

THE CONTEMPT OF COURT: BALANCE BETWEEN THE PROTECTION OF THE ADMINISTRATION OF JUSTICE AND THE RIGHT TO FREEDOM OF EXPRESSION

Vladyslav Teremetskyi, West Ukrainian National University
Oleksandr Korovaiko, Kherson Court of Appeals
Maryna Vasylenko, Sumy branch of Kharkiv National University of Internal Affairs

Yaroslav Zhuravel, Academy of Labor, Social Relations and Tourism
Oleksii Khovpun, Academy of Labor, Social Relations and Tourism
Viktor Kravchenko, Academy of Labor, Social Relations and Tourism
Halyna Muliar, Academy of Labor, Social Relations and Tourism

ABSTRACT

The article deals with contempt of court in context finding the balance between the protection of the administration of justice and the right to freedom of expression. The function of the law of contempt is to preserve this right while ensuring that the courts retain the power to deal with conduct that undermines the proper administration of justice. Prosecution for contempt of court in the world is used as a way in which the justice system protects the smooth running of the trial and the administration of justice, non-interference in the trial by illegally disclosing information about the process. The balance between the protection of the administration of justice and the right to freedom of expression during the prosecution for contempt of court lies in the fact that in each case it is necessary to investigate in detail the content of the expression or statement to establish its nature, which is crucial in deciding whether to prosecute a person for contempt of court. Restrictions on freedom of expression must be subject to real analysis and must have a convincing justification. No restriction of freedom the expression and contempt of court will be established unless it can be demonstrated that the risk of prejudice to the administration of justice is not outweighed by the public interest in freedom of discussion on matters of public concern.

Keywords: Contempt of Court, The Right to Freedom of Expression, Freedom of Speech, Freedom of Expression of Opinions and Views, The Administration of Justice, The Justice System, Media, European Court of Human Rights

INTRODUCTION

Freedom of expression is one of the basic human rights, which strengthens all other rights, allowing society to develop and progress. Freedom of expression is the basis for a free and democratic society and a necessary condition for the promotion and protection of human rights. The right to a fair court is the right of a person, which guarantees her fair and public consideration of the case during a reasonable period by an independent and non-partisan court established by the law. Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights protect both freedoms of expression and the administration of justice.

It has long been recognised that the courts have the power to punish as contempt any act which disrupts the trial process by defying the court's authority. In every national legal system, judges have the right to sanction contempt of court to ensure the administration of justice and the

rule of law and to maintain and strengthen public confidence in the judiciary. Interference with the administration of justice, influence on the court or judges in any way, contempt of court or judges, collection, storage, use and dissemination of information orally, in writing or otherwise to discredit the court or influence the impartiality of the court, calls for non-compliance court decisions are prohibited and result in liability. However, there is a significant tension between freedom of expression and the administration of justice. Today it is not always easy to balance freedom of expression with the needs of the justice system, to find the limit where there is freedom of expression and the fair administration of justice. Therefore, relevant today, finding the balance between the protection of the administration of justice and the right to freedom of expression.

RESULTS

Accountability for contempt of court in the world is used as a means by which the justice system protects the smooth running of the judicial process and the administration of justice. Contempt proceedings are used to protect the activities of the court and to prevent interference in the judicial process by unlawfully publicizing the status of the proceedings or by disrupting the work of the court during hearings. The legal regulation of contempt of court differs between states: in some states, contempt of court is provided for in the Constitution (India), in other cases is settled by case law (Canada, Australia, Ireland, United Kingdom), by special contempt of court laws (Great Britain, New Zealand), India) or other laws that deal in part with contempt of court (USA, Canada, Australia, Poland, France). Analysis of the case law and laws of various States concerning contempt of court allows us to identify two types of liability to which a person may be liable for acts constituting contempt of court: civil and criminal. There is a difference between civil and criminal liability. In civil proceedings, the court seeks to re-educate the person and compel him to do what the person did not want to do, that is to say, to enforce shortly a previously violated binding court order. The purpose of criminal liability is to punish a person and uphold the authority of the courts, that is to say, to punish a violation of a court order which is prohibited from committing or refraining from committing certain acts (Smith, 1995).

It should be noted that in deciding the question of prosecution for contempt of court, the court does not protect its dignity from insult or injury, but rather protects and upholds the rights of the parties to the proceedings to ensure the administration of justice is not distorted or biased. The contempt of court involves a wide variety of behaviours, which can be divided into several categories:

1. Contempt in the face of the court (the courtroom misconduct, interrupting a judge, commenting on the process, taking pictures, insulting a judge, yelling at a judge, disrupting the court proceedings, or becoming violent in the courtroom, scandalizing the court);
2. Contempt of court expressed in violation of court orders (the refusal to comply with a court order or obligation given to the court, disobedience to the judgments);
3. Contempt of court related to breach of official duties by a person involved in court proceedings (lawyer, witness, juror). Such contempt occurs when persons who have special duties before the court or who play a special role in the proceedings fail to fulfil their duties before the court) (Fernando, 2005; Chan, 2011; Watson, 2021).

Recently, publications and public speeches have also been included as contempt of court. The growth in the use of the Internet, which plays an important role in improving public access to news and in facilitating the dissemination of information in general, and the ability to store and transmit large amounts of information have led to new challenges to justice system. To begin with, it is erroneous to think that freedom of expression is a lack of control, interference and restraint. Freedom of expression constitutes one of the essential foundations of a democratic society, it applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population. Freedom of expression is the right to express one's views, ideas, feelings and thoughts without the control, service or restriction of the State. The right to freedom of expression encompasses all forms of expression, oral and written, and in most cases involves the

active action of the individual, such as posting a publication in the text, photo or video (or a combination thereof) from which other users can understand the ideas and opinions of this person, public speaking, giving interviews, etc.

Freedom of expression has become important in the context of the potential of the Internet as an interactive and global medium, a universal network that knows no borders, where uploaded information becomes available globally. With the development and spread of the Internet, opportunities for the expression of one's thoughts are growing at a very rapid pace, and with them the challenges of freedom of expression. The obligations that States have undertaken to protect human rights are taking on new dimensions.

Ensuring the freedom of expression is a complex challenge that raises several major points of legal and ethical issues, social and political issues and opens up cultural and economic dimensions that must be considered. The media are part of everyday life. It is through the media that problems of corruption, violence, public security and other sensitive issues are not neglected. Publicly speaking and publishing certain information about the trial, such persons can serve as the «watchdogs» of the society, and their criticism may not be recognized as a groundless and destructive attack on the judge or judicial system as such.

The Media is a Powerful Vehicle for Mass Communication

The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (ECHR, 1995; Prager & Oberschlick vs. Austria).

However, the basic assumption that freedom of the media is necessary to present to the public all points of view on public issues and to give a truthful account of events to enable everyone to form an opinion on every issue is defeated if everyone will submit a biased or pre-disposed report on the news and advocate only one of the solutions put forward by the media owners, the power elite, the editor-in-chief etc. In such a case, it is necessary to have all the information of all the media to obtain appropriate and exhaustive material for selection or determination. The greatest source of abuse of modern media is the fact that it emerged as a tool of free debate in a democracy, but that over time it has largely become a servant of commercial propaganda.

Of course, the “court cannot operate in a vacuum” (ECHR, 1979; the *Sunday Times vs. the United Kingdom*), healthy and constructive criticism is a necessary sign for the development of democracy, but the important issue here is when this criticism is made and in what way. Media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Factors to be considered in determining whether a publication has the necessary tendency to cause serious prejudice to a trial include the nature and the extent of the publication, the mode of the trial (whether by judge or jury) and the time which will elapse between publication and trial (*The Judicial Commission of New South Wales, 2021*). In an era when social media are filled with critics, commentators, and observers who consider it necessary to express their views in many uncontrollable and unhindered ways, there has been a growing tendency on the part of the media to check the boundaries of acceptable notifications of criminal cases. Sometimes it seems that the media has lost any sense of inner constraint and feels the ability to report what it wants, protected by the right to «freedom of expression» without any attendant duties. For example, the premature publication of evidence may tend to influence the evidence of witnesses or potential witnesses, publication of photographs may risk contamination of identification evidence. The potential for blogging or personal messaging should not be underestimated. Unlike large news organizations, which generally operate responsibly within the law and stability, Internet users often feel unrestricted by the laws of the country. However, at the international level UN Human Rights Council at the Resolution A/HRC/20/8 on the promotion, protection and enjoyment of human rights on the Internet defines, that

«the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights» (UN Human Rights Council, 2012).

This demonstrates the special role of freedom of expression in the information society and the Internet, which is essential in the digital age, where there are two sides to the coin: increasing opportunities for freedom of expression and at the same time increasing opportunities to restrict it. Freedom of expression, by its nature, cannot be used to attract other universally recognized rights and freedoms that are equally significant. The application of the right to freedom shall not be taken to contravene the rights and freedom of others: "A person's freedom ends where another man's freedom begins". The line between a person's own opinion or assessment of activities and making misleading or false statements is rather thin. Constructive criticism, of course, is an essential aspect of democratic progress, and freedom of expression must be protected. However, their roles of constructive criticism and contempt must be demarcated, or rather, a distinction between reasonable restriction of rights and contempt of court?

The right to freedom of speech thought or expression is not an absolute right, which means that it may be limited in certain circumstances. The right to exercise one's fundamental right to freedom of speech and expression, nowadays, is subject to certain reasonable restrictions. Of course, freedom of expression is closely linked to the protection of democracy and respect for the rights of others, so the enshrinement of the right to freedom of expression there may be a conflict. Such restrictions on the right to freedom of expression are the interests of sovereignty, integrity, security, friendly relations with foreign states, public order, decency or contempt of court. For example, in several states around the world, publishing, stating, or interviewing a case during a trial is unacceptable, meaning that no one should interfere in ongoing trials. In practice, this rule is usually used to prohibit the publication of material that is likely to prejudice the right to a fair trial during the trial, or, in a more colloquial sense, to prevent a "media trial".

Article 40.6.i of the Constitution of Ireland states:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State The publication or utterance of the seditious or indecent matter is an offence which shall be punishable in accordance with law (Law of Ireland, 1937).

In Canada, there is a publication ban that prevents anyone from publishing, broadcasting, or sending any information that could identify a victim, witness, or another person who participates in the criminal justice system. When deciding whether to order a publication ban for such victims, witnesses or justice system participants, the Court must take several factors into account. These include the right of the accused person to a fair and public hearing; whether there is a risk that the victim, witness or justice system participant would be harmed if the public knew their identity; whether the order is needed to protect a victim, witness or justice system participant from intimidation or retaliation; and society's interest in encouraging the reporting of offences and the participation of victims and witnesses and justice system participants (for example, court officers or jurors) in the criminal justice system (Law of Canada, 1985). All juvenile courts in Canada also

have a mandatory ban on the publication of information about a person's identity (the name of any person or any other information that can be used to identify that person) (Law of Canada, 2002).

In Poland, contempt of court is also the submission of a written statement or other documents that violate respect, peace of mind or the conduct of judicial proceedings (Law of Poland, 2001). In New Zealand, the person commits contempt of court if the person intentionally publishes any information, and the information is relevant to any trial of a person who is arrested; and there is a real risk that the publication could prejudice this person's right to a fair trial. A person who commits the contempt of court is liable on conviction: in the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding \$25,000; or in the case of a body corporate, to a fine not exceeding \$100,000. Also if the person proves that at the time of the publication of the information and after taking all reasonable care, the person did not know or could not reasonably have known of person's arrest or charge or the possibility or existence of a jury trial; the online content host or the distributor of the publication, after taking all reasonable care, the person did not know or could not reasonably have known that it contained information that created a real risk of prejudicing person's right to a fair trial, this person has a defence in a prosecution. It should be noted that this provision does not apply to a fair and accurate report of a hearing held in public that is published contemporaneously with the hearing and in good faith (Law of New Zealand, 2019). Thus, there is a limit to the extent of contempt of court and restriction of freedom of expression. A publication containing truthful information about the case or trial, but published before the court's decision, may be found to be contempt of court in several states of the world; the publication of biased material in a case before the court; publication containing unsubstantiated accusations to the judiciary; publication containing information about the accused that may influence the jury. However, fair criticism of a judicial decision after it had been pronounced, as well as a derogatory comment on the judge as an individual rather than an official, did not constitute contempt of court.

Article 10 of The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights includes:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (Council of Europe, 1950).

The interpretation of this provision has been clarified in many decisions of the European Court of Human Rights. In particular, in *Perrin v. the United Kingdom*, the court concluded that the applicant's criminal conviction could be regarded as necessary in a democratic society in the interests of the protection of morals and/or the rights of others for publishing that is freely available to anyone surfing the internet and is “obscene” where its effect is “such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it” (ECHR, 2005, *Perrin vs. the United Kingdom*).

Also in several decisions «*Čeferin vs. Slovenia*», *Nikula vs. Finland*», «*Steur vs. The Netherlands*» and «*Morice vs. France*» ECHR concluded that freedom of expression protects not only the substance of ideas and information but also the form in which they are transmitted. The fines imposed on the applicant for contempt of court can amount to an interference with his freedom of expression, therefore, the only question to determine is whether the interference was “necessary in a democratic society” («*Čeferin vs. Slovenia*», *Nikula vs. Finland*) (§§45—50), «*Steur vs. The Netherlands*» (§36) *i* «*Morice vs. France*» (§§128—137 *i* 139) (ECHR, 2018, *Ceferin vs. Slovenia*; ECHR, 2002, *Nikula v. Finland*; ECHR, 2004, *Steur v. The Netherlands*; ECHR, 2015, *Morice vs France*). If the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a

value judgment without any factual basis to support it may be excessive (ECHR, 2006; *Veraart vs. the Netherlands*). It is therefore important that the defendant be given a real chance to prove that there is a sufficient factual basis for his allegations.

In practice, several issues are crucial when considering if a publication can create a “significant risk of serious prejudice”: if in the trial take part jury (judges should be able to rise above what they read in the papers); the likelihood that the publication will come to the attention of a potential juror; its likely impact on a regular reader at the time of publication; and the so-called extinction factor (the break between trial and the publication).

In this case, it is principal to understand the basis on which can build a court assessment: 1) the facts that are considered well known, 2) confirmation of the statement by any source; 3) reference to independent research. Value judgments cannot be refuted or proven to be true, but at the same time cannot be unfounded and must be made based on at least minimal factual circumstances, otherwise, such judgments will be classified as abuse of freedom of speech. Sometimes the principle of priority of the client’s interests comes into conflict with the principles of advocate ethics and the rules of conduct of advocates. Depending on his client's interests and putting them above his interests, the behaviour of the advocate can be overzealous and based on the principled stand (may express strong and sharp criticism with emotion) and this conduct court can regard as contempt of court. But the arguments of the advocate in presenting his client's case cannot amount to contempt of court so long as the advocate does not in some way create an obstruction that blocks the judge in the performance of his judicial duty (Joy, 2020). In the case, *Ceferin v Slovenia* the court recognized the right of lawyers to publicly comment on the process and the administration of justice and statements cannot be considered a priori unfounded:

*“It is understandable that in cases of defending a defendant charged with a grave criminal offence for which a severe penalty is prescribed, the tolerance threshold which may be allowed by the courts may be higher than in other cases, however, the defence counsel may not cross the outer boundaries of this tolerance. If he does cross them, it is proper that the court protects other values, i.e., confidence in the judiciary and the good reputation and authority of the judiciary, which ensures that the public respects the courts and has confidence that the courts are able to perform the role they have in a state governed by the rule of law” (ECHR, 2018, *Čeferin vs. Slovenia*).*

By analyzing the balance between freedom of expression and the authority of the court, it should be understood that criticism of judges is a part of a discussion in a society with broader boundaries for accurate comments. Restrictions on freedom of expression must be subject to real analysis and must have a convincing justification. In carrying out the analysis of measures already taken, the court should consider the case as a whole, as well as in the «determination of proportionality of the intervention for lawful purposes» and the fact whether the reasons given during the trial were «appropriate and sufficient».

Therefore, depending on the circumstances of the case, in each case it is necessary to investigate in detail the content of the publication or statement to establish its nature, which is crucial in deciding whether to prosecute a person for contempt of court:

*“The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.... The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern....” (ECHR, 2004, *Cumpăna and Mazăre vs. Romania*).*

CONCLUSION

Prosecution for contempt of court in the world is used as a way in which the justice system protects the smooth running of the trial and the administration of justice, non-interference in the trial by illegally disclosing information about the process. The function of the law of contempt is to preserve this right while ensuring that the courts retain the power to deal with conduct that undermines the proper administration of justice. The press and the public must know where they stand and so the circumstances in which judicial intervention to prevent or punish contempt of court must be clearly defined.

The balance between the protection of the administration of justice and the right to freedom of expression during the prosecution for contempt of court lies in the fact that in each case it is necessary to investigate in detail the content of the expression or statement to establish its nature, which is crucial in deciding whether to prosecute a person for contempt of court. There is a limit to the extent of contempt of court and restriction of freedom of expression. Restrictions on freedom of expression must be subject to real analysis and must have a convincing justification. No restriction of freedom the expression and contempt of court will be established unless it can be demonstrated that the risk of prejudice to the administration of justice is not outweighed by the public interest in freedom of discussion on matters of public concern.

REFERENCES

- Gary, K.Y. (2011). Contempt of court and fair criticism in Singapore: *Shadrake Alan V Attorney General* (2011) SGCA 26. *Oxford University Commonwealth Law Journal*, 11(2), 197-206.
- Council of Europe. (1950). The convention for the protection of human rights and fundamental freedoms.
- European Court of Human Rights. (1979). *The Sunday Times vs. The United Kingdom* (Application no. 6538/74).
- European Court of Human Rights. (1995). *Prager and Oberschlick vs. Austria*. (Application No. 15974/90).
- European Court of Human Rights. (2002). *Nikula vs. Finland*. (Application no. 31611/96).
- European Court of Human Rights. (2004). *Steur vs. The Netherlands* (Application 39657/98).
- European Court of Human Rights. (2004). *Cumpăna and Mazăre vs. Romania*. (Application no. 33348/96).
- European Court of Human Rights. (2005). *Perrin vs. the United Kingdom*. (Application no. 5446/03).
- European Court of Human Rights. (2006). *Veraart vs The Netherlands*.
- European Court of Human Rights. (2015). *Morice vs. France* (Application no. 29369/10).
- European Court of Human Rights. (2018). *Čeferin vs. Slovenia*. (Application no. 40975/08).
- Law of Canada. (1985). Criminal Code (R.S.C., 1985, c. C-46).
- Law of Canada. (2002). Youth Criminal Justice Act (S.C. 2002, c. 1).
- Law of Ireland. (1937). Constitution of Ireland.
- Law of New Zealand. (2019). Contempt of Court Act 2019.
- Law of Poland. (2001). The Act of 27 July 2001, Law on the System of Common Courts.
- Peter, A.J. (2020). Judges' misuse of contempt in criminal cases and limits of advocacy. *Loyola University, Chicago Law Journal*, 50.
- Anthony, S.F. (1995). Contempt of Court. *Australian Journal of Forensic Sciences*, 27(2), 65-70.
- The Judicial Commission of New South Wales. (2021). Contempt generally.
- UN Human Rights Council. (2012). Resolution A/HRC/20/8 on the promotion, protection and enjoyment of human rights on the Internet.
- Roxanne, W. (2021). Scandalizing the court in the commonwealth in the Twenty-First Century. *Communication Law and Policy*, 26(4), 377-437.

Received: 18-Nov-2021, Manuscript No. JLERI-21-9538; **Editor assigned:** 20-Nov-2021; PreQC No. JLERI-21-9538(PQ); **Reviewed:** 04-Dec-2021, QC No. JLERI-21-9538; **Revised:** 10-Dec-2021, Manuscript No. JLERI-21-9538(R); **Published:** 18-Dec-2021