

*Scandalising the Judiciary:
Criticism of Judges and the Law of Contempt*

Lord Pannick QC

Life Peer, United Kingdom Parliament

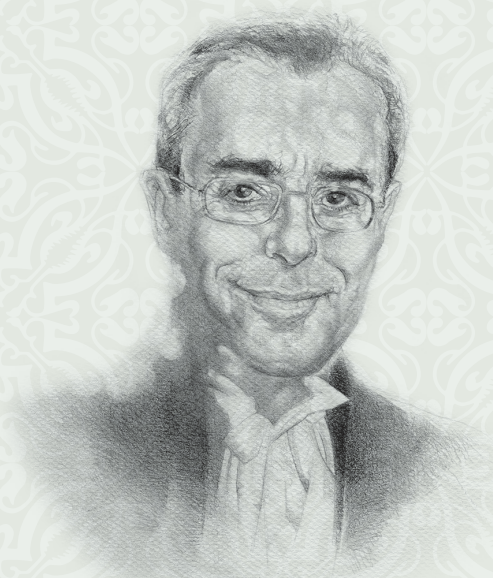
It is an enormous honour and pleasure to be
the Twenty-sixth Sultan Azlan Shah Law Lecturer.

Knowing, as I do, of His Royal Highness'
own distinguished contribution to, and interest in,
the development of public law, I want to speak
about a topic in that field.

Lord Pannick QC

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Scandalising the Judiciary: Criticism of Judges and the Law of Contempt



David Philip Pannick
(b. 7 March 1956)

David Philip Pannick, Lord Pannick QC was born on 7 March 1956. He read law at Hertford College, University of Oxford, where he obtained his Bachelor of Arts (Jurisprudence) degree as well as the prestigious Bachelor of Civil Law degree. He was called to the English Bar by the Honourable Society of Gray's Inn in 1979 and was made a Bencher in 1997. He became an Honorary Fellow of Hertford College, University of Oxford in September 2004.

Lord Pannick was appointed as a Queen's Counsel in 1992, and has been a Fellow of All Souls College, University of Oxford since 1978. He was Junior Counsel to the Crown (Common Law) from 1988 to 1992, a Recorder on the South Eastern Circuit from 1995 to 1998, and a Deputy High Court Judge from 1998 to 2005.

In 2008, Lord Pannick was appointed to a life peerage as a Crossbencher in the House of Lords as Baron Pannick of Radlett in the county of Hertfordshire.

Lord Pannick maintains a broad practice including Public Law and Human Rights; Media and Entertainment; Employment and Discrimination; Sports Law; EU and Competition; Professional Discipline; and Telecommunications.

He is held in the highest regard as one of the leading barristers of his time. Legal directories cite and commend Lord Pannick as “legendary”, “spectacular in all respects”, “an absolute dream to work with” and “a polymath to beat all polymaths” but to name a few. In 2012, *The Times* named Lord Pannick as one of the most influential lawyers in the UK, noting that Lord Pannick was described by one judge as “leader of the Crossbenchers” and having “incredible influence” in Parliament, and that Lord Pannick “is one of the country’s most powerful advocates”.

Lord Pannick has appeared in numerous landmark cases in the Appellate Committee of the House of Lords and in the new Supreme Court. He has appeared before the European Court of Justice in Luxembourg and in the European Court of Human Rights in Strasbourg, as well as the courts of Hong Kong, Brunei, Gibraltar and the Cayman Islands.

In *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, the last judgment delivered by the Appellate Committee of the House of Lords in July 2009 before the opening of the new Supreme Court, Lord Pannick acted for Debbie Purdy in this case which established that the Deputy Public Prosecutor has a duty to publish guidelines concerning his discretion to prosecute those who aided and abetted an assisted suicide abroad.

Lord Pannick also acted for an international firm of chartered accountants in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, where the UK Supreme Court considered the issue of whether the common law principle of legal advice privilege could extend to communications in connection with legal advice given by professional people other than lawyers, such as accountants and tax advisers.

In 2013, Lord Pannick acted for the Hong Kong Commissioner of Registration in the landmark constitutional case of *Vallejos v Commissioner of Registration* [2013] HKCFA 17, where the Hong Kong Court of Final Appeal had to decide whether Hong Kong legislation restricting foreign domestic helpers from qualifying for permanent residence contravened the Hong Kong Basic Law and was therefore unconstitutional.

Lord Pannick is an avid writer and writes a fortnightly column on legal matters for *The Times*, and is co-author and general editor with Lord Lester of Herne Hill QC of *Human Rights Law and Practice*, 3rd edition, 2009. He is the author of the legal classics *Judges*, Oxford University Press, 1987; *Advocates*, Oxford University Press, 1992; and *Judicial Review of the Death Penalty*, Duckworth, 1982. He is a member of the Editorial Board of *Public Law*, Sweet & Maxwell.

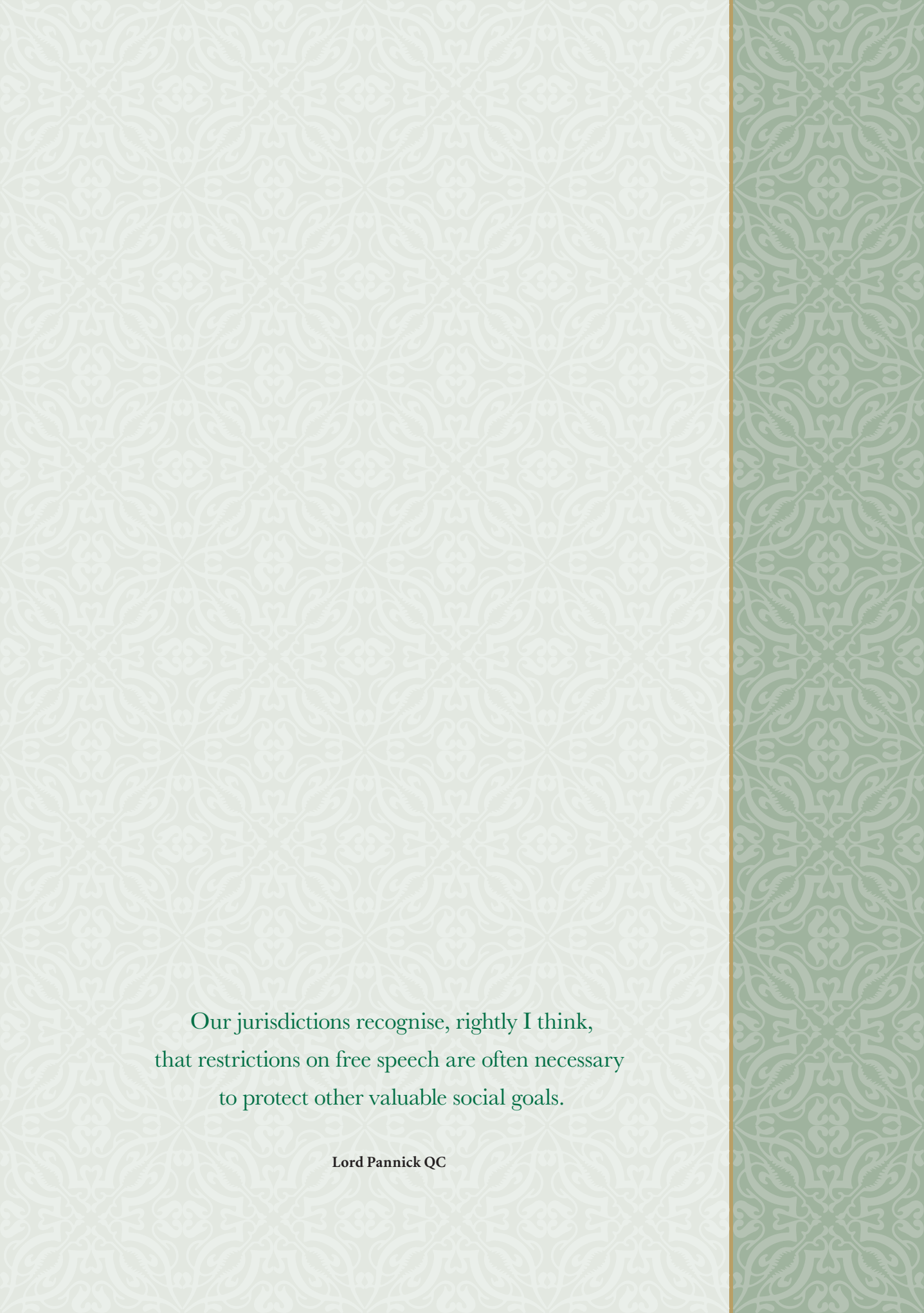
Lord Pannick is married to Lady Nathalie Trager-Lewis and has six children. He is a fan of Arsenal Football Club and the British television series *Coronation Street*.

Editor's note

Lord Pannick currently serves as a member of the Constitutional Committee of the House of Lords.

In 2016, Lord Pannick acted for the successful claimant in the landmark constitutional law case of *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, also known as the “Brexit” case, where the UK Supreme Court by a majority ruled that approval by Parliament was required before the Prime Minister could initiate proceedings under Article 50 of the Treaty of the European Union to take the United Kingdom out of the European Union. See further remarks on this case on pages 314, 340 and 348–349 below.

In 2019, Lord Pannick again acted for the successful claimant in *R (on the application of Miller) v the Prime Minister; Cherry and Ors v Advocate General for Scotland* [2019] UKSC 41, yet another landmark constitutional law case where the UK Supreme Court unanimously ruled that the Prime Minister had unlawfully advised Her Majesty to exercise her royal prerogative to prorogue Parliament. See further remarks on this case on pages 314 and 395 below.



Our jurisdictions recognise, rightly I think,
that restrictions on free speech are often necessary
to protect other valuable social goals.

Lord Pannick QC

Often, the criticism of a judge will not deserve a response.

In those rare cases where an answer is required,
it is wrong to suggest that judges cannot answer back
and so a criminal prosecution is the only remedy.

Lord Pannick QC



ROYAL ADDRESS

His Royal Highness Raja Nazrin Shah
Regent of Perak Darul Ridzuan

introducing

Lord Pannick QC

Twenty-sixth Sultan Azlan Shah Law Lecture

5 September 2012, Mandarin Oriental, Kuala Lumpur

Ladies and Gentlemen,

My father, His Royal Highness Sultan Azlan Shah was so very much wishing to attend this evening's lecture as he had done for the past 25 years. He was particularly looking forward to this lecture by the Honourable Lord Pannick.

His Royal Highness returned to Kuala Lumpur yesterday after undergoing successful medical treatment in London. However, on the advice of his personal physicians, he is unable to grace us with his presence this evening.

Lord and Lady Pannick,

HRH Sultan Azlan Shah and HRH Tuanku Bainun have asked me to convey their personal greetings to you both, and to extend their regrets to you for not being able to grace this evening's event.

Ladies and Gentlemen,

The Honourable Lord Pannick needs very little introduction. Your overwhelming presence here this evening is a testimony of his eminence.

Not only is Lord Pannick one of the most outstanding Queen's Counsel in the Commonwealth, he is also a Member of the British Parliament sitting in the House of Lords. Lord Pannick is an accomplished author, including two legal classics, the first on *Judges* and the second on *Advocates*. His brilliance in advocacy, his immense influence in law-making, and his thought-provoking writings are his hallmarks. He has been acknowledged as a "living-legend" and "the greatest barrister in the country". Lord Pannick is indeed a great jurist.

Ladies and Gentlemen, it now gives me great pleasure to invite The Honourable Lord Pannick to deliver the Twenty-sixth Sultan Azlan Shah Law Lecture.

Lord Pannick.



Legal ideas do not stop at passport control.

Lord Pannick QC

The modern offence of scandalising the judiciary recognises that some criticism of the judiciary is lawful. What is prohibited is abuse and unfounded allegations of judicial impropriety.

But it is unlikely to promote public confidence that the courts themselves assess whether allegations of impropriety against the judiciary are justified.

Scandalising the Judiciary:

Criticism of Judges and the Law of Contempt*

Lord Pannick QC

Life Peer, United Kingdom Parliament

Your Royal Highnesses, distinguished guests, ladies and gentlemen, it is an enormous honour and pleasure to be the Twenty-sixth Sultan Azlan Shah Law Lecturer. Knowing, as I do, of His Royal Highness' own distinguished contribution to, and interest in, the development of public law, I want to speak about a topic in that field. The truly great judges who have preceded me in giving this annual lecture, lawyers such as Lord Bingham, Lord Woolf and Lord Mackay, were rarely the subject of any criticism of their judgments, so it is an irony indeed that the subject of my lecture is insults to, and abuse of, the judiciary for performing their judicial function.

In 1900, Mr Justice Darling was the presiding judge at the Birmingham Spring Assizes. Mr Howard Gray, the editor of the local newspaper, the *Birmingham Daily Argus*, wrote

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Law Lecture delivered
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in the presence of
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Raja Nazrin Shah,
Crown Prince of
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Tuanku Zara Salim.*

a less than flattering article which the official Law Reports say, somewhat sanctimoniously, it was “unnecessary” to set out in detail.¹ Fortunately, another set of law reports, the *Law Times*, did inform its readers of the contents of the offending article, so preserving them for analysis by future generations of lawyers. In the article, Mr Gray described the judge as an “impudent little man in horsehair, a microcosm of conceit and empty-headedness”. Mr Gray added that “no newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt”. He suggested that the judge, assessed on his merits, would have been “a successful bus conductor”.²

Mr Gray’s invective, harsh though it sounds, was in fact kinder than the view of legal historians about Mr Justice Darling’s contribution to jurisprudence.³ But Mr Gray was charged with contempt of court. He swore a grovelling affidavit of apology, no doubt on legal advice. The Lord Chief Justice, Lord Russell, described the article as “scurrilous abuse of a judge in his character of a judge”. Finding contempt of court to be proved, the Lord Chief Justice said that but for the apology, the editor would have been sent to prison “for a not inconsiderable period of time”. Instead Mr Gray was fined £100 and ordered to pay the costs.⁴

Criticism of judges continues to be a risky activity in many jurisdictions, including the United Kingdom. The subject of my lecture this evening is the branch of the law

of contempt of court exemplified by Mr Gray's case: that is contempt by "scandalising the judiciary", or as Scottish law calls it, "murmuring judges". In this lecture I want to identify the range of cases around the common law world where this category of contempt continues to be applied, and then I want to assess whether scandalising the judiciary should remain a criminal offence.

I should make clear that I am not concerned in this lecture with other branches of the law of contempt. I am not addressing the contempts of court which occur when a person says or does something that impedes a fair trial in a civil or criminal court, or contempt in the face of the court, or a threat of physical violence to a judge or a statement which has public order consequences. What I am interested in this afternoon are critical, rude or downright offensive comments made out of court about judges and justice which do not impede justice in specific proceedings.

After Mr Gray's case in 1900, there were another five successful prosecutions in England for scandalising the judiciary in the early decades of the 20th century. They involved an aggrieved litigant who was sentenced to four months' imprisonment for walking up and down outside the Law Courts in the Strand with a placard accusing the President of the Probate Division and Admiralty Division of the High Court of being "a traitor to his duty";⁵ another dissatisfied litigant was imprisoned for eight months for sending a series of letters to a judge, Mr Justice Roche,

accusing him of being “a liar, a coward, a perjurer”, and who unwisely told the court that he “withdrew nothing and apologised for nothing”;⁶ the editor of the *New Statesman* magazine avoided a prison sentence after apologising for an article stating that the birth control pioneer, Marie Stopes, had no hope of receiving a fair hearing from Mr Justice Avory when he presided over a libel claim brought against her, “and there are so many Avorys”;⁷ three men were imprisoned for an article in the *Daily Worker* newspaper which suggested that Mr Justice Swift was a “bewigged puppet” who had displayed “a strong class bias” in sending Communist leaders to prison;⁸ and the fifth and final case concerned the editor of the magazine, *Truth*, whose title was misleading, who was fined for publishing an article suggesting that Lord Justice Slesser could not have taken an impartial view on legislation being applied in his court because, as Solicitor-General, he had steered the relevant statute through Parliament.⁹

That was the last successful prosecution for this branch of contempt of court in England, though there have since been, as I shall explain, many successful prosecutions in other parts of the world.

Two important cases in London recognised that the law must allow for a right to criticise the judiciary. In 1936, the Privy Council allowed an appeal from the judgment of the Supreme Court of Trinidad and Tobago which had fined the editor of the *Port of Spain Gazette*, Andre Ambard,

£25 for publishing an article critical of the local courts for alleged inequality in sentencing in criminal cases. Lord Atkin, for the Board, stated that “no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice”.

Lord Atkin explained that “the wrong-headed are permitted to err”, so a contempt could not be established by proving that the criticism of the judiciary was unjustified. He emphasised that “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”.

Lord Atkin concluded that the case before the Privy Council “concerns the liberty of the Press, which is no more than the liberty of any member of the public, to criticise temperately and fairly, but freely, any episode in the administration of justice”.¹⁰

Applying these principles, the Court of Appeal in 1968 dismissed an application for alleged contempt brought by a private individual, Mr Raymond Blackburn, against Mr Quintin Hogg MP, later Lord Chancellor Hailsham. Mr Hogg had written a magazine article criticising a Court of Appeal decision on gaming law. Mr Hogg’s article suggested that the Court of Appeal should “apologise for the expense and trouble” to which it had put the police.¹¹

The Court of Appeal held that the article was “erroneous” but “errors do not make it a contempt of court”.¹² Lord Denning pointed out that the contempt powers of the court should not be used as a means to uphold judicial dignity. He emphasised: “We do not fear criticism, nor do we resent it.” *

Lord Denning explained why the courts did not fear or resent criticism. It was because,

there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man ... to make fair comment, even outspoken comment, on matters of public interest.¹³

Lord Justice Salmon added that “the authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism”.¹⁴

The judgments in *Ambard* and *Blackburn* emphasised the importance of free speech in relation to criticism of the courts but they also made clear that there are limits to freedom of expression in this context. In *Ambard*, the 1936 decision of the Privy Council, Lord Atkin said that critics of the judiciary were required to “abstain from imputing improper motives to those taking part in the administration of justice” and the critic must be “genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice”.¹⁵

In the *Blackburn* case, Lord Justice Salmon said that “no criticism of a judgment, however vigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith”.¹⁶

“Lord Denning pointed out that the contempt powers of the court should not be used as a means to uphold judicial dignity. He emphasised: “We do not fear criticism, nor do we resent it.”

When I was a student at Oxford University in the 1970s, the law of scandalising the judiciary was regarded as an historical curiosity, with little if any contemporary relevance. In 1984, in the Appellate Committee of the House of Lords, Lord Diplock described the application of contempt law to statements “scandalising the judges” as “virtually obsolescent in England”.¹⁷ Lord Diplock’s statement echoed what had been said by Lord Morris in 1899 for the Privy Council. The Board considered an appeal against a sentence of 14 days’ imprisonment imposed on the agent of a newspaper in Grenada in the Caribbean which had published articles critical of the acting Chief Justice of St Vincent. One of the articles had described him as “a briefless barrister, unendowed with much brain”. In allowing the appeal, on technical grounds, Lord Morris

said that contempt of court by scandalising the judiciary had become “obsolete” in the United Kingdom. That was a year before the prosecution of Mr Gray. Lord Morris added (in words that bring no credit on the Privy Council) that

in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.¹⁸

A branch of the law declared to be obsolete in 1899 and 1984 refuses to lie down. As Mark Twain said of an obituary published during his lifetime, the report of the death was an exaggeration. Prosecutions for contempt by scandalising the judiciary have continued to be brought over the last 30 years in many jurisdictions and some of them have succeeded.

In 1982, the Privy Council upheld a conviction for scandalising the judiciary in Mauritius by an allegation of judicial bias, the judgment in the Privy Council being delivered by Lord Hailsham, the Lord Chancellor, as Quintin Hogg had by then become.¹⁹ Neither of the parties referred to one of the leading authorities: the 1968 Court of Appeal judgment concerning Mr Hogg’s magazine article.

In New Zealand, in 1977, the Court of Appeal upheld a fine imposed on a radio station which had broadcast a news

item which wrongly suggested that a judge had improperly dismissed a serious criminal charge behind closed doors. The court said that the comment was unfair and false in alleging judicial impropriety. The court explained that the basis of this branch of the law of contempt is that “it is contrary to the public interest that public confidence in the administration of justice should be undermined”.²⁰

In Australia, in 1983, the High Court refused to grant leave to appeal against the finding by the Federal Court that a trade union leader was guilty of contempt, and should be sent to prison for three months, for stating that a court had allowed an appeal in an earlier case because of strike action by workers. Gibbs CJ stated:

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.²¹

In 1987, the Court of Appeal of Ontario, in Canada, allowed an appeal by a lawyer who had been convicted of scandalising the judiciary by what one judge in the Court of Appeal described as “the whining of an unhappy loser”.²² The lawyer had told a newspaper reporter that the decision against his client was “a mockery of justice. It stinks to high hell”²³—a feeling that all advocates have had, though most of us express such views only to our sympathetic spouses or our domestic pets. The Canadian court of five judges agreed

that the comments did not amount to a contempt, though they were badly split as to the reasons for that conclusion. However, the majority said that the offence of scandalising the judiciary was not of itself inconsistent with the right to free speech.²⁴

In Hong Kong, in 1999, the Court of Appeal upheld a sentence of four months' imprisonment on the editor of the *Oriental Daily News*, a Chinese-language newspaper, for acts of contempt which included scandalising the judiciary. The newspaper, annoyed by adverse decisions by the courts and by the Obscene Articles Tribunal, published a series of abusive and offensive articles, impugning the integrity of the judiciary and the tribunal and abusing them as “scumbags”, “pigs” and “dogs”, with various additional epithets.²⁵ The Appeal Committee of the Court of Final Appeal refused leave to appeal.²⁶

Also in 1999, the Supreme Court of India held that scandalising the judiciary is a criminal offence consistent with the constitutional right to free speech. Chief Justice Dr Anand said that while the court should avoid being over-sensitive, “vulgar debunking cannot be permitted to pollute the stream of justice”.²⁷

In the same year, 1999, the Court of Appeal of Malaysia sent a journalist to prison for six weeks for contempt of court by scandalising the judiciary. He had written an article which stated that a civil claim brought by the wife of

a Malaysian judge on behalf of her son had been improperly expedited because of the father's status.²⁸

In Zimbabwe, in 2000, the Supreme Court held that the offence of scandalising the judiciary was compatible with the constitutional right to freedom of speech. Chief Justice Anthony Gubbay said that judges, unlike most public figures, "have no other proper forum in which to reply to criticisms" and so they deserve protection against allegations of "improper or corrupt motives or conduct".²⁹ The case concerned highly critical comments by the Attorney-General, later the Minister of Justice of Zimbabwe, about a judicial decision. Those comments were later held to be a contempt of court and a fine was imposed on the Minister.³⁰

In South Africa, in 2001, the Constitutional Court held that the offence of scandalising the judiciary continued to apply, particularly in relation to statements "reflecting adversely on the integrity of the judicial process or its officers" and which were "likely to damage the administration of justice". Justice Kriegler, for the Court, recognised that the scope for conviction on a charge of scandalising the judiciary must be "narrow indeed if the right to freedom of expression is afforded its appropriate protection". On the facts, the court allowed the appeal by an official who had been convicted for commenting that a judge had made a mistake in granting bail to an offender.³¹

In Singapore, in 2011, the Court of Appeal upheld a sentence of six weeks' imprisonment on an author who had written a book suggesting that the decisions of the courts in death penalty cases were influenced by political considerations. Justice of Appeal Andrew Phang Boon Leong, for the Court of Appeal, identified the fundamental purpose of the law relating to scandalising the judiciary as "to ensure that public confidence in the administration of justice is not undermined". The Court of Appeal found that the book contained "a series of fabrications, distortions and false imputations in relation to the courts of Singapore". While recognising that the appellant was free to engage in the debate for or against capital punishment, he was not free, said the court, to "scandalise the very core of the mission and function of the judiciary".³²

“It is unlawful to insult the judiciary with scurrilous abuse, or to allege bad faith or a lack of impartiality, at least where there is no reasonable basis for such criticisms.”

So the common law of scandalising the judiciary remains alive and active in many parts of the common law world. The case-law recognises three main principles. The first is that judges, like other public servants, are subject to criticism. In this context, as in others, freedom of expression is a core value of a free society.

The second principle of the common law is that there are limits to freedom of speech in this context. It is unlawful to insult the judiciary with scurrilous abuse, or to allege bad faith or a lack of impartiality, at least where there is no reasonable basis for such criticisms.

The third principle of the common law is that the justification for the criminal offence, and therefore the circumstances in which it may be applied, are based not on protection of the dignity of the individual judge but on the need to maintain public confidence in the administration of justice. The argument was stated by Justice Kriegler for the South African Constitutional Court in 2001:

Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.³³

Similar reasoning has been expressed by many other judges.³⁴

The European Court of Human Rights has accepted that, in principle, States may use the criminal law to protect courts from unfounded attacks by way of insults or allegations of bias in order to maintain the public confidence that judges need to be able to perform their function of

upholding justice under the rule of law.³⁵ Severe sanctions have, on occasions, been overturned by the European Court as disproportionate, as in the case of a man sent to prison for eight months in Poland for writing a letter to the President of the Regional Court describing his judicial colleagues as “irresponsible clowns”.³⁶ But the European Court has not questioned the validity of laws which penalise abuse of the judiciary or criticism which impugns judicial integrity.

All of this amounts to a formidable quantity and quality of judicial authority across the common law world. But is it persuasive? The question of principle remains: should the offence of scandalising the judiciary remain part of the law? That issue is currently being considered by Parliament in London. The impetus for reconsideration of whether to retain the common law offence is the attempt, earlier this year, to prosecute Mr Peter Hain MP, the former Secretary of State for Northern Ireland. In 2011, Mr Hain published his autobiography. He was critical of the way in which a Northern Ireland High Court Judge, Mr Justice Girvan (now a Lord Justice), had, a few years earlier, dealt with a judicial review application against one of Mr Hain’s decisions. Mr Hain described the judge’s conduct as “high-handed and idiosyncratic” and said he “thought the judge off his rocker”.³⁷ All authors hope that their work will attract a wide audience. But not necessarily an audience in the Attorney-General’s department. Mr John Larking QC, the Attorney-General for Northern Ireland, brought proceedings against Mr Hain in the High Court of Northern

Ireland alleging that the comments were in contempt of court. The legal proceedings attracted very considerable criticism, and indeed far more attention than Mr Hain's book would otherwise have received. Mr Larkin withdrew the charge of contempt after Mr Hain made clear in a letter that he had not intended to question the motivation or capabilities of the judge. Mr Larkin concluded that he no longer believed there was any risk of damage to public confidence in the administration of justice.³⁸

As a result of this failed prosecution, I, as a member of the House of Lords, tabled an amendment to the Crime and Courts Bill during the Committee Stage this summer to abolish the common law offence of scandalising the judiciary. The amendment was signed by, amongst others, Lord Mackay of Clashfern, a former Lord Chancellor. I suggested that Mr Hain was entitled to express criticism of a judicial judgment, whether his views are right or wrong (on which I take no position), respectful or outspoken. During the debate in the House of Lords in June, the amendment was supported by Lord Carswell, a former Lord Chief Justice of Northern Ireland and a former member of the Appellate Committee of the House of Lords. He said that the offence of scandalising the judiciary was not necessary and that if judges were unjustly criticised (as he had been), "they have to shrug their shoulders and get on with it".³⁹ The Minister, Lord McNally, gave the amendment a cautious welcome and said that the Ministry of Justice wanted to consult with the judiciary over the summer before deciding whether to

support the amendment at Report Stage.⁴⁰ As a result of the debate in Parliament, the Law Commission of England and Wales expedited the publication of a consultation paper in which it proposed that the offence of scandalising the judiciary should be abolished.⁴¹

There are four main points which I think are central to an analysis of whether to maintain this criminal offence. I emphasise that the strength or otherwise of these points will depend on the circumstances in each jurisdiction. I am certainly not presuming to advise you what the law should be in Malaysia or indeed in any other jurisdiction. Though I would hope that the points I make may be considered relevant in each jurisdiction. Legal ideas do not stop at passport control.

The first point is that the offence of scandalising the judiciary is based on assumptions which seem to me to be very dubious indeed. This criminal offence assumes not only that public confidence in the administration of justice would be undermined by critical comments but also that such confidence is maintained or restored by a criminal prosecution, or the threat of a criminal prosecution. The true position is surely as stated by Houlden JA in the Ontario Court of Appeal:

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.⁴²

If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises. The paradox of this area of the law is that the statements most likely to undermine public confidence in the judiciary—one hopes this is never the case in any of the jurisdictions in which these issues have arisen—are those that are true or at least have some basis.

The irony is that public confidence is surely undermined far less by a hostile book or newspaper comment that would otherwise have been ignored than by maintaining and applying a criminal offence which suggests that the judiciary is such a delicate flower that it, alone amongst public institutions, needs protection from criticism and cannot maintain its reputation by public perception of how it actually performs its functions.

The second point is that the existence of a criminal offence of scandalising the judiciary will inevitably deter people from speaking out on perceived judicial errors. Judges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance. The damage done by the maintenance of this offence substantially outweighs, in my opinion, any possible good that it achieves.⁴³ Indeed, there is a particular reason of principle why judges should not impose restrictions on free speech that relates to the

performance of their own functions. Justice Albie Sachs pointed out in the South African Constitutional Court that “as the ultimate guardian of free speech, the judiciary [should] show the greatest tolerance to criticism of its own functioning”.⁴⁴

“Judges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance.”

The third point is that the modern offence of scandalising the judiciary recognises that some criticism of the judiciary is lawful. What is prohibited is abuse and unfounded allegations of judicial impropriety.⁴⁵ But it is unlikely to promote public confidence that the courts themselves assess whether allegations of impropriety against the judiciary are justified. As for abuse, there are serious difficulties with a criterion which is based on politeness, and not just as to whether it should really be the function of the criminal law to enforce polite behaviour. As Cory JA said in the Ontario Court of Appeal,

Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the

interest and imagination of the public to the need for reform, and to suggest the manner in which that reform may be achieved.⁴⁶


The fourth point is that where criticism deserves a response, there are other means of answering it than a criminal prosecution. Often, the criticism of a judge will not deserve a response. A wise judge follows the advice of Lord Justice Simon Brown (now Lord Brown of Eaton-under-Heywood) in a case in 1999: “a wry smile is, I think, our usual response and the more extravagant the allegations, the more ludicrous they sound”.⁴⁷ As Lord Morris said for the Privy Council in 1899, judges are “satisfied to leave to public opinion attacks or comments derogatory or scandalous to them”.⁴⁸ In those rare cases where an answer is required, it is wrong to suggest that judges cannot answer back and so a criminal prosecution is the only remedy. In London, the Lord Chief Justice gives regular press conferences to address issues of judicial administration. He can make a public statement in answer to criticisms, where appropriate. The equivalent senior judge in other jurisdictions could respond in similar ways if critical comments are thought to deserve an answer.

Although contempt of court is not concerned to protect the reputation of an individual judge,⁴⁹ it is relevant that there is a remedy in libel law for false and critical allegations about a particular judge. Mr Justice Popplewell won damages of £7,500 from a newspaper in 1992 for libel after it wrongly suggested that he fell asleep during a murder

trial.⁵⁰ Last year, Lord Justice Sedley won an apology in the High Court after bringing libel proceedings in respect of false statements in the *Daily Telegraph* about his conduct of a case.⁵¹

“Respect for the judiciary, so vital to the maintenance of the rule of law, is undermined rather than strengthened by the existence and use of a criminal offence which provides special protection against free speech relating to the judiciary.”

The conclusion which I have reached on this interesting area of law—I hope this audience finds it as interesting as I do—is that respect for the judiciary, so vital to the maintenance of the rule of law, is undermined rather than strengthened by the existence and use of a criminal offence which provides special protection against free speech relating to the judiciary. Other legal systems do not share the commitment of the United States to freedom of expression. Our jurisdictions recognise, rightly I think, that restrictions on free speech are often necessary to protect other valuable social goals. But there is force in the comment by Mr Justice Black for the United States Supreme Court in a 1941 judgment overturning a fine on newspapers for critical comments about pending litigation. The judge doubted that

“respect for the judiciary can be won by shielding judges from published criticism”. He added that “an enforced silence ... would probably engender resentment, suspicion and contempt much more than it would enhance respect”.⁵² Respect for the courts will be all the stronger “to the degree that it is earned, rather than to the extent that it is commanded”.⁵³ The offence of scandalising the judiciary should be abolished. 

Editor's note

*The original title of this lecture was “*We do not fear criticism, nor do we resent it.*” (Lord Denning)—*Scandalising the Judiciary: Criticism of Judges and the Law of Contempt*.

The title of the lecture was modified for the purposes of this publication.

Endnotes

- 1 *R v Gray* [1900] 2 QB 36, 37.
- 2 *R v Gray* 82 LT Reports 534 (1900).
- 3 See, for example, *Dictionary of National Biography* 1931–40, LG Wickham Legg (ed), 1949, page 211: “in charges of less gravity he often allowed himself to behave with a levity quite unsuited to the trial of a criminal case. ... [He] frequently lost the respect of the jury to such an extent that they ignored or paid little attention” to him.
- 4 [1900] 2 QB 36, 39–42.
- 5 *R v Vidal*, *The Times*, 14 October 1922.
- 6 *R v Freeman*, *The Times*, 18 November 1925 and *Arlidge, Eady & Smith on Contempt*, 4th edition, 2011, paragraph 5-228. He threatened to continue sending the judge three such letters a day.
- 7 *R v Editor of the News Statesman*, *ex parte DPP* (1928) 44 TLR 301.
- 8 *R v Wilkinson*, *The Times*, 16 July 1930 and *Arlidge, Eady & Smith on Contempt*, 4th edition, 2011, paragraph 5-230. At the hearing, the defendants refused to apologise and repeated the allegations.
- 9 *R v Colsey*, *The Times*, 9 May 1931.
- 10 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335–337.
- 11 *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No 2)* [1968] 2 QB 150. Mr Hogg had suggested that the relevant legislation had been “rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous decisions of the courts, including the Court of Appeal”.
- 12 See Lord Denning MR at pages 154G and 155E.

See also Lord Justice Salmon at page 156D–E on the “inaccuracies and inconsistencies” in the article. And Lord Justice Edmund Davies said at pages 156G–157B that it was “open to doubt” whether Mr Quintin Hogg’s article had “paid proper respect to the standards of accuracy, fairness and good taste”, but that his Lordship’s “conclusions regarding the fairness and good taste of the article in question are immaterial”.

- 13 Ibid, at page 155A–C.
- 14 Ibid, at page 155F.
- 15 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335.
- 16 *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No 2)* [1968] 2 QB 150, 155G.
- 17 *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339, 347A.
- 18 *McLeod v St Aubyn* [1899] AC 549, 554 and 561.
- 19 *Badry v Director of Public Prosecutions* [1983] 2 AC 297. Concerning an allegation of judicial bias, Lord Hailsham of St Marylebone LC said at page 304G that “nothing really encourages courts or Attorneys-General to prosecute cases of this kind in all but the most serious examples, or courts to take notice of any but the most intolerable instances”.
- 20 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 230–231 (Richmond P for the Court of Appeal of New Zealand). A real risk of undermining public confidence sufficed; there was no need for the prosecution to show a clear and present danger of a court being influenced or impeded in the administration of justice (page 234).

Recent cases where scandalising the judiciary has been established include *Solicitor-General v Smith* [2004] 2 NZLR 540 (High Court of New Zealand). See ATH Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (April 2011), pages 68–71.

- 21 *Gallagher v Durack* (1983) 152 CLR 238, 243. The trade union leader’s statement was “insinuating that the Federal Court had bowed to outside pressure in reaching its decision”, an unwarranted imputation of a “grave breach of duty by the court” (page 244). One of the five judges, Murphy J, dissented from the decision to refuse leave to appeal. He stated at page 246 that a “clear and present danger to judicial administration” was required before such a contempt could be proved as this would involve “a better balance between the conflicting interests of free speech and of integrity of the judicial system”.

See also *Re Colina, ex parte Torney* (1999) 200 CLR 386 (High Court of Australia); *R v Hoser & Kotabi Pty Ltd* [2003] VR 194 (Supreme Court of Appeal of Victoria); and *Attorney-General for the State of Queensland*

v Colin Lovatt QC [2003] QSC 279 where Chesterman J in the Supreme Court of Queensland held a senior counsel in contempt by scandalising the judiciary by stating of the magistrate—during court proceedings while representing a client—“This bloke’s a complete cretin”.

Chesterman J concluded: “It conveyed, and I have no doubt was meant to convey, the imputation that [the Magistrate] was an idiot, a simpleton, who lacked the necessary intellectual power to discharge the important functions of his judicial office. ... Few things could be more likely to impair the authority of the courts than to have it stated publicly that a judicial officer is mentally deficient and thereby incapable of performing his function”.

22 *R v Kopyto* (1987) 47 DLR (4th) 213, 223–224 (Cory JA).

23 *Ibid*, at page 219.

24 One judge held that an offence of scandalising the judiciary was inconsistent with the right to freedom of expression under the Canadian Charter of Rights. Two judges held that the offence was committed only if the publication created a substantial and immediate danger to the administration of justice. And the other two judges held that the offence could be established only if the publication created a serious risk of bringing the administration of justice into disrepute. They all agreed that the offence was not established on the facts.

25 *Wong Yeung Ng v The Secretary for Justice* [1999] HKCA 382 at paragraph 53 where Vice-President Mortimer said that “sustained scurrilous, abusive attacks made in bad faith, or conduct which challenges the authority of the court, are not susceptible of reasoned answer. If they continue unchecked they will almost certainly lead to interference with the administration of justice as a continuing process”.

See also *Secretary for Justice v Choy Bing Wing* [2011] HKCFI 30.

26 Mr Justice Litton PJ said, for the majority of the Appeal Committee of the Court of Final Appeal (one judge out of three dissented): “Where the contemnor goes way beyond reasoned criticism of the judicial system and acts in bad faith, as the applicant has done in this case, the guarantee of free speech cannot protect him from punishment”: *Wong Yeung Ng v The Secretary for Justice* [1999] HKCFA 51 at paragraph 11.

- 27 *Narmada Bachao Andolan v Union of India* AIR 1999 SC 3345, 3346–3347, paragraph 6.
 - 28 *Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321; [1999] 4 AMR 4005.
 - 29 *Re Chinamasa* (2000) 12 BCLR 1294, 1309–1310.
 - 30 *BBC News Website*, 18 July 2002.
 - 31 *The State v Mamabolo* (2001) 3 SA 409 (CC), at paragraphs 33, 45 and 61.
 - 32 *Shadrake v Attorney-General* [2011] SGCA 26 (27 May 2011) at paragraphs 22 and 143.
 - 33 *The State v Mamabolo* (2001) 3 SA 409 (CC), at paragraphs 16–20.
 - 34 See, for example, Lord Steyn for the Privy Council in 1999 in upholding the constitutional validity of the offence of scandalising the judiciary in Mauritius, where a newspaper had falsely alleged that the Chief Justice had selected which judges should hear his libel claim against a politician: *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 305–306.
 - 35 See *Barfod v Denmark* (1989) 13 EHRR 493, 500–501, paragraphs 33–34; *Prager v Austria* (1995) 21 EHRR 1, 19–21, paragraphs 34–38; and *De Haes v Belgium* (1997) 25 EHRR 1, 55–56, paragraphs 46–49, and in particular at paragraph 37: “The courts—the guarantors of justice, whose role is fundamental in a state based on the rule of law—must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism”.
- See also *Zugic v Croatia* (Application No 3699/08, 31 May 2011) at paragraphs 46–49.
- 36 *Skalka v Poland* (2003) 38 EHRR 1, 10, paragraph 45. The European Court has also overturned some criminal sanctions on the basis that it was not necessary to restrict free speech where the criticism of judges was on a matter of public interest: see, for example, *Hrico v Slovakia* (Application No 49418/99, 20 July 2004); and *Amihalachioaie v Moldova* (2005) 40 EHRR 833, 840, paragraphs 35–36.
 - 37 Peter Hain, *Outside In* (Biteback Publishing Ltd, 2012), pages 332–333.

- 38 *The Guardian*, 17 May 2012.
- 39 *Hansard*, House of Lords, 2 July 2012, columns 555–566. Lord Carswell’s speech is at column 561.
- 40 Columns 563–564.
- 41 Law Commission Consultation Paper No 207, “Contempt of Court: Scandalising the Judiciary” (10 August 2012).
- 42 *R v Kopyto* (1987) 47 DLR (4th) 213, 255. Cory JA added at page 227: “the courts are not fragile flowers that will wither in the hot heat of controversy”.
- 43 See Clive Walker, “Scandalising in the Eighties” (1985) 101 LQR 359, 381–384.
- 44 *The State v Mamabolo* (2001) 3 SA 409 (CC) (Sachs J, concurring judgment), paragraph 78.
- 45 See *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 306B–E (Lord Steyn for the Judicial Committee of the Privy Council).

See also, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 32 and 38–39 (Mason CJ and Brennan J in the High Court of Australia); *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 229–230 (Richmond P for the Court of Appeal of New Zealand); and *Shadrake v Attorney-General* [2011] SGCA 26 (Andrew Phang Boon Leong JA for the Court of Appeal of Singapore, 27 May 2011) at paragraphs 83–84.
- 46 *R v Kopyto* (1987) 47 DLR (4th) 213, 226 .
- 47 *Attorney-General v Scriven* CO 1632/99 (Divisional Court) as quoted in *Arlidge, Eady and Smith on Contempt*, 4th edition, 2011, footnote to paragraph 5-207.
- 48 *McLeod v St Aubyn* [1899] AC 549, 561.
- 49 See *The State v Mamabolo* (2001) 3 SA 409 (CC) (Kriegler J for the Constitutional Court of South Africa), paragraph 24: “it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such”.

- 50 *The Times*, 22 and 24 July 1992.
- 51 *The Guardian*, 9 March 2011. See also *Arlidge, Eady and Smith on Contempt*, 4th edition, 2011, paragraph 5-208.
- 52 *Bridges v State of California* 314 US 252, 270–271 (1941).
- 53 *The State v Mamabolo* (2001) 3 SA 409 (CC) (Sachs J, concurring judgment in the Constitutional Court of South Africa), paragraph 78.

The paradox of this area of the law is that the statements most likely to undermine public confidence in the judiciary are those that are true or at least have some basis.

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