-sections require intent, either explicitly or impliedly (because attempting to influence a witness or offering an inducement to a judge clearly require intent), and section 2(b), which applies to actions both with intent and merely having a certain effect. Inasmuch as these rules are applied to restrict freedom of speech, it is incumbent on courts to apply the narrower meaning of section 6. This also flows from general criminal law

principles, whereby merely having an effect, without wishing to create that effect, lacks the *mens rea* required for criminal liability.

ii. Opinion

> *"(f) Whether publicity during trial or prejudging the outcome of a hearing or trial amounts to criminal contempt under the Contempt of Court Ordinance, 2003?"*

There is nothing in these provisions of the Contempt of Court Ordinance that would suggest, absent proceedings having specifically been declared to be in camera, that there is any bar on media publicity during a trial. In fact, the public has a constitutional right to know what is happening in courts of law as a matter of public interest. Specifically, the public has a right to know what the possible outcome or decision may be of a trial and any concerns about the manner in which the trial is being conducted.

Furthermore, as section 6 of the Ordinance makes clear, criminal contempt only covers acts which a person has done with a specific **intention to obstruct** the administration of justice.

As a result, publicity during trial, including by prejudging the outcome, would only amount to contempt of court where the speaker acted with intent to obstruct the course of justice and where this was in fact a likely outcome of his or her actions.

This is supported by the decision of the Supreme Court of Pakistan in *Riaz Hanif v. Saeed uz Zaman Siddiqui*,[97] where the Court held that:

- It is the right of every citizen to make fair comments about a judge or a judgment as long as this is done with *bona fide* intentions.
- Fair comments by an individual are based on his point of view or opinion, which cannot be made cognisable under any law.

[97] 2011 SCMR 948.

- Fair comments are healthy signs of the public showing trust towards the judicial system, as long as the opinions expressed are not derogatory of or do not ridicule the judiciary.

Since publicity during a trial does not fall within the scope of any of the categories in the Contempt of Court Act Ordinance for criminal contempt of court, neither it nor any other discussion about the conditions of a trial or hearing or the possible outcomes thereof amounts to criminal contempt of court.

> *"(g) Whether the regulatory framework is effective enough to ensure that the sanctity and integrity of legal proceedings remains protected"*

The Supreme Court of Pakistan, in contempt proceedings against anchorperson Arshad Sharif[98] declared"

> [T]he Code of Conduct [of the Pakistan Electronic Media Regulatory Authority (PEMRA)] ensured that the freedom of speech and right to information (Article 19 and 19A of the Constitution) were protected, and at the same time provided that the discussion on sub judice matters must be conducted in a manner which did not negatively affect another person's fundamental right to be dealt with in accordance with the law (Article 4 of the Constitution) and the right to fair trial and due process (Article 10A of the Constitution).

Given the presence of detailed standards in the PEMRA Code of Conduct, there is limited need for additional tools to regulate media reporting on legal proceedings. In the first instance, in-house committees, as mandated by the PEMRA Ordinance, should take cognisance of any alleged violations and take measures to address them. Should that fail, the Councils of Complaints can consider the issue and recommend that PEMRA take action, which may include fines. It would only be in the very most seroius

[98] PLD 2019 Supreme Court 1.

cases that resort to criminal proceedings before a court would be needed to address harmful behaviour.

It may also be noted that, during the past few years, PEMRA has become quite active in taking action against broadcasters who may have violated any provision of the law, including as a result of breaching the codes. In 2019 alone, PEMRA issued 20 show-cause notices, five advisories, five notices and nine directives to licensees. It has also banned the airing of certain programmes on satellite TV channels and prohibited individuals from appearing as guests in talk shows or anchoring TV shows altogether. This suggests that PEMRA is able to ensure that the sanctity and integrity of legal proceedings remains protected. Indeed, these actions raise serious questions as to whether PEMRA is showing adequate respect for freedom of expression.

d. Whether the programmes in question amounted to criminal contempt

Question of the Court:

> *"(h) Whether the content of the programmes, to which these proceedings relate, amount committing criminal contempt under the Contempt of Court Ordinance, 2003"*

Law

The relevant rules relating to criminal contempt of court are described in the Law part of section 4(c) of this brief.

Opinion

The content of the programmes in question does not fall foul of any of the categories of criminal contempt as defined in the Contempt of Court Ordinance, 2003. It seems most unlikely that either the anchors or any of the guests acted with an intent to "obstruct the administration of justice" during these programmes. The anchors and guests in the programmes clearly did not attempt to influence or intimidate any witness or offer any

improper inducement to or attempt to intimidate any judge so as to obtain a “favourable verdict”. They also did not commit any other act intending to divert the course of justice. Rather, the programmes discussed what their participants clearly felt was a real risk to the fair course of justice in this case. This seems clear, whether or not one agrees with their comments.

Moreover, there is no evidence that the programmes in fact have proven to be “**substantially detrimental to the administration of justice**”. There is no evidence that these programmes have prevented the Court from performing its functions as per its normal routine or that it has stopped doing so in any way whatsoever. There is also no evidence that the programmes have brought the courts into general disrepute. In particular, citizens are approaching the Court as usual for redress of their grievances as per the law. Mere discussion about certain risks associated with a trial or hearing and the possible outcomes relating to those risks is not prohibited by the criminal contempt of court rules in the Contempt of Court Ordinance. Therefore, it is clear that the anchors and guests in the programmes in question did not commit criminal contempt of court.

e. The Independence of Media Regulatory Bodies and the Role of the Courts

Questions of the Court:

The Court did not pose any questions directly on this issue but we deemed it to be relevant to the overall questions to be determined by the Court.

i. International Standards

The idea that bodies which exercise regulatory powers over the media need to be independent of the government and protected against both political and commercial interference is well-rooted in international standards as well as the comparative practice of democratic States. The rationale for this is evident: if regulators are controlled by the government, they are likely to make regulatory decisions which favour the government of the day rather than the wider public interest. This will undermine the ability

of the media to report critically, especially on political actors, and thereby unduly limit freedom of expression.

It is equally important that regulators are independent of the sectors they regulate. While this has not been a major issue in many developing countries, it is a major or emerging problem in many democracies, where it is referred to as ‘regulatory capture’. The negative implications of this are equally evident and essentially the same: if industry controls the regulator, it will operate with a bias towards industry, rather than making decisions in the wider public interest.

These issues are of particular importance when it comes to the matter of regulating content, where the risk of bias on the part of the regulator, including due to political or industry interference, are greatest.

It is worth noting that the principle of independence applies to the exercise of regulatory powers and not to higher-level policy making, which normally remains the preserve of government. For example, in most countries, framework decisions about the digital switchover – including what system will be used, the general timetable for the switchover and any general measures of public support for the process – are policy decisions which are made by a government body. On the other hand, specific decisions about which companies should receive digital multiplexes are regulatory decisions. If these are left to government, the choices will be influenced by politics, to the detriment of freedom of expression.

Numerous international statements by authoritative actors support the need for independence of bodies with the power to regulate the media. For the most part, these statements have been directed at broadcast or telecommunications regulators, largely because most democracies do not have official bodies that regulate the print media or journalists. A broader statement of the need for independence is the following quotation from a 2003 Joint Declaration adopted by the special international mandates for freedom of expression:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[99]

This was expanded upon by the special mandates in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations:

> Administrative measures which directly limit freedom of expression, including regulatory systems for the media, should always be applied by an independent body. … It should also be possible to appeal against the application of administrative measures to an independent court or other adjudicatory body.[100]

Recently, the special mandates again emphasised this principle in their 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, stating:

> States also have positive obligations to protect media freedom, including through the following measures: … ensuring the independence of bodies which exercise regulatory powers over the media.
>
> …
>
> Politicians and public officials should refrain from taking actions which undermine the independence of the media, such as interfering politically in the operations of or taking commercial control over regulatory bodies or commercial, community or public service media, or putting pressure on online platforms to engage in content regulation.[101]

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[99] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.
[100] Adopted 4 May 2015, para. 4(a). Available at: http://www.osce.org/fom/66176.
[101] Adopted 2 May 2018, paras. 1(b)(v) and 4(a). Available at: http://www.osce.org/fom/66176.

In its most recent General Comment on Article 19 of the ICCPR, adopted in September 2011, the UN Human Rights Committee set out the same principle, albeit limited to broadcast regulators:

> It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses. [references omitted][102]

All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also emphasised the need for independent regulation of the media. Thus, the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration) states very clearly, at Principle VII(1):

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[103]

The *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration), adopted by the Inter-American Commission on Human Rights in October 2000, does not explicitly state that broadcast regulators must be independent. But it does refer to the underlying reason for this, stating, in Principle 13:

> [T]he concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.[104]

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[102] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 39.
[103] Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[104] Adopted at the 108th Regular Session, 19 October 2000.

An entire recommendation of the Council of Europe – the key human rights body for the wider community of European countries – is devoted to this issue, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation). The very first substantive clause of this Recommendation states:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.[105]

This view has been upheld by international and national courts. The reasons for this were set out elegantly in a decision of the Supreme Court of Sri Lanka holding that a broadcasting bill which gave a government minister substantial power over appointments to the broadcast regulator was incompatible with the constitutional guarantee of freedom of expression. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[106]

Very few cases involving control of regulatory bodies by private actors have come before international courts. In an interesting case before the UN Human Rights Committee from Canada, the issue was the legitimacy of a system for accreditation of journalists to Parliament. The system was run by a private association, which had been officially recognised by Parliament as the accrediting body for journalists. The association had refused to accept the applicant in the case as a fully accredited journalist, which they had justified on the basis of doubts about the regularity of the newspaper

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[105] Adopted by the Committee of Ministers of the Council of Europe on 20 December 2000. See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted 26 March 2008.

[106] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

for which he worked. In holding that this was a breach of the right to freedom of expression, the Committee stated:

> In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members.[107]

This gives some sense of the extent to which the right to freedom of expression imposes stringent requirements of independence and fairness on any body which has the power to restrict freedom of expression.

Recognising the principle of independent regulation is one thing but guaranteeing it in practice is quite another and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice. The COE Recommendation provides some guidance as to how independence may be guaranteed in practice, with sections on Appointment, Composition and Functioning (of the governing boards of these bodies), Financial Independence, Powers and Competence, and Accountability.

The way in which members are appointed to the governing boards of regulatory bodies is central to their independence. The African Declaration states that the appointments process should be "open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party."[108] The COE Recommendation devotes some attention to this matter, calling for members to be "appointed in a democratic and transparent manner"; rules of 'incompatibility' to prevent

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[107] *Gauthier v. Canada*, Communication No. 633/1995, views adopted 5 May 1999, para. 13.6.
[108] Note 103, Principle VII(2).

individuals with strong political connections or commercial conflicts of interest from sitting on these bodies; prohibitions on members receiving instructions or a mandate from anyone other than pursuant to law; and protection against dismissal except for "non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions".[109]

The COE Recommendation also notes the importance of funding arrangements to independence. It calls on public authorities not to use any financial decision-making power to interfere with regulatory bodies and calls for funding arrangements to "be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently".[110] The Recommendation also calls for regulatory bodies to have the power to set their own internal rules.[111]

Both the COE Recommendation and the African Declaration recognise that broadcast regulators need to be accountable to the public but stipulate that such accountability should be achieved in a manner that does not compromise independence. The African Declaration, for example, states:

> Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.[112]

The COE Recommendation emphasises this point and notes that regulators "should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities".[113]

ii. Approaches of Other Jurisdictions

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[109] Note 105, Clauses 3-8.
[110] *Ibid.*, Clause 9.
[111] *Ibid.*, Clause 12.
[112] Note 103, Principle VII(3).
[113] Clause 26.

These principles are widely recognised in democracies around the world. In South Africa, the very name of the broadcast regulator, the Independent Communications Authority of South Africa (ICASA), reflects the idea of independence, and this is also set out clearly in its founding legislation, which states:

> (3) The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.
> (4) The Authority must function without any political or commercial interference.[114]

The governing Council of ICASA consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles: a) participation by the public in the nomination process; (b) transparency and openness; and (c) the publication of a shortlist of candidates for appointment. Only individuals who are committed to freedom of expression and other positive social values, who have relevant expertise and who, collectively, are representative of South Africa as a whole may be appointed. Individuals with strong political connections, as well as those with vested interests in telecommunications or broadcasting, are prohibited from becoming members.[115]

In Chile, the law[116] makes it clear that the National Television Council (CNTC) is an autonomous public authority that is functionally decentralised, with its own legal capacity and accountable to the President through the Ministry of the General Secretary of Government (Ministerio Secretaria General de Gobierno). Council members should be individuals possessing relevant personal and professional virtues, in the opinion of both the President and the Senate. Members sit for an 8-year term of office and one-half are re-elected every four years. The President appoints the 11 members with the agreement of the Senate.

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[114] Independent Communications Authority of South Africa Act, No. 13 of 2000, s. 3.
[115] *Ibid.,* ss. 3 and 6.
[116] Law No 18,838. Available in Spanish at: http://www.cntv.cl/prontus_cntv/site/artic/20101221/pags/20101221112826.html.

In 1995, a new process was put in place for all public appointments in the United Kingdom. Although the relevant Secretary of State continues to appoint the non-executive members of Ofcom, the broadcast and telecommunications regulator, appointments are made on the basis of recommendations reached through the standard public appointments procedure. This stipulates that all public appointments should be based on merit and subject to scrutiny by at least one accredited independent assessor.[117] Ofcom's board consists of five members and a chairman, appointed through the independent appointments process, together with three executive members, selected from the senior staff group and including the Chief Executive Officer.

Another system to ensure the independence of the appointments process is in place for the Jamaican Broadcasting Commission (JBC), established by the Broadcasting and Radio Re-Diffusion Act.[118] The members are appointed by the Governor-General (the titular Head of State) after consultation with the Prime Minister and the Leader of the Opposition. Any serving politician, and anyone who sought election within the past 7 years (whether or not they were successful), is disqualified from appointment.

In Indonesia, the Broadcasting Law, adopted in 2002,[119] sets out a number of "principles, objectives, functions and directions" for broadcasting as a whole (Articles 2-5), which include several references to the idea of independence. Article 7 establishes the Indonesia Broadcasting Commission (KPI) as an "independent state body" responsible for broadcast regulation, composed of one national and then a number of regional bodies. The nine members of the national KPI and seven members of the regional KPIs may be nominated by the public and are elected by the parliament (or provincial parliaments) based on an "open fit and proper test", while appointments are formalised by the President and Governors, respectively. Each member must be loyal to Pancasila[120] and

[117] See the website of the Office of the Commissioner for Public Appointments, at: <http://www.publicappointmentscommissioner.org/>.
[118] Cap. 47. Available at: http://www.broadcastingcommission.org/uploads/content_page_files/BroadcastingandRadioRe-DiffusionAct.pdf.
[119] Law No. 32/2002.
[120] Pancasila is a set of five principles considered to be foundational to the Indonesian State, including belief in one god, the unity of Indonesia, democracy and social justice.

the Constitution, be a citizen of Indonesia and have a university degree or demonstrate the equivalent intellectual capacity, including knowledge of broadcasting. They must not be directly or indirectly involved in mass media activities, be a member of a legislative or judicial body or be a government official. Membership is for three years and may be renewed once. Members may be removed following imprisonment based on a court decision or by a Presidential Decree upon the recommendation of the parliament. The members elect the chair and vice-chair from among themselves.

iii. Application of these principles to the Pakistan Electronic Media Regulatory Authority (PEMRA)

In accordance with the Pakistan Electronic Media Regulatory Authority Ordinance-2002, the Pakistan Electronic Media Regulatory Authority (PEMRA) has extensive powers to regulate broadcasters, including through issuing licences and reviewing complaints relating to the behaviour of or content disseminated by licensed broadcasters.

It is very clear PEMRA fails to meet the standards for independence outlined above. The following provisions from the Pakistan Electronic Media Regulatory Authority Ordinance-2002, As Amended by the PEMRA (Amendment) Act, 2007, outline the manner in which members are appointed:

Section 6

(I) The Authority shall consist of a Chairman and twelve members to be appointed by the President of Pakistan.

(3) Out of twelve members one shall be appointed by the Federal Government on full time basis and five shall be eminent citizens chosen to ensure representation of all provinces with expertise in one or more of the following fields: media, law, human rights, and social service. Of the five members from the general public, two members shall be women.

(4) Secretary, Ministry of Information and Broadcasting, Secretary, Interior Division, Chairman, Pakistan Telecommunication Authority and Chairman, Central Board of Revenue shall be the ex-officio members.

(4-A) The remaining two members shall be appointed by the Federal Government on need basis on the recommendation of the Chairman.

Section 7(1) The Chairman and members, other than ex-officio members, unless earlier removed for misconduct or physical or mental incapacity, shall hold office for a period of four years and shall be eligible for re-appointment for a similar term or as the Federal Government may determine:

Provided that the Chairman and a member shall retire on attaining the age of sixty-five years.

Explanation.- For the purposes of this section the expression "misconduct" means conviction for any offence involving moral turpitude and includes conduct prejudicial to good order or unbecoming of a gentleman.

There is no mention anywhere in the Ordinance of the idea of independence or even autonomy. The government largely controls the appointments process, apart from in relation to the ex-officio members, who are government officials or close to government. There is no requirement for the process to be transparent, no provision for the engagement of civil society, no political rules of ‘incompatibility’ to prevent individuals with strong political connections from being appointed, although there are rules on commercial conflicts of interest (section 10), and there are only limited protection against dismissal, which is presumably effected by the government, which may be for vague grounds such as not behaving like a gentleman.

On the other hand, there are some protections for the budget of PEMRA. According to section 15, PEMRA prepares its own budget and submits it to government, although presumably government then exercises some oversight role. According to section 14, the sources of funding for PEMRA include “seed money” from government, fees from licences, loans, after government approval, foreign donations and other sources.

When it comes to issues of programme content, as noted above, Councils of Complaint, established in different parts of the country, make recommendations to PEMRA as to the “appropriate action of censure”, which may include fines (section 26(5)). The appointment of the Councils is governed by section 26(1) of the Ordinance, which provides simply:

> The Federal Government shall, by notification in the Official Gazette, establish Councils of Complaints at Islamabad, the Provincial capitals and also at such other places as the Federal Government may determine.

No constraints are put on the power of the government in relation to the Councils and none of the international standards regarding independence, noted above, are provided for.

5. Conclusion

Maintaining the fair administration of justice, including the rule of law, is a fundamental human right as well as a necessity for the operation of many key social systems and institutions. Measures are, therefore, necessary to protect the judiciary against attacks that undermine it. At the same time, freedom of expression is also a fundamental human right and one that is essential for the protection of all other rights, including the fair administration of justice. Part of that is ensuring that the judiciary are open to criticism so that problems may be exposed and addressed.

International guarantees for freedom of expression, and specifically those found in the International Covenant on Civil and Political Rights, which

Pakistan has ratified, are not formally part of the legal system of Pakistan. However, it is still incumbent on Pakistani courts to interpret domestic legal rules, including the Constitution and laws, so as to align with Pakistan's international obligations, insofar as this is reasonably possible.

Freedom of expression is not an absolute right. However, international law sets out strict conditions for any restriction on freedom of expression, described in Article 19(3) of the ICCPR as the following three-part test:

1) The restriction must be provided by law.
2) The aim of the restriction must be to respect the rights or reputations of others, or to protect national security, public order, public health or public morals.
3) The restriction must be necessary to achieve that aim.

There is no question that freedom of expression may be limited to serve the ends of justice. Courts must, for example, have the power to constrain disruptive expressions made in the courtroom during the course of a trial. Similarly, efforts to bias witnesses or judges, and other intentional efforts to subvert the course of justice must be prohibited. Even in these cases, however, the rules must conform to the three-part test, for example by avoiding unduly vague or broad terms, or excessively harsh sanctions. And statements should only attract sanction if they really do pose a substantial risk of serious prejudice to the fair administration of justice. In this context, we must assume that judges are strictly impartial and also highly resistant to being influenced by media coverage, such that it would only be in highly exceptional circumstances that this might actually pose a real risk of biasing them.

When it comes to general criticism directed at courts and judges, there has been a strong move globally to abolish the historic laws, often falling into the category of scandalising the court, which prohibited this. Judges may still have recourse to defamation law to defend their personal reputations, and there may be some warrant for special defamation rules or systems to protect judges, given the limits on their ability to express themselves freely.

But when it comes to judges in their professional capacities, and the courts as public institutions, the principle that open debate about these sorts of actors is essential in a democracy should be respected. In general, States may not impose limits on criticism of public institutions. There is one exception to this in the case of courts, namely where this criticism reaches such a level that it starts to erode the trust of citizens in the courts, to the point that they may no longer be willing to use the courts as the final arbiters of disputes in society. In more stable democratic contexts, that threshold is in practice never met. Even in less developed countries, it represents a very high barrier to justifying any restriction on criticism of courts.

When it comes to the media, there are other ways than the criminal law to address statements which may undermine the fair administration of justice or the presumption of innocence. In particular, administrative systems of complaints, whether self-regulatory, co-regulatory or purely statutory in nature, can provide a quick, light and yet effective form of redress which strikes a good balance between the various competing interests. Even here, however, any State-sponsored restrictions must conform to the three-part test. This means that the prohibitions in any code of conduct used in the complaints system must be clear and appropriate and that the system must be overseen by a body which is robustly independent of the government.

The complaints system established under the Pakistan Electronic Media Regulatory Authority Ordinance-2002 fails the second condition, due to the lack of independence of the Authority. In addition, the specific rules on judges and courts would only meet the first condition if they were interpreted very narrowly. Otherwise, however, it seems quite clear that this system at least provides strong protection for the fair administration of justice, even if it is problematical vis-à-vis the right to freedom of expression.

In general, the law on criminal contempt of court in Pakistan does not preclude media reporting on ongoing trials or even prejudging the outcome of such trials. Indeed, both of these activities are necessary to serve the

right of citizens to know about these trials. This is especially the case where a trial involves heightened public interest, for example due to the notoriety of the parties or the importance of the issues at stake. At the same time, any media reporting which had the intentional aim of subverting the course of justice might fall foul of the criminal contempt rules.

In terms of the statements at issue in the current case, it seems most unlikely that they were made with the intent of undermining the fair administration of justice, so that they should not be held to have breached the law on criminal contempt of court. Furthermore, they do not, in fact, appear to have had a substantial negative impact on the administration of justice, again ruling out the idea that they represented a form of criminal contempt of court.

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