THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON CONTEMPT OF COURT

(TOPIC 4)

We, the following members of the Law Reform Commission of Hong Kong, present our report on Contempt of Court.

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Chapter 1

Summary of work

Terms of Reference

1.1 On 15 January 1980 His Excellency the Governor of Hong Kong Sir Murrary, MacLehose, GBE, KCMG, KCVO in Council directed the establishment of the Law Reform Commission of Hong Kong and appointed it to report on such of the laws of Hong Kong as might be referred to it for consideration by the Attorney General and the Chief Justice.

1.2 On 14 August 1981 they referred the following question to the Law Reform Commission for consideration -

> *"Laws of Contempt of Court :*
>
> *Should the present law and practice relating to contempt of court in Hong Kong be changed and, if so, in what way?"*

Sub-Committee Membership

1.3 At its sixth Meeting on 5 October 1981 the Commission appointed a sub-committee with the Hon Mrs Selina Chow, JP as Chairman to research, consider and advise on the present state of the law and to make proposals to the Law Reform Commission for reform. The membership of the sub-committee is set out at Annexure 1.

Method of Working

1.4 The sub-committee saw it as their first task to seek the views of interested persons and organisations and to this end they prepared and widely distributed a Discussion Paper to set out the parameters of the subject and to pose questions that seemed to them needed to be addressed. A copy of the Discussion Paper is at Annexure 2. Their invitations elicited considerable response and the observations received were of great value in the preparation of the sub-committee's Report. A list of organisations and individuals who assisted the sub-committee in this way is given at Annexure 3.

1.5 Ten full meetings of the sub-committee were held and also a number of additional meetings within the sub-committee to study the subject.

1.6 Before submitting their Report to the Law Reform Commission the sub-committee invited comment upon their tentative proposals from the organisations and individuals they had originally consulted. Their recommendations were generally well received. On 1st June 1984 the sub-committee signed its report and delivered it to the Commission, and the topic was considered by the Commission at its 28th, 29th, 30th, 44th, 45th, 46th and 47th meetings.

Chapter 2

Introduction

2.1 We should say at once that although the expression "contempt of court" has often been criticised because those words, as now generally understood, embrace such a wide diversity of concepts, the quest to find a more apt expression has defeated us. Our law in its present form derives from two sources - first from provisions contained in Ordinances and Rules of Court and second from inherited English common law rules still in force. It was made plain to the sub-committee in their consultations that a large proportion of our population does not really understand the law, and this despite the traditional respect accorded to the courts. The reason for this is not far to seek - only some of its content is in statutory form and where it is, provisions are scattered over a considerable number of legislative enactments.

2.2 Nor has case-law thrown great light on the subject. Isolated instances of what has been found to be, and not to be, contempt of court, occur in the law reports but in relation to what is known as "criminal contempt", authoritative decisions analysing the general scope and content of the law are scarce for only comparatively recently was provision made for a general right of appeal (see now s.50 of the Supreme Court Ordinance (Cap. 4)).

2.3 In the United Kingdom the law of contempt of court has recently undergone substantial reform and in the course of our deliberations we have referred to the UK Contempt of Court Act 1981 and to the Report of the Phillimore Committee which led up to it. Many of our recommendations follow the Report and the Act, (referred to in this report as "the UK Act") but we have also made a number of recommendations which go further.

The purpose of the law of contempt

2.4 We think it to be self-evident that no civilised jurisdiction can get by without laws dealing with contempt of court. Difficulties of definition cannot relieve the law-maker of doing everything possible to safeguard the due administration of justice. As Lord Diplock said in A-G v. Times Newspapers Ltd. [1974] A.C. 273 at 307 -

> *"In any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and*

the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another "Contempt of court" is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms."

2.5 On the other hand in a healthy society the judicial system and the administration of justice must be open to scrutiny and legitimate criticism. The press, organisations, "pressure groups" and individuals have the right to express their views if freedom of expression is to have any meaning. The function of the law of contempt as we see it is to preserve this right while ensuring that the courts retain power to deal with conduct which 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. It is not enough to say that the law can be found in the cases.

2.6 Early in our deliberations, therefore, we <u>concluded that the time had come in Hong Kong for the enactment of a comprehensive Contempt of Court Ordinance including the following :</u>

a) <u>A clear statement of the principles by which "contempt of court" is defined.</u>

b) <u>Clear procedures establishing how contempts are to be dealt with in specific situations, including procedural controls to limit the potential for abuse.</u>

c) <u>Clear guidelines to allow the media to understand at what time publication can constitute contempt.</u>

d) <u>Clear limits on the penalties which may be imposed for contempt of court.</u>

e) <u>Clear rules as to who may commence and discontinue contempt proceedings.</u>

The Ordinance should be drafted with a view to expressing the law in the simplest terms this complex subject will allow, with a careful translation (including detailed explanatory notes) into Chinese for wide dissemination.

Contempt and freedom of the press

2.7 So far as the work of the courts is concerned a constitutional imperative is that cases must be heard in open court. Only in very exceptional circumstances can the court sit in camera (see ss.122 & 123 of

the Criminal Procedure Ordinance (Cap. 221) and s.20 of the Juvenile Offenders Ordinance (Cap. 226) and if the ordinary rule is breached without good cause the trial will be declared a nullity.

2.8 We think that Lord Denning was right in describing the press as the "watchdog of justice". It is not possible to exaggerate the importance of the media as a whole in this role. Responsible reporting and comment is not to be unjustifiably muzzled by the law of contempt. Restraints on the media are just as unacceptable if they stem from editorial fear of punishment due to the uncertainty of the law. Our Report, therefore, makes proposals for the clarification and codification of the law as it relates to the media.

2.9 In common with a number of other jurisdictions, the law restricts the publication of certain information relating to judicial proceedings. Examples are -

(a) indecent matter or medical, surgical or physiological matters which are revolting or offensive or the publication of which would be calculated to injure public morals (s.3(1)(a) of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287));

(b) in relation to certain matrimonial proceedings any particulars other than (i) the names, addresses and occupations of the parties and witnesses (ii) a concise statement of the charges, defences and counter-charges (iii) submissions on points of law and decisions thereon (iv) the judgment and observations made by the judge in giving judgment (s.3(1)(b) of Cap. 287);

(c) where a court sits in private and (i) proceedings relate to wardship, adoption, guardianship, custody and so forth of children (ii) certain proceedings are brought under the Mental Health Ordinance (iii) national security is involved (iv) information relating to a secret process or invention (v) where the court expressly has power to do so and expressly prohibits the publication of certain information (s.5 of Cap. 287);

(d) in relation to Juvenile Courts, (i) the name, address or school or any particulars calculated to lead to the identification of anyone under the age of 16 years who is a party to the proceedings or a witness (ii) or any picture of such a child (s.20A of the Juvenile offenders Ordinance (Cap. 226));

(e) in certain circumstances any information which might lead to the identity of a woman complainant in a case of rape or indecent assault (s.156 of the Crimes Ordinance (Cap. 200))

<u>We accept the continued need for these restrictions.</u>

Chapter 3

Contempt of court – Criminal and civil

Introduction

3.1 The Common law has traditionally divided contempt of court into two categories - civil and criminal. We will describe them in more detail below and in later chapters, but in the simplest terms civil contempt is committed when an order of the court made in civil proceedings is disobeyed. More often than not its procedures are invoked by a party in whose favour an order has been made who wants to see it enforced. The term criminal contempt is applied to all other contempts, but more often than not those are contempts which somehow interfere with the administration of justice in a more general way - for example disrupting court proceedings, publishing material which might influence the court, or insulting a judge.

3.2 At times the dividing line between the two forms of contempt becomes hazy - for example, is the breach of an order prohibiting publication of the name of a party to proceedings a criminal or a civil contempt? Some have expressed doubt as to the value of the distinction. For example Salmon L J in Jennison v Baker [1972] 2QB 52 at 61 said :

> *"Contempts have sometimes been classified criminal and civil contempt. I think that, at any rate today, this is an unhelpful and almost meaningless classification."*

We agree with that observation and it is a fact that over time many of the distinctions in procedure and consequences which did exist have faded. For example there is now a right of appeal for all cases of contempt of court (except where an order is made by the Court of Appeal), and no distinction is drawn in this respect as it once was. However other consequences remain. In criminal contempts the writ of sequestration allowing the seizure and disposal of the contemnor's assets has no application. The prerogative of pardon is only exercised in respect of criminal contempts. Different rules of procedure and evidence might apply. It can also generally be said that the power of final control over criminal proceedings is in the Crown, whereas the parties can settle matters that give rise to civil contempt.

3.3 The distinctions between the two forms of contempt do not all bear close examination, and throughout this report we will be making recommendations which if implemented will do away with all those which are unnecessary. In practice, however, there will remain a distinction except in

the hazy area where the two categories overlap, because, as will be readily apparent from the detailed description of civil and criminal contempt which we set out below, the sort of contempt which is readily identifiable as civil and the sort which is readily identifiable as criminal occur in quite different circumstances and require quite different responses.

Criminal Contempt

3.4 The law of criminal contempt is there to protect and keep pure the administration of justice. It may be committed in the face of the court (broadly speaking words spoken or acts done in or in the precincts of a court which obstruct or interfere with the due administration of justice or are calculated so to do) or outside the court (in general terms, words spoken or otherwise published, or acts done, outside the court which are intended or likely to interfere with or obstruct the due administration of justice). Set out below are some examples of conduct which might be said to fall within this category -

(a) conduct in the face of the court such as committing an assault, insulting the court by language or manner, interrupting the proceedings, photography or sketches of the judge, jurors, parties or witnesses, refusing to be sworn or to give evidence or to answer a lawful question as a witness, misbehaviour by a juror;

(b) conduct outside the court, such as scandalising the court by words written or spoken, publishing words written or spoken calculated to prejudice the due course of justice, doing any act (before, during or after the proceedings) calculated to prejudice the due course of justice, interfering with receivers or with property under arrest in certain actions, interfering with wards of court, impeding the service of process or forgoing or altering the process of the court, disobedience to a witness summons, acting as a solicitor when not qualified.

3.5 Several traditional forms of criminal contempt in the face of the court have been codified and are punishable by the appropriate courts. The following are some examples -

(a) the High Court or a District Court can punish a person summarily for contempt of court up to a maximum of two years' imprisonment (i) if a person disobeys a witness summons or order to attend court (ii) if a person refuses to give evidence or be sworn when required (s.36 of the Criminal Procedure Ordinance (Cap. 221));

(b) a magistrates' court may summarily impose a sentence of up to $2,000 fine or 2 months' imprisonment on a person who behaves in an insulting manner or uses any threatening or

insulting expression to or concerning or in the presence of a magistrate when performing any magisterial duty (s.99 of the Magistrates Ordinance (Cap. 227));

(c) a District Court may commit a person to prison for a specified period not exceeding 2 years or fine him up to $5,000 if he (i) wilfully insults a judge or a witness or any officer of the court in attendance, or who is going to or returning from the court (ii) wilfully interrupts the proceedings, commits any other contempt of court or otherwise misbehaves in court (s.20 of the District Court Ordinance (Cap. 336));

(d) a juror may be fined up to $3,000 for failing to attend or for absenting himself without leave (s.32 of the Jury Ordinance (Cap. 3));

(e) the presiding officer of a labour tribunal may summarily impose a sentence of 2 months' imprisonment or a fine of $500 on any person who at a hearing (i) uses a threatening or insulting expression to or concerning or in the presence of the presiding officer (ii) behaves in an insulting manner or wilfully interrupts the proceedings (s.42 of the Labour Tribunal Ordinance (Cap. 25));

(f) in relation to commissions of inquiry, certain offences are punishable by a fine of $1,000 and imprisonment for 3 months. These include (i) failing to attend in response to a witness summons (ii) refusing to be sworn (iii) refusing to answer lawful questions (iv) wilfully interrupting the proceedings or otherwise misbehaving. Other offenders are liable to a fine of $10,000 and to imprisonment for 1 year for such offences as (i) wilfully hindering or deterring another from attending, giving evidence or producing any article or document (ii) threatening, insulting or causing loss to a commissioner on account of his duties (iii) publishing or otherwise disclosing any material received by the commission in camera or which the commission has prohibited from publication or disclosure. The commission itself can deal summarily with any of these offences as a contempt if so empowered by the directions of the Governor-in-Council. Every inquiry is deemed to be a judicial proceedings and any conduct which would constitute contempt of the High Court or of a judge is a contempt of the commission and may be dealt with by a judge of the High Court as a contempt of the High Court (ss. 8, 9 & 11 of the Commissions of Inquiry Ordinance (Cap. 86));

(g) the adjudicator in a Small Claims Tribunal may fine a witness up to $1,000 if he (i) refuses without cause to attend or produce specified documents (ii) refuses to be sworn or to give evidence (s. 35 of the Small Claims Tribunal Ordinance (Cap. 338));

(h) the Lands Tribunal is given all the "powers vested in the High Court in the exercise of its civil jurisdiction in respect of …… the punishment of persons guilty of contempt" (s.10 of the Lands Tribunal Ordinance (Cap. 17)).

Civil Contempt

3.6 Perhaps the most important role of civil contempt procedures is to supply the necessary sanction when all else fails to secure compliance with orders of the court. Individuals can be sent to prison, corporate bodies can be punished by fine and sequestration of assets, or by the committal of their directors or other officers. The following are examples of conduct which has been held to be a civil contempt of court -

(a) failure to carry out an undertaking given to the court;

(b) subject to certain restrictions, disobedience to a judgment or order for the payment of money within a specified period;

(c) disobedience to an order for the payment of money into court in time;

(d) failing to obey a judgment or order to do or abstain from doing an act within a specified time;

(e) failure to obey an order for interrogatories, inspection or discovery.

Chapter VIII deals with civil contempt in more detail.

Courts with contempt jurisdiction

3.7 The powers of the High Court and the Court of Appeal, as superior courts of record, to commit for all forms of contempt of court are now regulated by 0.52 of the Rules of the Supreme Court. A successful application will result in the offender being seized under the order of the court by a court official and taken to prison. The courts' inherent powers are expressly reserved by 0.52 r.9 and so there is jurisdiction to fine or take security for good behaviour or instead of committing, to grant an injunction against repetition of the contemptuous conduct. The assets of a company may be sequestrated. The court has power to suspend the execution of the order for committal on terms and may at any time on the application of the person committed, order his discharge.

Chapter 4

Contempt in the face of the court

Misbehaviour in court

4.1 It is generally accepted that courts of law must possess adequate powers to check and prevent misbehaviour during judicial proceedings so that an atmosphere conducive to the orderly administration of justice is maintained. As Chapter III of the Report has shown the legislature has granted the courts at different levels wide powers to punish for contempt committed in their face. Where a contempt amounts also to a criminal offence such as assault (in a recent case an angry defendant threw one of his shoes at the presiding magistrate) the offender will normally be tried in the usual way before another magistrate and there will be nothing remarkable about the procedure. But misbehaviour in court which disrupts the proceedings will often be dealt with by the summary procedure and it is here that the courts' powers are seen by some to be arbitrary in that the judge, as it were, frames the charge, initiates and conducts the prosecution and fixes the penalty. It must be said at once that we have no evidence that this summary jurisdiction is exercised in Hong Kong otherwise than with wisdom and restraint, and only as a last resort. A warning, a reprimand or, in appropriate cases, the removal of the offender from court, will often suffice to restore order and allow the case to proceed. Moreover the apparent harshness of the summary procedure has been reduced by the vigilance of the superior courts, so that the offender must be told the precise nature of the alleged contempt and given a full opportunity of defending himself. We think that the following passage from the judgment of Lord Denning in Balogh v. Crown Court [19741 3 All E.R.283 at 288 aptly summarises the modern approach to the exercise of summary powers -

> *"This power of summary punishment is a great power. It is given to maintain the dignity and authority of the judge to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is imperative to act immediately - so as to maintain the authority if the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt .... But properly exercised, it is a power of the utmost importance which should not be curtailed."*

The summary procedure

4.2 There are indeed powerful arguments for the retention of the summary procedure to punish contempt in the face of the court. The presiding judge must be able to deal with a disruption of the proceedings quickly and effectively so that the hearing can continue. The facts will rarely be seriously in dispute and the judge who has seen and heard what has happened will be in as good a position as another judge to determine guilt and decide the right penalty. He will moreover be better able to place the behaviour complained of in its proper context. The deterrent factor must also be borne in mind. The threat of an immediate sanction is more likely to be effective than that of postponed proceedings elsewhere.

4.3 We entertain no doubt that the power to deal with a contempt committed in its face is one that a court must of necessity continue to possess. There will be examples of conduct which need to be restrained and punished at once if the machinery of justice is to function properly. However we consider that the interests of justice demand that the growing current practice of using summary powers only when it is a matter of urgency and it is imperative to act immediately, be reflected in legislation. It seems to us that for justice to be seen to be done, the ordinary process should be the rule and the summary procedure the exception. We are also of the opinion that the steps invariably taken by a judge to safeguard the interests of an offender when the summary procedure is invoked should be similarly codified.

Proposals for reform

4.4 We believe it to be unsatisfactory that misbehaviour in court is dealt with, as it is at present, in different Ordinances with varying definitions and penalties. We recommend that a specific offence should be created, preferably in a comprehensive Contempt of Court Ordinance, to cover all forms of conduct with intentionally or recklessly disrupt a judicial proceeding. To cover the worst cases, the maximum penalty, we feel, ought to be a fine of $50,000 or 2 years' imprisonment in the High Court or the Court of Appeal. Where the contempt is committed in the District Court, we think that a maximum of a fine of $20,000 or 1 year's imprisonment would be adequate. We also think that a magistrates' court or a tribunal with power to punish for contempt should have power to impose a maximum penalty of a fine of $5,000 or 3 months' imprisonment.

4.5 The following offences now scattered in different Ordinances (see para. 2.7) should be included in the new Ordinance -

(i) disobeying a summons or order to appear as a witness;

(ii) refusing to give evidence, or to answer lawful questions, or to be sworn, when required;

(iii) failing to attend as a juror or absenting oneself without leave.

4.6 In this area of the law of contempt in the face of the court, the legislation we envisage would -

(a) create the offence we have outlined in para. 3.4;

(b) provide that the judge or magistrate presiding at the. proceedings in which the offence was committed shall remand the offender in custody or on bail for trial in the usual way before another court, unless he considers, for reasons to be recorded, that the interests of justice dictate that the offence should be dealt with summarily by him ;

(c) provide that where the offence is dealt with summarily by the presiding judge or magistrate before whom it was committed, the judge or magistrate should -

  (i) reduce the charge into writing and ask the offender to show cause why he should not be punished for contempt;

  (ii) except where official shorthand-writers are present, take a full note of the proceedings;

  (iii) where an offender is punished for contempt, inform him of his right of appeal;

  (iv) have power to review an order of committal on his own motion or on application and order the discharge from custody of the offender.

4.7 In line with our other recommendations, we do not think it right to retain the power of a District Court (s.21 of the District Court Ordinance (Cap. 336)) or of a magistrates' court (s.100(b) of the Magistrates Ordinance (Cap. 227)) to punish a witness summarily for perjury. We see no reason why such an offence should not be tried in the usual way. We recommend that these sections be repealed.

Tape recorders in court

4.8 Except in special circumstances, all court proceedings are held in public, and there might appear to be no valid reason why the use of tape recorders in court should be prohibited. After all since what transpires in court can be taken down in short-hand, a mechanical recording is simpler and is likely to be more accurate. Newspapers with limited resources might not have available reporters with the necessary short-hand skills. However there are a number of factors which militate against the indiscriminate use of tape recorders. Where official short-hand writers are not employed the proceedings will be taken down by the presiding judge in note form and will be accepted by an appellate court as an accurate record unless the contrary is shown.

Undesirable controversy might arise when a full transcript is compared with the judge's notes and it will hardly be a fair comparison. It is also well-known that recordings are all too easy to tamper with. However, we consider that with proper safeguards it would be wrong to deny the use of such a practical modern invention. We therefore recommend by a majority that contempt of court legislation should include provisions on the following lines -

(a) that it be an offence for any person other than an official short-hand writer or court reporter to bring into court or use a tape recorder without the leave of the court;

(b) where leave has been given, it may be withdrawn during any particular part of a case;

(c) to ensure consistency, the court should exercise its discretion to grant or refuse leave in accordance with guide-lines to be issued from time to time by the Chief Justice, in the form of a Practice Direction (we consider the Practice Direction handed down by the Lord Chief Justice in the English Court of Appeal on November 19, 1981, a useful starting point in determining what guide-lines should be laid down in Hong Kong. A copy of the Practice Direction is reproduced in Annexure 5);

(d) that it be an offence to broadcast a recording.

Photographs and sketches in court

4.9 Section 7 of the Summary Offences Ordinance (Cap. 228) prohibits the taking of photographs and the making of sketches in court, which includes its precincts. It has been suggested to us that the ban on making sketches in court is unnecessary and outmoded. However we consider that this restriction is still justified, if only to protect nervous witnesses and jurors, and to save possible embarrassment. It has also been represented to us that difficulty often arises in defining the "precincts" of the court. We therefore recommend that a map or plan should be displayed wherever practicable indicating the boundaries of the precincts of the court, for the purpose of defining the extent of the area in which photography and sketching is forbidden.

4.10 There is no provision in the Commissions of Inquiry Ordinance (Cap 86) to make it an offence to take a photograph or to make a sketch of a commissioner or a witness in an inquiry but it might well be that such conduct could be regarded as "wilfully interrupting the proceedings of the Commission" punishable under section 8(1)(d) of the ordinance. We recommend that the taking of photographs and the making of sketches of certain classes of persons involved in the inquiry, and their publication, should be expressly prohibited by law.

Chapter 5

Contempt by publication

Introduction

5.1 Since the sub-committee was set up, there have been growing signs of concern particularly in newspaper circles that the law of contempt unduly inhibits the freedom of the press. The press and, indeed, the other media were however concerned that at many key points the law was uncertain, particularly as to whether comment on matters that might become the subject of criminal proceedings was inhibited by the law of contempt only while such proceedings were "pending" or from the time they were "imminent".

5.2 We consider that basically the law of contempt is sound. Its purposes, founded on the need to ensure the fair and effective administration of justice in our courts of law, have been described in Chapter 2 of the Report. The law must draw the line between the need to ensure the proper administration of justice and freedom of speech. It can never be easy to know exactly where that line should be drawn. But it is in the interests of neither for there to be uncertainty. Areas of uncertainty should be cleared up and the opportunity taken to improve and modernise the procedures and powers of the court when dealing with cases of contempt.

The meaning of "prejudice"

5.3 In its widest sense, anything which amounts to an improper interference with the due administration of justice constitutes a criminal contempt, but probably the most serious interference is a publication which jeopardises the fair trial of an accused person. The individual's right to a fair trial before a court of law is a fundamental right in a free society, protecting both the individual and society. It is thus a most important function of the law of criminal contempt to ensure that every trial is a "fair trial". A "fair" trial means a trial conducted free from prejudice and in which the court tries the case impartially after considering all the available evidence which has been properly submitted. These essential requisites are impaired if, instead of trial by the court, there is so-called "trial by newspapers" or "trial by television". As Wills J. said in R v. Parke [1903] 2 K.B. 432 :

> *"…(These trials) deprive the court of the power of doing that which is the end for which it exists namely, to administer justice duly, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which*

has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

5.4 As a general proposition, any publication which has the tendency to "prejudice" a fair trial will amount to contempt. Publications which are held to "prejudice" a criminal case fall under two categories : the type of publication which tends to induce the court (or more especially a jury) to be biased, thereby jeopardising the court's impartiality; and the type of publication which prejudices the court's ability to determine the true facts. Although there are numerous examples of contempt of the first category, namely publications which tend to impair the court's impartiality, there are essentially four principal ways in which impartiality of the court may be impaired :-

(a) by commenting on the personal character of the accused;

(b) by publishing an alleged confession by the accused;

(c) by commenting on the merits of the particular case; and

(d) by publishing a photograph of an accused person in such a way that he can be identified where the question of identity is likely to be in issue.

5.5 Publications under the second category can be divided into the type which prevents the court from hearing all the evidence and the type which affects the truth or validity of the evidence given. An example of the first type is publication, not personally addressed to a particular witness, but which has the effect or potential effect of deterring witnesses from coming forward. Another example is publication which induces the court to ignore or treat with scepticism the evidence of a particular witness. The most blatant example of "trial by newspapers" comes under the second type where a newspaper conducts its own private investigation and publishes the results. It may also amount to a contempt to publish the evidence which a witness may later give before a court, and in particular to publish interviews with witnesses.

5.6 There is a different category of "prejudice" in connection with civil proceedings. This is the type of publication which tends to deter the parties from bringing or defending the action in the first place. Undue pressure upon a party through unfavourable press comments may cause him to discontinue or compromise the action. It is also a contempt to cast aspersions on the character of one of the parties if such comment is likely to prejudice the jury against the party criticised.

The problem of "gagging writs"

5.7 A "gagging writ" is a writ issued for the specific purpose of stifling comment, rather than with any real intention of bringing any action. The "gagging" is achieved by issuing a writ for libel. The question is : does

the issue of the writ prevent any further comment being made, lest the comment be contempt, even though there is no real intention of pursuing the action? The general tenor of authority is that the issue of the writ per se does not stifle comment but comments made near to the time of the trial would be subject to the law of contempt. In Hong Kong, 'gagging writs' are very rarely issued.

The test of liability

5.8 It should be noted that at common law for a publication to amount to contempt, it is not necessary that it should actually prejudice a trial - where the trial is in fact prejudiced, the accused can appeal to have the conviction quashed. It is sufficient in contempt proceedings that the tendency of such publication is to prejudice the case.

5.9 At common law, two tests are always applied : first, is the comment at all likely to interfere with a fair trial? Secondly, is the threat to a fair trial substantial enough for the court to intervene? (see Wright J. in R v. Payne and Cooper [1896] 1 Q.B. 577 at 581).

5.10 The authorities have established that emphasis has all along been placed upon the seriousness or triviality of the risk of interference, rather than the degree of interference. The Phillimore Committee believed that this was wrong and that the law should aim at preventing serious prejudice, not serious risks. It proposed a new statutory definition whereby, "the test of contempt is whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced." Section 2(2) of the U.K. Contempt of Court Act 1981 provides that 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.

5.11 This section contains one significant difference from the recommendations of the Phillimore Committee, namely the insertion of the word "substantial" before "risk". Parliament in passing the statute apparently went beyond Phillimore and further restricted the type of publication which is subject to the strict liability rule. We consider section 2(2) acceptable and recommend its adoption in Hong Kong.

Mens rea

5.12 Contempt of court is usually regarded as a "strict offence", and therefore, it is said, requires no mens rea at all. (R v. Odham Press Ltd., ex parte A.G. [1957] 1 Q.B. 73, R v. Griffiths, ex parte A.G. [1957] 2 Q.B. 192, Lo Sau-king v. R. [1962] H.K.L.R.124). However, it must be shown that the accused intended to publish the offending material. Although an intent to prejudice proceedings is unnecessary, it is a crucial factor in deciding the appropriate punishment.

5.13 In discussing the mental element which should be required to ground liability for contempt, the Phillimore Committee drew a distinction between contempt by publication and other cases. Broadly speaking, the Committee believed that contempt by publication should continue to attract strict liability, but that in other cases an intent improperly to interfere with the administration of justice should be required. We agree with their view and recommend a similar approach be adopted in Hong Kong.

The means of publication

5.14 Contempt is not restricted to any particular medium of communication. Written articles, photographs, or even cartoons in a newspaper can amount to contempt. Contempt can also be committed by news films as well as television programmes and radio programmes. The Phillimore Report proposed to define 'publication' widely for this purpose to include printed matter, radio and television broadcasts, films, tape-recordings, dramatic performances and words addressed to a public meeting or to a private meeting to which the press was invited. Communications intended for 'private circulation' alone would not be covered (see s.2(1) of the U.K. Contempt of Court Act 1981). We recommend that the same definition be provided in the proposed Contempt of Court Ordinance.

The timing of publication

5.15 The problem of when the law of contempt begins to operate in relation to criminal proceedings is perhaps one of the most troublesome areas of contempt. A publication which is likely to prejudice a fair trial will amount to a contempt if proceedings can be said to be "pending" or "imminent".

5.16 "Pending" covers the situation where an arrest has been made whether or not a warrant has been issued. Cases show that proceedings may also be regarded as "pending" where a magistrate has issued a warrant.

5.17 What does "imminent" mean? "Any attempt to give meaning to 'imminent' must necessarily be speculative" (Borrie and Lowe "The Law of Contempt (1973) p.142). The authors suggest that "imminent" means that an arrest is about to take place in the immediate future. Shiel J. in R v. Beaverbrook Newspapers [1962] N.I. 15 suggested that "imminent" meant "impending" or "threatening". The general tenor of the English statements shows that court proceedings must be imminent if at the time of publication it is reasonably certain that the suspect will be charged and, therefore, court proceedings covering the charge will take place.

5.18 It has been established that civil proceedings are "pending" as soon as the writ is issued and as long as any proceedings can be taken. (Dunn v Bevan [1922] 1 Ch. 276 at 284).

5.19 Proceedings, both criminal and civil, remain sub judice until an appeal hearing is completed or the time has expired within which notice to appeal may be given.

5.20 The Phillimore Committee proposed to limit the ambit of contempt by reference to a fixed point in the criminal process. The conclusion is that "the law of contempt operates from the moment when the suspected man is charged or a summons served". (see para. 123 of the Phillimore Report). We agree that it is preferable to remove editorial uncertainty by fixing a readily ascertainable point for the start of the sub judice period. <u>We therefore recommend that the sub-judice period commence when the suspect is charged or a summons served.</u>

5.21 It has been submitted to us that in some cases it might be impossible for a journalist to know whether a person has been charged or a summons issued. We recognise this difficulty and express the hope that if our recommendations are accepted, the Police will be instructed to help journalists to keep within the law by giving them the necessary information wherever possible. A responsible journalist will, in any event, be protected by the defence summarised in para. 5.35 below.

5.22 According to the Phillimore Committee, the restriction should begin to apply in civil cases when the case has been set down for trial. <u>We recommend that a civil case should be regarded as being sub judice as soon as it appears on the "running list" for cases liable to be heard at short notice or, where the date for the trial is fixed, for a period of six weeks before that date. We also recommend that both the running list and the fixtures list should be published.</u>

5.23 As to when the contempt restriction should cease to apply, we agree with the recommendation of the Phillimore Committee that <u>in both criminal and civil proceedings, the contempt restriction should cease to apply once the first instance hearing has been concluded, that is when a verdict has been returned and sentence pronounced or judgment given, or an equivalent order or decree made or given.</u>

Responsibility for a newspaper or magazine

5.24 The editor is the most obvious person to be held liable for a newspaper publication since he has ultimate and overall control over the contents of his newspaper. In practice, the courts always hold the editor responsible although he may not necessarily be punished. Provided the editor has taken all reasonable precautions and has not been negligent, the tenor of recent English decisions suggests that in such circumstances the editor will not be punished.

5.25 The proprietor, for example, a newspaper company, is responsible for the contents of its newspaper and will always be held responsible for a contempt by publication.

5.26 The liability of the printers is based on the fact that they are the persons who actually print the articles. Such persons can be regarded, therefore, as "publishing" the contents of the newspapers and guilty of the actus reus and as having the necessary intent. Personal ignorance of the contents of the publication will be no defence. In practice, printers are rarely charged with contempt; as the printing is usually done by the newspaper concerned, the proprietor and the editor will be held responsible. Under the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) section 3(2), it is expressly stated that the master printer or publisher can be held liable for a publication contravening the provisions of that ordinance.

5.27 The distributors of newspapers may be held liable for contempt on the ground that they are responsible for the widespread publication of the newspaper's contents. However, it can be argued that a paper-boy, a street seller, or even the small retail shop ought not be held guilty of contempt because they cannot be said in any real sense to have intended to publish since they will be ignorant of the contents and under no duty to be acquainted with them.

5.28 R v. Griffiths, ex parte A.G. [1957] 2 Q.B. 192 was concerned with a foreign publication and liability was imposed upon the distributors because they were the only persons who could be held responsible. Although they may be personally ignorant of the contents, they were expected, at least at common law, to be acquainted with them. Whether the same can be said for a local publication is more doubtful.

5.29 Section 4(2) of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) gives the distributors a defence, if having taken all reasonable care, they have no reason to suspect that the publication contained material which was calculated to interfere with the course of justice. This defence operates irrespective of whether the publication is foreign or local.

5.30 We share the view of the Phillimore Committee that the writer of material held to be in contempt should himself be liable whatever his status, whether he is an inexperienced junior reporter or leader writer, whether he is on the permanent staff or is self-employed. If he was acting under express orders, this will be a matter for mitigation of penalty, but not a defence. We realise that it could be the case that the writer's material has been edited or re-written to such an extent that it can no longer be regarded as his own. In that case the ordinary principle of criminal law that a person is liable only for his own act will apply.

5.31 We recommend that responsibility should lie with those either directly engaged in the production of or those exercising control over the publication concerned, and that the printer or distributor of a local publication should not, merely as printer or distributor, be liable. However in the case of foreign publications the printer or publisher will not usually be in Hong Kong and the only person in a position of responsibility for the publications will be

the Hong Kong distributor. We take the view that such distributors should be held responsible because otherwise foreign publications would be able to escape the law of contempt in Hong Kong.

Responsibility of persons engaged in other media

5.32 The same principles are applicable to a television or radio broadcast as to a newspaper publication. As in the case of newspapers, liability will devolve only on those really responsible for the broadcast. The producer or the person who has editorial responsibility for the programme must be held responsible for he is the person who has de facto control over the contents of the programme. Responsibility will be ascribed to the television or radio company or to programme contractors as they are in a similar position to the proprietors of a newspaper.

5.33 Persons occupying a higher position than the producer, such as the head of a particular network or the regional head, or the person in charge of a particular type of programme fall into a different category. In each case before liability can be established the exact role of the person must be ascertained.

Defence of innocent publication and distribution

5.34 Section 4 of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) provides :-

> (1) A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time having taken all reasonable care, he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent, as the case may be.
>
> (2) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing such matter as is mentioned in sub-section (1) of this section if at the time of distribution, having taken all reasonable care, he did not know that it contained any such matter as aforesaid and had no reason to suspect that it was likely to do so.

5.35 Subject to what we said in para. 5.31 above, it is our view that a publisher who has taken all reasonable care to find out the facts should be free from liability, the burden of proof of the defence (by subsection (3)) being on him.

5.36 We think that the essence of this defence should be retained. Consequential amendments will be required if our recommendations as to the

starting point for contempt and the abolition of the concept of "imminence" are accepted. We should re-iterate our recommendation that this defence should be of no application to local distributions of foreign publications.

Defence of "public benefit"

5.37 If the doctrine of contempt exists for the public good, it can be argued that where there is a greater public interest, it is for the public good that the doctrine of contempt should not operate in certain circumstances, for example, where a dangerous convict is "on the run". For example, this defence might arise when in these circumstances the publication was made as a result of police request.

5.38 It has been argued that a general defence should be introduced whereby it is open to a person against whom contempt proceedings have been instituted to show that the possibility of prejudice to a fair trial was off-set by some other public interest advanced by the publication. The Phillimore Committee, however, rejected proposals for introducing this defence since it would introduce an element of uncertainty into the law. We have considered this proposal thoroughly and recommend that the law should not recognize such a defence, except in the limited circumstances set out in the next paragraph.

General public discussion

5.39 However, we do not think it right to stifle, by threat of contempt proceedings, discussion on matters of general interest simply because there are pending legal proceedings in which the issues might arise. We therefore recommend that there should be specific provision on the lines of section 5 of the U.K. Act that it shall not be contempt of court where a publication is made as or as part of a discussion in good faith of public affairs or other matters of public interests, and the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

5.40 It was held in Attorney General v. English [1983] A.C. 116 that section 5 of the Act was not intended to prevent the bona fide discussion in the media of controversial matters of public interest merely because contemporaneous legal proceedings existed in which some particular instance of those controversial matters might be in issue, and it was for the Attorney General to prove that a publication did not fall within section 5 and that the risk of prejudice to a fair trial was not "merely incidental" to the discussion.

5.41 We recommend that our legislation should clearly state that the burden of proof is on the prosecution in such case.

Reporting court proceedings

5.42 The general rule is that court proceedings are freely reportable and, provided the report is fair and accurate, it cannot amount to contempt. Certain statutory exceptions are the reporting of committal proceedings, proceedings concerning children, section 3 of Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) and proceedings heard in private; these have already been mentioned in paragraph 2.9.

5.43 Such reports can be published contemporaneously with the trial. However, if the interests of justice would otherwise be prejudiced, the court has at common law the power to direct that there should be no reports of the trial until the proceedings have finally been completed.

5.44 We recommend that a provision to the effect of s.(4)(1) and (3) of the UK Act be adopted in Hong Kong that where the publication is a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith, it cannot be contempt.

5.45 We also think that the common law power of the courts to postpone publication of proceedings should be confirmed. We therefore recommend that there should be specific provision on the lines of section 4(2) of the U.K. Act that in any public court proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

The secrets of the jury-room

5.46 At common law it has been held that to establish that publication after a trial of a juror's disclosure of jury-room secrets amounts to a contempt of court, it is necessary to show, in the light of the circumstances of the case, that such disclosure tended or would tend to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their verdicts (Attorney-General v. New Statesman and Nation Publishing Co. Ltd. [1980] 2 W.L.R.246).

5.47 We think that there is a real danger (although it must be admitted no examples have been brought to our attention) that too free publicity of what transpires in the jury-room might affect the confidence and independence of jurors, and might even bring the jury system into disrepute. We therefore recommend that a new Contempt of Court Ordinance should clarify the law and make it contempt of court to publish information about the deliberations of a jury or to disclose or solicit the disclosure of such information, on the lines of present United Kingdom legislation. The information sought to be protected would cover statements made, opinions expressed, arguments advanced or votes cast. We recommend that

proceedings for this form of contempt should not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it.

5.48 It has been suggested to us that an exception should be made in respect of soliciting or disclosing information concerning jury deliberations for bona fide research. We can appreciate that duly authorised and properly conducted studies might benefit the community but we adhere to the view that our law should comprehensively prohibit the solicitation and disclosure of juries' deliberations.

Protection of sources of information

5.49 We recommend that the new Ordinance should contain a provision on the lines of section 10 of the U.K. Act that a court may not require a person to disclose the source of information contained in any publication unless it is established that disclosure is essential in the interests of justice or national security or for the prevention of disorder or crime; and that therefore no contempt of court is committed by a refusal to disclose that does not fall within these exceptions.

Chapter 6

Scandalising the court

The scope of the offence

6.1 This deals with that part of the law of contempt which prohibits verbal or written attacks upon judges or the courts. It is clear that under the existing law, a contempt may be committed through publication of material, such as an accusation of bias, prejudice or corruption, which is calculated to bring a judge or a court into contempt or to lower his authority. This interferes with the administration of justice by 'scandalising' a court or a judge. Thus, it has been held that any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court (R v. Gray [1900] 2 Q.B. 36).

6.2 This particular part of the law of contempt is aimed at prohibiting scurrilous attack or abuse of a judge or of a court and attacks upon the integrity and impartiality of a judge or of a court. The important underlying consideration is to prevent the undermining of public confidence in the administration of justice. As Lord Denning said in "The Road to Justice"(1955) at page 73 :

> *"The judges must of course be impartial : but it is equally important that they should be known by all people to be impartial. If they should be libelled by traducers, so that people lost faith in them, the whole administration of justice would suffer. It is for this reason that scandalising a judge is held to be a great contempt and punishable by fine and imprisonment."*

6.3 On the other hand, it has long been clear that bona fide and reasoned criticism of a judgment in a particular case, for instance, or of the administration of justice generally, is permissible. As Lord Atkin said in his celebrated opinion in Ambard v. Attorney General for Trinidad and Tobago [1936] A.C. 322 at 335 :

> *"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, 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. The path of criticism is a public way : the wrong-headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of*

justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men."

We feel that the importance of reasoned criticism made in good faith should not be undermined; without it our legal system could not have been expected to develop satisfactorily. Fortunately, proceedings for contempt of this kind are very rare in Hong Kong. Where such contempt has occurred, it has usually been dealt with by way of a prosecution for sedition.

6.4 We recommend that such conduct should be subject to penal sanctions but as a statutory criminal offence and not as part of the ordinary law of contempt. It is important that the administration of justice be protected and public confidence in the judicial system be preserved. It should no longer be only part of the ordinary law of contempt as there is normally no reason why it requires to be dealt with urgently under the summary procedure. Where, of course, such conduct takes place in the face of the court, or relates to pending proceedings giving rise to a risk of serious prejudice then such conduct can and should be capable of being dealt with summarily as a contempt on that basis.

A new offence recommended

6.5 We have examined the approach to "scandalising the court" adopted in a number of other jurisdictions. In particular, we have looked at the recommendations made by the Phillimore Committee in its report and at those of the English Law Commission in its report on "Offences Relating to Interference with the Course of Justice" (Law Com. No. 96 at page 142). We examined, too, the approach suggested by the Canadian Law Reform Commission (Report No.17) and that of the Australian Law Reform Commission proposed in its Research Paper on "Public Criticism of Judges". These studies have led us to a number of conclusions as to the formulation of an offence appropriate to Hong Kong's particular circumstances.

6.6 Firstly, we consider that it should be necessary for the prosecution to show that the statement in question was false. We do not think it necessary for the courts to seek to prevent the disclosure of accurate statements, albeit critical of the judicial system. In addition, it should be a defence that the maker of the statement honestly believed the statement to be true and that he had reasonable grounds for that belief.

6.7 Secondly, we believe that the protection afforded by the offence should not be restricted to members of the judiciary but should extend to the conduct of those concerned with the administration of justice while engaged in judicial proceedings. A false allegation of impropriety in the conduct of counsel in a case could, it seems to us, bring into disrepute the administration of justice.

6.8 Thirdly, we consider that the offence should be constituted by the making of a statement which is likely to bring the administrative of justice into disrepute. We considered the Australian Law Reform Commission's reference to statements which create "a clear and present danger" to the administration of justice but concluded that such a formulation did not necessarily attack those statements which we felt should be regarded as culpable. In deciding whether a particular statement is likely to bring the administration of justice into disrepute, regard could be had to a number of factors. These could include the likelihood of repetition of the statement: whether the statement is likely to be given credibility; the nature and reputation of the maker of the statement and the circumstances in which it is made; and whether the statement has a significant bearing on the administration of justice as a whole.

6.9 Accordingly, we recommend the creation of a new offence which should be constituted by the publication, in whatever form, of a false statement alleging corrupt or improper conduct in judicial proceedings where that statement is likely to bring the administration of justice into disrepute. It should be a defence that the accused honestly believed the statement to be true and that he had reasonable grounds for that belief. As this is an offence which strikes at the administration of justice, we think it right that no prosecution for such an offence should be instituted except with the consent of the Attorney General.

Chapter 7

Acts which interfere with or obstruct persons having duties to discharge in court

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The rationale of the offence

7.1 Persons having duties to discharge in court include, inter alia, judges, juries, witnesses and parties. It is essential that for the rule of law to be maintained, public confidence in the administration of justice should not be shaken. The criminal law is already well able to protect the court process by the offence of perverting or attempting to pervert the course of justice. But certain conduct so endangers the course of justice that it requires to be dealt with immediately, as part of the law of contempt. Thus acts calculated to prejudice the due course of justice may constitute contempt whether committed before, during, or after the proceedings (Attorney General v. Butterworth [1963] 1 Q.B. 696). So, for example, any interference with a judge for the purpose of influencing his decision in a case is a contempt as is any interference with a juror whilst discharging his duty in court. Also, interferences with witnesses the purpose of which is to deter him from giving evidence or to influence the nature of his evidence is a contempt. So also are interferences with witnesses who have given evidence, for example, by victimising them for having given evidence. Other examples include interferences with process servers, receivers, bailiffs and officers of the court carrying out their duties.

7.2 The underlying reason why such conduct is regarded as contempt is the need to protect the administration of justice. As Pearson L.J. said in Chapman v. Honig [1963] 2 Q.B. 502 at 519:

> *"The object of the court's jurisdiction to punish for contempt of court is the protection of justice and not the protection of the individual affected."*

Victimization of jurors, witnesses and other persons after the conclusion of proceedings

7.3 Where, however, proceedings are concluded and are not pending or imminent, there is very little need for the court to deal with the matter summarily as part of the law of contempt. As we have said, the criminal law is well able to cope with such a situation. There may, however,

be exceptional cases even where proceedings are concluded and the court should have power to deal with it. Insofar as victimization of or reprisals against witnesses and jurors are concerned, once proceedings are concluded, such conduct should, in our view, no longer be part of the law of contempt but instead should be made a criminal offence. Discrimination against jurors by their employers is already punishable as an offence (s. 33 of the Jury Ordinance (Cap. 3)).

Litigants

7.4 Another matter which calls for comment is conduct directed at parties to a suit, in particular, litigants in civil proceedings. We have dealt with publications in earlier part of this Report. We now turn to other conduct directed at litigants. Although we have not been presented with any evidence that this occurs in Hong Kong, it is not difficult to envisage the position where a person is subject to pressure or threats by another with power or authority over him, say employees by employers, tenants by landlords. Parties who are exercising their undoubted rights to have an issue determined by the courts should not be subject to such improper conduct. But, it is also obvious that the law cannot protect parties from all kinds of pressure or threats but only unlawful ones.

7.5 We recommend therefore that conduct directed against a litigant in connection with legal proceedings in which he is concerned which amounts to intimidation, either criminal (under s. 24 of the Crimes Ordinance (Cap. 200)) or tortious, should be capable of being dealt with as contempt but that conduct falling short of that should not be regarded as contempt.

Chapter 8

'Civil contempt' – disobedience of court orders

Standard of proof

8.1 Under the present law, disobedience to an order made in civil proceedings is regarded as civil contempt.

8.2 The distinction between civil and criminal contempt is of diminishing importance in modern times. It has been held that even in civil contempt, the standard of proof required is the same as that in criminal contempt; namely, proof beyond reasonable doubt. The reason for this is self-evident. As Lord Denning M.R. said In Re Bramblevale Ltd. [1970] 1 Ch. 28 at 137 :

> *"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt."*

It is only right, in our view, that the standard of proof for all contempt should be proof beyond reasonable doubt.

The distinction between civil and criminal contempts

8.3 As we mentioned earlier, some different rules of procedure and of evidence apply in civil and criminal contempts. Other differences between the two classes of contempt include privilege from arrest and waiver. Certain classes of person have privilege from arrest on civil as opposed to criminal process, for instance, witnesses who go to or come from courts of justice in obedience to subpoenas, and solicitors and barristers attending courts to discharge their professional duties (Re Freston [1883] 11 Q.B.D. 545 at 552). This difference is, in our view, no longer desirable or necessary. We recommend that all privileges from process for civil as opposed to criminal contempt should be abolished, unless specifically provided for under such enactments as the International Organizations and Diplomatic Privileges Ordinance (Cap. 190).

8.4 Where a party in civil proceedings waives disobedience by another party to a court order, for all practical purposes, that is usually an end of the matter. But this is not always so. Where an order has been made in

respect of a child, it has been held that disobedience to such an order cannot be waived (Corcoran v. Corcoran [1950] 1 All E.R. 495. This difference between civil and criminal contempts is no longer a valid one. We recommend that a court should have power on its own motion to act against a person whenever it thinks fit to do so. This is particularly important for instance, where there has been a flagrant breach or disobedience of a court order and the party in whose favour the order was made declines, for one reason or another, to attempt to enforce it.

8.5 As has been mentioned, the powers of the High Court and the Court of Appeal to commit for all forms of contempt of court are now contained in O. 52 of the Rules of the Supreme Court. And by section 50 of the Supreme Court Ordinance Cap. 4 a right of appeal now exists for all cases of contempt (other than an order made by the Court of Appeal).

Ways in which civil contempt may be committed

8.6 Provision is made in O. 45 to O. 52 of the Rules of the Supreme Court for the enforcement of court orders. These are effective provisions. Although in theory, disobedience to any order of the court is a contempt, an order of committal is reserved to those cases which are dealt with pursuant to O. 45, r. 5 of the Rules of the Supreme Court.

8.7 O. 45, r. 5 is very wide indeed as it applies to refusal or neglect to do an act within a time specified in a judgment or order, and also to disobedience to a judgment or order to abstain from doing an act. Although in theory it can be invoked in the event of disobedience to a very large number of orders of the court made in the course of civil proceedings, O. 45, r. 5 is in practice normally invoked only in the case where no other remedy will be effective. There is a very good reason for this. The primary purpose of providing a sanction for disobedience is to make the order effective. Thus, it is an entirely effective sanction, for instance, to give judgment to the plaintiff where a defendant fails to comply with an order to deliver further and better particulars of the same. And, in practice, enforcement of judgments or orders are sought by whichever of the methods provided by O. 45 to O. 51 is appropriate to the circumstances of each case. O. 45, r. 5 is, in practice, therefore only invoked where no other remedy will be effective, say where there is a breach of an injunction granted by the court or a failure to carry out an undertaking given to the court.

8.8 Sanctions for disobedience are primarily designed to coerce the contemnor into obedience. The normal practice is to commit an individual until such time as he chooses to obey. Imprisonment is therefore sine die rather than for a fixed term. If the contemnor then changes his mind and decides to obey the order he is entitled to immediate release. This, however, leads to some difficulty in practice. Obstinate contemnors have to be released eventually, despite non-compliance. And the majority of contemnors are those who can be persuaded to obey by the threat of committal or by a fairly short stay in prison. We therefore recommend that sine die committals

should be abolished and that fixed terms limited to those set out in para. 4.4 should be imposed in all cases. It has been suggested to us that some contempts (such as the disobedience of a court order) can only be properly dealt with by committal for an indefinite and unlimited period. We gave careful consideration to this question and remained convinced that our proposal that the period of committal should be fixed without prejudice to the power of the court to order earlier release are fair and will meet the needs of justice in by far the majority of cases. We can imagine that only in very rare cases will a person continue to be in contempt after his release from imprisonment. In such a case, presumably, he can be punished again for any renewed defiance of a court's order.

8.9 We are reinforced in our view by a review of the law reports which shows that in recent years the jurisdiction of the courts has been invoked infrequently and that the courts recognise that committal for contempt is only justified in the gravest cases and as a last resort. Some of the cases are summarised in Annexure 4.

8.10 Other examples of conduct which are regarded as civil contempt are :

(a) failure of a solicitor to carry out an undertaking given by him in his capacity as solicitor;

(b) disobedience to a judgment or order for the payment of money (other than for the payment of money into court) within a specified period, subject to certain restrictions (O. 45, rr. 1(1) and 5(1)(a));

(c) disobedience to a judgment or order for the payment of money into court within a specified period (O. 45, rr. 1(2) and 5(1)(a));

(d) disobedience to a judgment or order to do or abstain from doing any act within a time specified (O. 45, r. 5(1));

(e) disobedience to a judgment or order for the giving of possession of land within a specified period (O. 45, r. 3);

(f) disobedience to a judgment or order for the delivery of any goods within a specified period which does not give the alternative of paying the assessed value (O. 45, r. 4(1));

(g) failure by a solicitor to enter an appearance, or give bail or pay money into court in lieu of bail in an admiralty action, pursuant to his written undertaking to do so (O. 75, r. 9);

(h) failure, without excuse, of a solicitor to give notice to his client of an order for interrogatories, discovery or inspection (O. 24, r. 16(4) and O. 26, r. 6(4));

(i) failure of a party to comply with an order for interrogatories, discovery or inspection (O. 24, r. 16(2) and O. 26, r. 6).

8.11 We received a representation that our law should diverge from the law in England as stated by the House of Lords in Home Office v. Harman [1983] A.C. 280. In that case the House of Lords, held by a majority of 3-2 that a solicitor, who in the course of discovery in litigation obtained possession of copies of documents belonging to his client's adversary, gave an implied undertaking to the court not to use the copies, nor to allow them to be used, for any purpose other than the proper conduct of the action on behalf of his client; that the fact that such documents were read out in open court at the hearing of the action, whether admitted in evidence or not, did not bring that implied undertaking to an end, and breach of it was a civil contempt of court. Accordingly, the appellant had been guilty of a contempt of court in passing the documents in question to a journalist.

8.12 In his dissenting speech (with which Lord Simon of Glaisdale concurred) Lord Scarman said -

> *"Can it be good law that the litigant and his solicitor are alone excluded from the right to make that use of the documents which everyone else may now make, namely, to treat them as matters of public knowledge? In our view, this is not the law. We do not think that a system of law which recognises the right of freedom of communication in respect of matters of public knowledge can decently or rationally permit any such exception. ....A balance has to be struck between two interests of the law - on the one hand, the protection of a litigant's private right to keep his documents to himself notwithstanding his duty to disclose them to the other side in the litigation, and, on the other, the protection of the right, which the law recognises, subject to certain exceptions, as the right of everyone, to speak freely, and to impart information and ideas, upon matters of public knowledge.*
>
> *In our view, a just balance is struck if the obligation endures only so long as the documents themselves are private and confidential. Once the litigant's private right to keep his documents to himself has been overtaken by their becoming public knowledge, we can see no reason why the undertaking given when they were confidential should continue to apply to them" (at pages 312-313).*

8.13 With respect, we consider that these views are preferable to those of the majority and recommend that the new Ordinance should make it clear that no contempt is committed in relation to the publication of that part of a document which has become public knowledge in the course of proceedings by being actually read out in open court. We note that the government of the United Kingdom has now also accepted this position. Ms Harman, the solicitor who had earlier been found guilty of contempt, complained to the

European Commission of Human Rights (Application 10038/82) that her freedom of expression had been breached. As a result the government agreed to seek to change the law so that such behaviour would cease to be contempt.

Conclusions

8.14 We are of the view that the provisions of O. 45, r. 5 should remain in their present form. In theory, as we have said, it is wide in its terms but the general principle is that process by way of contempt should not be lightly employed, and not in aid of a civil remedy where some other method of achieving justice is available (Re Clement [1877] 46 L.J. Ch. 375; Danchevsky v. Danchevsky [1974] 3 W.L.R. 709). Thus, the real safeguard is that the courts will not impose a sanction which goes beyond what is necessary to make their orders effective, except in the rare cases where a punitive sanction is appropriate. We would therefore recommend that there be no change to O. 45, r. 5. Under the present rule, it must be shown that the person whom it is sought to commit had sufficient prior notice of the terms of the judgment or order which it is alleged he disobeyed. The requirements of notice are set out in 0.45, r.7 and are, in our view, adequate. We see no reason for any change in Order 45.

8.15 We do, however, feel that two other rules of the Rules of the Supreme Court should be revoked. These provide for committal in the event of a breach. One is O. 24, r. 16(2), (3) and (4) and the other is O.26, r. 6(2), (3) and (4). These refer to failure to comply with an order for discovery or inspection of documents and failure to comply with an order for interrogatories. We doubt whether the power to commit for these failures has ever been invoked in Hong Kong; if it has, it must have been very rarely invoked. We think that the existing powers under O. 24, r. 16(1) and O. 26, r. 6(1) to strike out pleadings and enter judgment by default are adequate and, in practice, fully effective. In the rare case where committal might be regarded as an appropriate sanction, the provisions of O. 45, r. 5 are wide enough to cover the situation. We therefore recommend that O. 24 r. 16 and O. 26, r. 6 should be amended in so far as they provide for orders for committal.

Chapter 9

Miscellaneous related matters

The institution of proceedings

9.1 In general, contempt proceedings, civil or criminal, may be instituted by a private individual. There are certain exceptions such as under the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287), which can only be brought by the Attorney General or with his consent. It is in practice rare for criminal contempt proceedings to be brought other than by the Attorney General. His position in this respect is a special one and he has a special right, if not a duty, to draw the court's attention to instances of contempt where he believes it to be in the public interest to do so.

9.2 The role of the Attorney General in contempt cases was explained by Lord Diplock in A.G. v. Times Newspaper Ltd. [1973] 3 W.L.R. 298 at 319 -

> *"(The Attorney General) is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as "the fountain of justice" and not in the exercise of its executive functions. It is in a similar capacity that he is available to assist the court as amicus curiae and is a nominal party to relator actions. Where it becomes manifest, as it had by 1954, that there is a need that the public interest should be represented in a class of proceedings before courts of justice which have hitherto been conducted by those representing private interest only, we are fortunate in having a constitution flexible enough to permit of this extension of the historic role of the Attorney General."*

9.3 We believe that the Attorney General must retain his right to actin the public interest where he thinks fit to do so. Although contempt is a public offence in the sense of being an interference with the course of justice, private individuals are sometimes affected by it, and if for one reason or another the Attorney General decides not to act, we believe that the individual should have the right to test the matter in the courts. We consider, however, that it should be a requirement before proceedings alleging a contempt other than one arising out of a breach of an order of the court are begun, that notice of the intention to proceed be given to the Attorney General. This requirement would not apply where the proceedings were commenced by a judicial officer.

Legal Aid

9.4 Legal aid is available for certain civil proceedings under the Legal Aid Ordinance (Cap. 91) and in respect of certain criminal trials by virtue of the Legal Aid in Criminal Cases Rules made under section 9A of the Criminal Procedure Ordinance (Cap. 221). We regard it as an important safeguard for an accused person who is liable to be committed or fined for contempt of court in serious cases to be legally represented both at the hearing and at any appeal. We therefore recommend that the law be clarified and amended to permit legal aid to be given in appropriate cases both in the normal way and by the order of the judge presiding in the contempt proceedings or at the appeal.

Control of Publications (Consolidation) ordinance

9.5 The Control of Publications (Consolidation) ordinance (Cap. 268) was enacted in 1951 to amend and consolidate the law relating to the printing, publication, sale, distribution, importation, control, registration and licensing of newspapers and other printed matters.

9.6 Under section 4 of the Ordinance penalties can be imposed for the publication of a contempt including the suppression of the newspaper for up to six months, upon application by the Attorney General.

9.7 We recommend that contempt should be removed from the list of offences in the schedule to this Ordinance, since the penalties of fine and imprisonment add little to those for contempt of court itself and suppressing a publication for being in contempt seems excessive.

Chapter 10

Summary of recommendations

10.1 There should be a comprehensive Contempt of Court Ordinance including the following :-

(a) A clear statement of the principles by which "contempt of court" is defined.

(b) Clear procedures establishing how contempts are to be dealt with in specific situations, including procedural controls to limit the potential for abuse.

(c) Clear guidelines to allow the media to understand at what time publication can constitute contempt.

(d) Clear limits on the penalties which may be imposed for contempt of court.

(e) Clear rules as to who may commence and discontinue contempt proceedings.

This Ordinance should be drafted with a view to expressing the law in the simplest terms this complex subject will allow, with a careful translation (including detailed explanatory notes) into Chinese for wide dissemination (paragraph 2.6).

10.2 The present restrictions on media coverage of court proceedings should remain (paragraph 2.9).

10.3 All unnecessary distinctions between criminal and civil contempt should be abolished (paragraph 3.3).

10.4 All offences relating to conduct which intentionally or recklessly disrupts a judicial proceeding should be consolidated into one Ordinance, and a new scale of maximum penalties established (paragraphs 4.4 and 4.5).

10.5 In the High Court and Court of Appeal the power of fine should be limited to a $50,000 fine and the power to imprison to a maximum period of two years (paragraph 4.4).

10.6 The powers of judges in the District Court and commissions of inquiry to impose penalties for contempt in the face of the court should be increased to a $20,000 fine or 1 year's imprisonment (paragraph 4.4).

10.7 The powers of magistrates and tribunals to impose penalties for contempt in the face of the court should be limited to a $5,000 fine or 3 months' imprisonment (paragraph 4.4).

10.8 Summary contempt procedures should be used only when there are compelling reasons to act immediately or it is a matter of urgency (paragraph 4.6).

10.9 Whenever a contempt is dealt with the presiding judge or magistrate should :

(i) reduce the charge into writing and ask the offender to show cause why he should not be punished for contempt;

(ii) except where official shorthand-writers are present, take a full note of the proceedings;

(iii) where an offender is punished for contempt, inform him of his right of appeal;

(iv) have power to review an order of committal on his own motion or on application and order the discharge from custody of the offender (paragraph 4.6).

10.10 The provisions in the District Court Ordinance and the Magistrates Ordinance relating to punishing a witness summarily for perjury should be repealed (paragraph 4.7).

10.11 Regulations should be made governing the unofficial use of tape-recorders in court, and of recordings obtained thereby. Breach of the regulations should be punished as an offence (paragraph 4.8).

10.12 The present restrictions on photography and sketching in the precincts of the court should continue (paragraph 4.9).

10.13 A map or plan should be displayed wherever practicable indicating the boundaries of the precincts of the court and any place where a Commission of Inquiry is sitting for the purpose of defining the extent of the area in which photography and sketching is forbidden (paragraph 4.9).

10.14 Provision should be made in the legislation to prohibit the taking of photographs and the making of sketches in commissions of inquiry (paragraph 4.10).

10.15 The strict liability test for contempt should apply only where there is a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. S.2(2) of the UK Contempt of Court Act 1981 should be followed (paragraph 5.11).

10.16 Strict liability should apply only for contempt by publication. In other cases proof of an intent improperly to interfere with the administration of justice should be required (paragraph 5.13).

10.17 A clear, definition of "publication" is necessary. A definition based on the Contempt of Court Act 1981 section 2(1) should be adopted. This would include printed matter, radio and television broadcasts, films, tape-recordings, dramatic performances, and words addressed to a public meeting or to a private meeting to which the press was invited. It would not cover communications intended for "private circulation" (paragraph 5.14).

10.18 Where the proceedings in question are criminal,' strict liability for publication should apply only when the accused person is charged or a summons served (paragraph 5.20).

10.19 Where the proceedings in question are civil, strict liability should apply only when the case appears on the "running list" or, where the date for the trial is fixed, for a period of six weeks before that date. The running list and the list of cases set down for trial should be published (paragraph 5.22).

10.20 Strict liability for publications should cease to operate when a verdict has been returned and sentence pronounced or judgment given, or an equivalent order or decree made or given (paragraph 5.23).

10.21 Responsibility should lie with those directly engaged in the production of or those exercising control over the publication concerned. The printer or distributor of a local publication should not, merely as printer or distributor, be liable. Local distributors of foreign publications which are in contempt should be held responsible (paragraph 5.31).

10.22 Responsibility for a television or radio broadcasts should lie with the producer or the person who has editorial responsibility of the programme as well as the television or radio company or programme contractors (paragraph 5.32).

10.23 The defence of innocent publication and distribution provided by section 4 of the Judicial Proceedings (Regulation of Reports) Ordinance - Cap. 287 should be retained with such modifications as will be necessary if our recommendations in para. 5.20 and para. 5.22 are implemented (paragraph 5.36).

10.24 A defence that publication is for the public benefit should not be introduced into the law of contempt (paragraph 5.38).

10.25 It should not be contempt where publication formed part of a legitimate discussion of matters of general public interest and it only incidentally created a risk of prejudice to particular proceedings (paragraph 5.39).

10.26 The new law should clearly specify that the burden of proving that the risk was more than incidental should fall on the prosecution (paragraph 5.41).

10.27 It should be a defence to an allegation of contempt to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith (paragraph 5.44).

10.28 The Court should have power in any public proceedings where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings, pending or imminent, to order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose (paragraph 5.45).

10.29 It should be contempt of court to publish information about the deliberations of a jury or to disclose or solicit the disclosure of such information. Proceedings should only be able to be commenced on the motion of the court or with the consent of the Attorney General (paragraph 5.47).

10.30 It should not be a contempt of court to refuse to disclose the source of information contained in any publication unless it is established that disclosure is essential in the interests of the administration of justice or national security or for the prevention of disorder or crime (paragraph 5.49).

10.31 Unless there is good reason for the court to take immediate summary action "scandalising the court" should cease to be treated as contempt and should be otherwise provided for under criminal law. A new offence should be created, constituted by the publication, in whatever form, of a false statement alleging corrupt or improper conduct in judicial proceedings where that statement is likely to bring the administration of justice into disrepute. It should be a defence that the accused honestly believed the statement to be true and that he had reasonable grounds for that belief. No prosecution for such an offence should be instituted except with the consent of the Attorney General (paragraphs 6.4 and 6.9).

10.32 It should continue to constitute contempt to victimize or take reprisals against witnesses during the continuance of legal proceedings. Such conduct should not, however, be treated as contempt after the conclusion of proceedings but should be otherwise provided for under criminal law (paragraph 7.3).

10.33 Conduct directed against a litigant in connection with legal proceedings in which he is concerned which amounts to intimidation, either criminal or tortious, should be capable of being dealt with as contempt. Conduct falling short of that should not be regarded as contempt (paragraph 7.5).

10.34 All rules which confer privilege from process for "civil" as opposed to "criminal" contempt of court should be abolished (paragraph 8.3).

10.35 The rule that waiver by an aggrieved party in civil proceedings automatically relieves the contemnor of liability should be abolished (paragraph 8.4).

10.36 All committals to prison for civil contempt should be for fixed terms (paragraph 8.9).

10.37 No contempt should be committed in relation to the publication of that part of a document which has become public knowledge in the course of proceedings by being actually read out in open court (paragraph 8.13).

10.38 Certain of the Rules of the Supreme Court which provide for committal in the event of breaches of specific court orders should be revoked, and all cases of disobedience which may be dealt with by committal procedure left to the general provisions of 0.45, r.5 (paragraphs 8.14 and 8.15).

10.39 The right of private individuals to initiate proceedings for contempt should continue, without prejudice to the powers of the Attorney General to take proceedings at his own instance should he consider it proper to do so in the public interest (paragraph 9.3).

10.40 In all contempt proceedings which a private individual seeks to institute, other than those for the enforcement of a court order made in his favour, he should be required to serve notice of those proceedings on the Attorney General (paragraph 9.3).

10.41 Legal aid should be available to an accused person who is liable to be committed or fined for contempt of court in appropriate cases both in the normal way and by the order of the judge presiding in the contempt proceedings (paragraph 9.4).

10.42 Contempt of court should be removed from the list of offences in the schedule to the Control of Publications (Consolidation) Ordinance (paragraph 9.7).

Annexure 1

Contempt of Court Sub-committee
Membership

(Chairman)	The Hon Mrs Selina Chow JP* Company Director, member of the Legislative Council
(Vice-chairman)	The Hon Mr Justice Kutlu Fuad* Justice of Appeal
	Mr Louis Cha OBE Editor, Ming Pao Daily News
	Mr J M Duffy Deputy Crown Prosecutor
	Mr Robin G Hutcheon Editor, South China Morning Post
	Mr I R A MacCallum JP Solicitor
	Mr Arjan H Sakhrani QC JP* Barrister
	Mr Leslie Sung Solicitor
	Mr David E L Wong Chairman, Hong Kong Journalists Association
(Secretary)	Mr C G Jackson Attorney General's Chambers
(Secretary)	Miss A Luk Attorney General's Chambers

*Commission member

Annexure 2

Sample of discussion paper sent to interested bodies inviting submission.

January 1982

Dear

Invitation for submissions by interested parties

A sub-committee appointed by the Law Reform Commission of Hong Kong is presently charged with considering the question "Should the present law and practice relating to Contempt of Court in Hong Kong be changed and if so in what way".

As secretary to the sub-committee I am instructed to write to parties who may be interested and concerned with the question to invite them to submit to the sub-committee either collectively or individually in writing any views that they may have or any representations that they may wish to make.

The sub-committee clearly would like to have as wide a participation as possible if they are to be able to put forward to the Law Reform Commission a balanced paper and with this in mind apart from writing to specific parties the sub-committee is also inviting representations from the public at large.

The Law of Contempt is a very wide and indeed a very uncertain subject and it may be helpful if I attach hereto a discussion paper which hopefully sets out many of the issues to be considered by the sub-committee. Some of the issues may be of interest to you - some way not. It would be much appreciated if you, your society or your organisation have views on any particular part of the topic if you would submit them in writing to me. In due course your views or submissions will go before the sub-committee for discussion.

Hopefully in due course the sub-committee will report to the full Commission giving recommendations (if any) for change.

In submitting the discussion paper to you for your views the sub-committee have asked me to deal with certain additional matters as follows

(a) In para 17K of the discussion paper the question of tape recorders and cameras is raised. To clarify the question I would say that in general terms tape recorders and cameras in the hands of the public are not allowed within the precincts of the Court. You may feel that there is a case in Hong Kong for permitting the use of tape recorders in the interests, for example,

of accurate reporting. As to cameras the problem has arisen as to the definition of "precincts of the Court".

(b) Is there any good reason why sketches taken during the court proceedings should not be permitted? Would, for example, the drawing of sketches in any way deter or inhibit a judge, a witness or a member of a jury?

(c) 18 D should be extended to include jurors i.e. to what extent should press, radio or television interviews with witnesses or jurors be permitted?

(d) To what extent should the Law of Contempt attempt to preserve the secrets and confidentiality of the jury room?

(e) Should courts have the power to order the press not to report particular matters and proceedings and if so which matters and which proceedings?

As I have indicated the participation of interested bodies is particularly important to the task before the sub-committee and I should be grateful if you would like to submit any views that you do so in writing as soon as possible and in any event before March 1982.

This letter is being sent to the Judiciary, the Media, the University and to Legal Practitioners. If you feel that it should also be sent to any other bodies or individuals I should be grateful if you would let me know.

You may wish to circularise your "membership" with this letter and paper. That is of course a matter for you but if I can help in any way please do not hesitate to let me know.

Yours faithfully,

(C.G. Jackson)
Secretary to the Sub-committee

Contempt of Court
Discussion Paper

This paper which is intended to show the area of the topic and to pose questions for consideration is based upon and draws much of its form and content from the Phillimore Report to the Lord Chancellor and the Majesty's Advocate 1974.

Introduction

1. "Contempt of Court is a means where by the courts can act to prevent or punish conduct which tends to obstruct prejudice or abuse the administration of justice either in relation to a particular case or generally".

2. "The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented" per Lord Justice Salmon.

3. Is the law of contempt of fundamental importance? How does it operate in Hong Kong? How is a person guilty of contempt under the present law and is it reasonable that he should be? Given a charge of contempt is the person charged at an unreasonable disadvantage as compared with a defendant in other proceedings? Should the press be allowed to report all proceedings regardless of possible prejudice? These are some examples of the questions to be considered by the sub-committee.

4. Contempt of Court virtually defies a precise definition because of the infinite number of ways in which the administration of justice can be prejudiced or abused. The report of the Phillimore Committee pointed for example to organised demonstrations in court; publishing an article denigrating an accused man shortly before his trial; threatening a witness; publishing articles about matters which are being considered at that time by the courts; disobedience to court orders; attempts to bribe judicial officers; forgery of a courts process etc. The examples perhaps show the very wide area covered by contempt proceedings.

5. Contempt of Court is not fully defined by statute but has been formulated in England and thus in Hong Kong over many years by the common law or case law. The examples quoted above may well explain why no attempt has been made to legislate for every type of contempt or every eventuality.

6. Because contempt cannot be clearly defined there has arisen a considerable degree of uncertainty as to its meaning and its operation over recent years.

7. In Hong Kong the common law position is the same as it is in England somewhere local ordinances have made special provision. The ordinances for example make such provision in certain general areas e.g. How a magistrate or District Court Judge can deal with contempt? What punishment he may impose? The method of appeal etc. but the ordinances do not define the acts of contempt themselves. As has already been stated this might be an impossible task.

8. It is not known how often contempt proceedings of any kind are used in Hong Kong because apart from the Law Reports there is no record. There is for example no record of the occasions when say an aggrieved defendant in a magistrates court has abused or threatened the magistrate or a court official; nor is there a record of how any such case was disposed of.

9. From looking at the Hong Kong Law Reports one sees that over the last 50 years there have been very few recorded cases involving contempt. Those that there are dealing with different kinds of contempt e.g. publishing prejudicial matter; witness assaulted in court precincts after giving evidence; non-compliance with a court order for payment of money; refusal to obey an injunction etc. That might be seen as an argument for leaving the present law alone as it appears to work well in Hong Kong and is not (albeit at the present time) the subject of acrimonious debate.

10. What is of particular importance in the law of contempt is that courts are given a special and summary procedure to deal with contempt which may be severely punished. For example a person may insult a Judge during proceedings; the judge himself will in effect "try" the accused and sentence him. Is that fair to the accused? If the matter is delayed and transferred to another judge will such a step weaken the authority of the first judge within his own court? Again these are important matters for consideration.

11. The uncertainty of the present law of contempt has already been touched upon. That uncertainty is particularly present in that part of the law which affects the press and will be dealt with in greater detail at a later stage in this paper.

12. Thus for it seems that there a number of important questions of a general nature to be answered before proceeding to questions of detail. Those questions are :-

(a) Is the protection of the administration of justice and the authority of the courts which is presently enshrined in "contempt" still necessary in Hong Kong?

(b) If so is the present law adequate and fair so that it does not require amendment or clarification?

(c) If it does require amendment or clarification how is this best achieved either by legislation for particular aspects of contempt or by codification of the whole?

The Summary Procedure

13. This subject has been referred to briefly in para. 10 above and is one of considerable importance. In cases of alleged contempt many persons depending on the circumstances may make an application to the court for the committal of the alleged contemner. Although he (the applicant) must prove beyond reasonable doubt that contempt has been committed in many case she does not have to prove a mental element. There are no limits to the penalty and in the case of contempts in the face of the court no application is necessary. The Judge himself is aware of the relevant facts and can proceed to deal with the alleged contemner immediately.

14. One result of using the summary procedure is that a person alleged to be in contempt does not enjoy the usual benefits of an accused person e.g. the judges rules or trial by jury. Of cause there are good reasons for the summary procedure provided it is used sparingly. "Its principal merit is that it can be set in motion rapidly in order to deal with a threat to the administration of justice". For example a prejudicial publication shortly before a trial may need to be brought before the court without delay in order to prevent a recurrence.

The Mental Element

15. In some areas of the law particularly in relation to the press liability does not depend upon proof of intent. Lack of knowledge or intent is normally relevant only in mitigation of penalty. In such cases liability is "strict". Again this contrasts with the usual position in the criminal law where a mental element is an essential ingredient of the crime. Can this be justified or ought there to be certain classes of contempt which can only be committed intentionally or recklessly.

Courts with Contempt Jurisdiction

16. Which courts in Hong Kong should have such jurisdiction. Should there be legislation and if so to what extent setting out the various powers relating to contempt which each court (including e.g. the Bankruptcy Court) can deal with e.g. compulsion of witnesses; enforcement of court orders, contempt in the face of the court; assaults on officers of the court etc.

Contempt in the Face of the Court

17. Some examples of this include throwing objects at the judge; insulting persons in court; organised singing etc. and it is in cases of this kind that the courts summary powers are most often used.

The questions raised by this type of contempt are as follows :-

(a) Should the judge appear to be the prosecutor and judge in his own course?

(b) Has the alleged contemner sufficient opportunity to defend himself or make a plea in mitigation?

(c) Is the threat of immediate punishment a better deterrent than a threat to refer the case elsewhere?

(d) Should the judge have an option to send the case elsewhere for trial?

(e) Should the summary procedure be abolished in favour of "ordinary trial procedure"?

(f) Should legal aid be awaitable to the defendant as a matter of course?

(g) Should a period of time be interposed between the determination of the issue and the imposition of penalty?

(h) Is the appeal procedure in Hong Kong for contempt cases adequate?

(i) Should there be a limitation upon the penalties to be imposed?

(j) Are the present powers of the court to compel the attendance of witnesses adequate?

(k) Should cameras and tape recorders be permitted in court in any circumstances?

Prejudice deliberately caused

18. This subject raises a number of important issues and questions as follows :-

(a) Do judges sitting alone without a jury need the protection of the contempt laws against prejudice? In Hong Kong the consideration must also extend to the magistrates. Are they by

their training and experience capable of putting prejudicial matter out of their minds?

(b) What of juries - should they be treated differently and if so why? Are they likely to be prejudiced for example by what they read and hear during a trial?

(c) To what extent might witnesses be affected by prejudicial matter before or during their giving of evidence?

(d) To what extent should press, radio or television interviews with witnesses or jurors be permitted?

(e) In what circumstances if any should witnesses be paid for interviews or articles to the press or the media? Would the effect of such payment create a vested interest in the outcome of a trial?

(f) What of the pressures and influences that could be put upon the parties to an action? To what extent if at all should such pressure be permitted? e.g. a section of the press siding with one party to an action against another.

The risk of prejudice unintentionally caused

19. In England it was found that here lay the main conflict between the public interest in the administration of justice and the principle of free speech. The following questions are specifically raised :-

(a) To what extent should free speech be restrained by the law in the interests of the administration of justice.

(b) Should the defence be awaitable that at the time of publication a person did not know and had no reason to suspect that the proceedings in question were pending or imminent.

(c) Is there justification for drawing a distinction between publications and private conduct? e.g. for a private individual to be guilty of contempt should an intent to interfere be a necessary ingredient?

(d) What of offers of payments or other rewards to witnesses? e.g. Press agrees with witness for a sum that his story will be published after the conclusion of proceedings.

(e) The view has been expressed that if there is a distinction to be drawn between private conduct and publications then it is necessary to frame a definition of "publication". Also that the strict test should only be applied to publications which are

intended to be distributed or addressed to the public at large and not those intended for private circulation. How then should "publication" be defined?

20. Still under the general heading of prejudice unintentionally caused arose perhaps the most important or certainly those questions which prompted most public debate and demand for change in England and elsewhere. Given that we must keep in mind above everything else in considering this topic the need to preserve the balance between public interest and the right of the individual to a hearing free of prejudice we clearly must recognise that Hong Kong is not England or elsewhere. Those factors which principally gave rise to the 'debate' in England and elsewhere may not be present in Hong Kong and even if they are, the approach of others to the problem may not be appropriate to Hong Kong.

It is all very well to say that public interest demands a greater freedom from restraint but practicalities are vitally important. If for example one says that a publication ought to be allowed despite the risk of prejudice because of the public interest what is the result if in fact prejudice is caused? In other countries it may not matter very much if the prejudice is a local one as opposed to a national one. The case can be retried elsewhere. Not so in Hong Kong because of its size and its press or medium coverage.

21. According to the Phillimore Report the three important events which gave rise to the debate were as follows :-

(a) The setting up of the National Industrial Relations Court.

(b) The relaxation in the House of Commons of its sub-judice rule and

(c) The publicity and the campaign in the thalidomide case.

It may well be that none of these factors have any application as yet to Hong Kong but it is perfectly conceivable that the last mentioned situation could arise at any time here and accordingly it appears to be pertinent to ask the following questions:

(a) If a court is concerned with a case which may give rise to discussion and protest in the press and amongst the public and which raises deep and widespread issues of public and political controversy how far is it possible or desirable to restrict comment by the law of contempt?

(b) Should the law of contempt recognize that the need to prevent prejudicial comment should be balanced against the right to discuss a matter of widespread public concern and controversy?

(c) If the answer to either of the above two questions is that the law ought to be changed how should such a change be expressed so that it is clearly understood by the press and the public?

22. Whilst still under this general heading it might be useful to consider if the use of "gagging writs" is practised in Hong Kong and if so or if they might be used what steps should be taken to prevent them or limit them?

23. In considering the whole question of publication it may be helpful to take Phillimore's four distinguishable types of publication for consideration and to apply the questions raised to each of the four in turn. The four are as follows : -

(a) Publications which report as news, events which are likely to lead to legal proceedings e.g. crimes and accidents and comment on them (also photographs of suspected persons).

(b) Publications which report or comment on legal proceedings which have started or are known to be about to start.

(c) Reports resulting from investigative journalism which may lead to legal proceedings.

(d) Reports of and comment on matters of general public interest which are also or may become the subject of legal proceedings.

24. In considering the question of whether or not a publication is in contempt should the test be "whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced" or should some other definition be used more appropriate to Hong Kong?

25. If there is to remain a law of contempt in respect of publications at what points of time is the law to come into operation and end? In criminal proceedings e.g. is it to start at the time of arrest or charge and is it to end at the close of the trial or when the last date for appeal has been reached? In civil proceedings should the time start to run from the issue of a writ, its service or the setting down of the action and should it end at the close of the trial or at some other time?

26. The next matter for consideration is that of "Defences" and can best be dealt with by a series of questions as follows :-

(a) "A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that the proceedings were pending or that such proceedings were imminent as the case may be". This defence would only be relevant if there were no statutory time limits as

suggested in the last paragraph and the time test for contempt remains as it is now i.e. Imminence.

(b) "It is a defence to contempt proceedings to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith". Would this defence go so far to suit Hong Kong and swing the balance too much in favour of the press?

(c) Should a defence of public benefit be created or would its very definition defeat its purpose.

27. Consideration should also be given and guidance would be appreciated by the sub-committee upon the question of responsibility for publications be it individual: editorial (newspapers broadcasting) or that of employers. What two of the liability of distributors?

Matters for specific consideration

28. Reprisals against witnesses: Should such reprisals be made indictable offences and removed from the Law of Contempt?

29. Scandalizing the court: Should this fall within the law of contempt or should it be a strictly defined criminal offence? Indeed should there be such an offence at all? If there should be such an offence would "truth" or "public benefit" be a defence?

30. The sub-committee will no doubt be considering the present law and practice relating to disobedience to court orders and any submissions upon this subject would be welcome.

31. Finally the sub-committee will consider the whole question of procedure, appeals and sentences e.g. Who should have the right to institute proceedings? How can the enforcement of fines be strengthened? Are the present sentencing powers of the courts in Hong Kong for contempt adequate? etc. Again submissions upon any of these general topics would be appreciated.

Annexure 3

Persons/bodies who have been consulted by the Sub-committee :

1. Hong Kong Bar Association
2. The Law Society of Hong Kong

*3. School of Law, University of Hong Kong

4. Magistrates' Association of Hong Kong

*5. Information Services Department

*6. Labour Department

*7. Royal Hong Kong Police Force

8. Radio Television Hong Kong
9. Television Broadcast Ltd.

*10. Asia Television Ltd.

*11. International Press Institute, Hong Kong National Committee

*12. The Newspaper Society of Hong Kong

*13. Mr. A.L. Marriott, Solicitor

*14. Registrar, Supreme Court of Hong Kong

*15. Hong Kong Journalists Association

*Those who submitted their views in writing

Annexure 4

Digest of Hong Kong cases on Contempt of Court

(a) The Queen v. South China Morning Post Ltd. [1955] H.K.L.R.120.

The Attorney General moved the court for writs of attachment against the S.C.M.P., its printer and editor in respect of an article relating to an action which commenced in the Supreme Court 3 days after the publication date. The article was captioned "Big Claim Against 3 Government Doctors" and referred to an action against the doctors claiming damages in negligence for certifying a Mr. Q. to be insane. The article contained the following sentence "There Mr. Q. was allegedly examined and termed 'uncertifiable' by prominent Harley Street psychiatrists". It was said that the article was calculated to interfere with the fair trial of the action by prejudicing the public against the defendants, the public being the jury who were to try the action. The Court while disapproving of the language used and stating it to be a technical contempt held that they were insufficiently grave and serious to warrant invoking a jurisdiction which should only be invoked for grave and serious reasons and on real and substantial grounds;

(b) Lo Sau-King v.R. [1962] H.K.L.R.124

At a time when criminal proceedings had begun against several persons, 6 newspapers published articles in connection with the activities of the police in arresting those persons. The descriptions given in the articles of those arrested left no doubt that they referred to the persons in respect of whom proceedings had already begun. The articles made it clear that those persons were believed to be implicated in criminal offences which had attracted considerable notoriety. It was submitted on behalf of the newspapers concerned that they had no intention to prejudice the trial of the persons arrested. It was held that the respondents were guilty of contempt in that the newspaper articles were calculated to interfere with or were likely to interfere with the course of justice. The test of guilt was whether the matter complained of was calculated to interfere or indeed was likely to interfere with the course of justice and not whether that was the intention of those responsible for the publication of the paper.

(c) Lo Sau-King and others v. R. [1950] H.K.L.R.26

The Attorney General moved the court for the issue of writs of attachment against the proprietor, editor, publisher and printer of a Chinese newspaper in respect of a publication alleged to be highly prejudicial to the trial of several persons who had been arrested on a charge of robbery. The article referred to the arrests, gave certain particulars of two of the persons arrested (including details of a previous conviction) and mentioned evidence tending to show that they were guilty of the offence charged. The printers were a limited liability

company and their counsel contended that the company could not be fined. He further argued that the publication was not intended by the respondents to prejudice a fair trial and consequently was not so calculated. It was held (i) the court may fine a limited liability company which is involved in contempt of court and (ii) there need not be, on the part of some person responsible for, or at least concerned in, the publication a deliberate and conscious calculation that the publication would produce an effect prejudicial to the trial. It is sufficient if the circumstances show that the actions of the respondents were likely really to interfere with a fair trial or seriously to interfere with the due course of justice.

(d) In re. an Application by the Attorney General for Committal for Contempt of Court (M.P.12/76)

The Attorney General applied for an order of committal for contempt of court against the publisher and editor of a newspaper for an article published in an issue together with a man's photograph above the caption "Suspect". The article was as follows :-

(Suspect robber grabbed)

An alleged robber ordered a hearty meal in a North Point restaurant and when it came to pay ... he did it with a knife and took $1,100.

The incident happened yesterday afternoon at the Tin Po Restaurant, near State's Theatre in King's Road. But the man did not go far. He dashed for about 10 blocks before he was overpowered by three passers-by and restaurant employee. Thanks to the robber, the owner of the restaurant decided to donate the recovered money to the Community Chest." The gravamen of the charge against the respondents was the juxtaposition of the article and the photograph. The contention was, that at the time of publication, the issue of the identity of the offender might well have to be decided by a court of law. It was never suggested that the article itself would have amounted to contempt. Counsel for the Crow argued that prejudice might arise either by influencing any judge of fact at the trial or any identifying witness. It was held (i) the court would not order committal where the risk of prejudice was slight: there had to be a real risk and not just a remote possibility of prejudice and (ii) the court would not intervene since it was persuaded that the identity of the alleged robber could reasonably be anticipated to be a live issue especially as the available information disclosed that the person arrested had taken a meal in the restaurant before committing the alleged offence, had been chased from the restaurant by an employee until he was arrested and had been arrested with the proceeds of the alleged robbery in his possession.

(e) Wen Wei Pau and others v. R. [1959] H.K.L.R.216

Fines, and not imprisonment, were imposed against the proprietors, publishers, printers and editor of two Chinese newspapers who admitted publishing etc., articles calculated to poison and inflame

public opinion against a man who had been arrested on a criminal charge tending to prejudice his fair trial on the grounds (a) the newspapers were long established in Hong Kong without a similar previous transgression, (b) the publication appeared on one day only and (c) the defendants had expressed regret and offered an unreserved apology.

(f) Edwards (No. 3) v. Alamo [1957] H.K.L.R.269

A notice of motion before the Full Court contained scurrilous passages about the conduct and integrity of the trial Judge. In reviewing the authorities on the extent to which a Judge may be criticised in the conduct of the proceedings, the Court held that contempt had been established but the power to deal summarily and severely with it should be used with forebearance and only to the extent necessary to ensure the proper administration of justice. The justice of the case would be met by directing that the offending passges be deleted and that they be not repeated. Of the authorities of the Court said -

> "These cases do seem to indicate that there are limits and boundaries to what may properly be done and what may properly be said in presenting an appeal to the Court of Appeal against the decision of a Supreme Court Judge. Clearly the appellant must be entitled to make such criticisms of the judge's decisions and the judge's conduct in the case as are necessary for him fairly and properly to present his case to the Court of Appeal, but if he goes beyond those boundaries and says things which although ostensibly uttered as a party or appellant are in reality uttered more for the purpose of vilifying and abusing those who have not accepted his opinions, then in our opinion the proper boundaries and limits would be crossed and the person responsible would be guilty of an act which in our opinion would tend to obstruct and impede the course of justice."

(g) Chan U and others v. Wong Hing and others [1959] H.K.L.R.95

On an appeal copies of the record had not been prepared and the Court directed the Registrar to enquire into the reasons for delay. It transpired that the fault was primarily that of counsel who failed to return the necessary papers to his instructing solicitors. Counsel wrote letters to the Registrar, in the course of the enquiry, which the Court felt, on the face of them, were defiant and contumacious. In relation to the letters, counsel was ordered to attend and show cause why he should not be punished for contempt of court. In the course of the judgment, the Court said -

> "It is the right and the duty of this Court to enforce respect for itself and its officers and that is a duty which we intend to discharge. Whilst fully conscious that the powers which we possess in this connection should be sparingly employed and

> that their value depends on the wisdom and restraint with which they are used, it seems to us that counsel, in behaving as he did, has made it necessary for us to determine whether he should or should not be punished for contempt of court; although, naturally, in determining any such punishment we would give every consideration to the apology which he has already made. It is clear however that no one should be punished for contempt until he has been informed of the precise charge made against him and been given every opportunity of making an explanation and urging whatever he would wish to urge in response to that charge or in mitigation of the consequences."

(h) In the matter of an application bv Liu Lee Yuk Ching H.C.M.P. 814 of 1982

The applicant moved an order for committal against her husband. The applicant and her husband separated in July 1981. The husband filed a petition for divorce on 23 December 1981. On 30 December, he took out an ex parte summons which he did not serve on the applicant. On 8 January 1982, he obtained an order enjoining the applicant from, molestinq him until the return day for the inter partes summons (20 February 1982) and from entering the premises of or interfering with the business of the company of which they were the majority shareholders, and restraining the applicant from, selling any of her assets or their joint assets. The husband then sent copies of the order to a bank, the mortgagees of a flat held in the applicant's name, the Kowloon Stock Exchange on which the applicant owned a seat and the Registrar of Companies for filing against four companies of which the applicant was a shareholder. On 20 February, the judge ordered that the interlocutory injunctions be discharged upon mutual undertakings given by the parties. The husband again sent copies of the order to the bank mortgagee and the Kowloon Stock Exchange. His solicitors refused to reveal to the applicant's solicitors the names of any other persons or companies upon whom or to whom copies of either order had been sent or served. Copies of both orders were sent to the Citibank, the mortgagee of a flat newly acquired by the applicant. The court held that the husband's conduct was consistent with a deliberate planned attempt to pressurize the applicant into a speedy settlement to save herself from public embarrassment. The conduct on behalf of him was an abuse of the "lawful process of the court" which must be treated as a contempt. By his conduct on 20 February, the husband had molested and interfered, with the applicant contrary to his undertaking contained in the order of that date, which also constituted contempt. However, having regard to the fact that the husband had throughout acted upon the advice of solicitors to his apologies tendered to the court, and upon his undertaking to take all such steps as were necessary and possible to eradicate the effects of the conduct complained of, the court did not think it was necessary or appropriate to make an order for committal and ordered the husband to pay the applicant's costs of proceedings.

Annexure 5

Practice Direction

SUPREME COURT

Practice - Tape recorders - Use of tape recorders in court - Leave of court – Discretion - Factors relevant to exercise of court's discretion - Contempt of Court Act 1981, s.9.

1. Section 9 of the Contempt of Court Act 1981 contains provisions governing the unofficial use of tape recorders in court. Among other things it provides that it is a contempt of court to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court; and it is also a contempt of court to publish a recording of legal proceedings or to use any such recording in contravention of any conditions which the court may have attached to the grant of permission to use the machine in court. These provisions do not apply to the making or use of sound recordings for purposes of official transcripts of proceedings, on which the Act imposes no restriction whatever.

2. The discretion given to the court to grant, withhold or withdraw leave to use tape recorders or to impose conditions as to the use of the recording is unlimited, but the following factors may be relevant to its exercise: (a) the existence of any reasonable need on the part of the applicant for leave, whether a litigant or a person connected with the press or broadcasting, for the recording to be made; (b) in a criminal case, or a civil case in which a direction has been given excluding one or more witnesses from the court the risk that the recording could be used for the purpose of briefing witnesses out of court; (c) any possibility that the use of a recorder would disturb the proceedings or distract or worry any witnesses or other participants.

3. Consideration should always be given whether conditions as to the use of a recording made pursuant to leave should be imposed. The identity and role of the applicant for leave and the nature of the subject matter of the proceedings may be relevant to this.

4. The particular restriction imposed by s.9(1)(b) of the 1981 Act applies in every case, but may not be present to the mind of every applicant to whom leave is given. It may therefore, be desirable on occasion for this provision to be drawn to the attention of those to whom leave is given.

5. The transcript of a permitted recording is intended for the use of the person given leave to make it and is not intended to be used as, or to compete with, the official transcript mentioned in s.9(4) of the 1981 Act.

Lane CJ
Denning MR
John Arnold P
R.E. Megarry V-C

19th November 1981

Annexure 6

COMPARATIVE LAW

Australia

In July 1982 reference was made to the Australian Law Reform Commission to review the law and procedure of contempt of court. Singled out for particular attention in the Australian Law Reform Commission project were :

- who should hear and determine contempt cases;
- what non-judicial tribunals should have contempt powers and protection;
- what penalties should be imposed;
- what standards of proof should be observed; and
- how the balance should be struck between free speech and the protection of the integrity of judicial process, particularly in relation to "scandalising the court".

The Attorney General's reference to the Commission covers Federal Commissions as well as courts. It requires the Commission to have regard to the guarantee in the International Covenant on Civil and Political Rights both for "freedom of expression" and "fair trial". The Commission is instructed to take into account the need to ensure that judicial proceedings are conducted in an orderly fashion, and the need to ensure that the courts, tribunals and their officers are not unjustifiably brought into disrepute.

The Commission proposes to publish a series of 7 research papers for consultation as part of the process of producing a final Report. Two of these were published in 1985. They were "Public Criticism of Judges" and "Improper Behaviour in Court".

The former paper dealt with "scandalising the court" and recommended that a remark should only be treated as "scandalising" if it created a "clear and present" danger to the administration of justice. This would replace the existing criterion that the remark must be "calculated" to impair public confidence in the administration of justice. The likelihood of repetition of the remark should be taken into consideration when assessing whether or not it is "scandalising".

The court should be required to consider whether the remark carries credibility and whether it has a significant bearing upon the administration of justice as a whole. The court should take account of fact

that judicial decisions reflect the political, moral, economic and social considerations and personal predilections of the judge concerned.

The offence of scandalising should require proof of an intention to create a clear and present danger to the administration of justice.

Truth or honest belief should be a defence and there should be a new defence of public apology and retraction. If the court is satisfied that the accused has published a full apology and retraction in all major newspapers circulating in the jurisdiction where the scandalising remarks were disseminated and that this apology and retraction are sufficient to render the damage done by the remarks insignificant it will exonerate the accused.

The Research Paper on "Improper Behaviour in Court recommends that the common law offence of contempt in the face of the court and equivalent statutory offences should be done away with. There should be a basic statutory offence of wilfully acting in such a way as to cause a significant disruption of a trial in progress. Refusal by a witness to answer questions would constitute an offence only if (a) there was no reasonable cause including privilege and (b) it was necessary to the satisfactory conclusion of the trial that the answer be given by the witness at the time it was asked.

There should be a specific offence of wilfully and improperly bringing about the termination of the trial. This is aimed primarily at lawyers tactically choosing to abort a trial by conduct giving the judge no option but to discharge the jury.

There should be an offence of wilful refusal by a lawyer to appear for a client without reasonable excuse where the lawyer had previously undertaken to represent him.

Bermuda

Recommendations made by the Bermuda Law Reform Committee were followed by the Administration of Justice (Contempt of court) Act, 1979. This Act adopts many of the recommendations made in the Phillimore Report. The principal provisions of the Act are as follows :

1. Civil proceedings include proceedings before a tribunal.
2. Criminal proceedings commence when accused is arrested or charged or summons issued requiring his attendance.
3. Civil proceedings commence when the date of the trial or hearing has been fixed.
4. Criminal proceedings end -

(i) on a conviction when sentence passed;

(ii) on acquittal when accused person released or discharged;

(iii) when no verdict is recorded in a trial when the prosecution indicates that there will be no further proceedings;

(iv) if accused is found unfit to plead at the time of the recording of such finding.

5. Civil proceedings end at the conclusion of the trial or interlocutory hearing at first instance.

6. A contempt in the face of the court is punishable in a specific way with limits imposed.

7. A failure to obey or comply with a Court order is to be dealt with in a particular way.

8. A specific provision for contempt of a tribunal.

9. Spoken or written contempt not in the face of the court is defined.

10. Innocent publication and distribution and publication of information relating to proceedings in camera is dealt with in the legislation.

11. Publication of reports of proceedings when similar proceedings outstanding and responsibility for broadcast publications is covered in the legislation, as is the responsibility of directors and partners.

12. Specific punishment for contempt is provided for, as is the failure of witnesses to attend and the refusal of witnesses to give evidence.

Canada

The Law Reform Commission of Canada published a Report on Contempt of Court in 1982 (Report No. 17). The Report followed discussion on a Working Paper which had been issued for public comment in 1977. In the Working Paper, the Commission pointed out that the development of the Canadian law of contempt had been influenced by their particular social and political context. The whole subject had become particularly relevant in Canada because of frequent labour disputes; organised resistance to injunctions; political opposition to the judicial system during 1970 and the emergence of guerilla tactics against the court. As a consequence the number of contempt of court cases increased dramatically, were heavily

publicised and the law of contempt had become a subject of heated debate. Some critics viewed the law of contempt as an arbitrary power exercised without basic guarantees found in other offences and some viewed it as a power used to muzzle critics of the judicial system. The media did not assist by sometimes spreading this negative image by contrasting contempt of court with freedom of expression. It followed therefore that to the man in the street contempt of court appeared unjust and artificial and created a negative impression in certain situations. An impression was created that contempt was over-used and that it was in any event an arbitrary power. Some lawyers agreed with this last point. In 1972 S(9) of the Criminal Code was amended to give those accused of contempt of court a right of appeal both from conviction and sentence.

The Working Paper concluded that the following proposals should be adopted :-

(a) The totality of offences against the administration of justice be included in legislation and that the common law offence of contempt of court should disappear.

(b) That the customary forms of contempt known as misbehaving in court, disobeying a court order, scandalising the court, obstructing justice etc. be defined in the Criminal Code.

(c) That the new text be drafted in simple language clearly expressing the rules found in the cases and practice yet remaining flexible enough for adaptation by the courts to the particular circumstances of the case.

(d) That a mens rea of intent or recklessness be required for all codified contempts.

(e) That the law contains the principle that the ordinary procedure remain the general rule except for cases of misbehaving in court.

The final Report of the Commission reflected comment of those who had responded to the Working Paper. The commission recommended that :

(1) A specific offence should be created covering attempts to disrupt judicial proceedings by disorderly or offensive conduct.

(2) Disobeying a court order: this existing offence be retained.

(3) Scandalising the court: a new offence be created in more specific terms but that a defence of truth of the facts be available; and that a trial of this offence be presided over by a judge other than the one involved.

(4) There be an offence of attempting, while judicial proceedings are pending, to "obstruct, defeat or pervert" judicial proceedings or of publishing anything the publisher knew (or ought to have known) might interfere with those proceedings; that in criminal matters judicial proceedings be considered pending from the moment that the information is laid or indictment preferred until the final verdict, order or the sentence; that in civil matters judicial proceedings be considered pending from the moment the matter is set down for trial until it is adjudicated and the trial is terminated.

(5) There be an offence of disobeying any order of court "where such disobedience constitutes an outright defiance of, or a public challenge to, judicial authority".

New Zealand

In 1977, a committee on defamation published its report and explained that in doing so it had been necessary to consider at the same time the law of contempt as it might concern the publication of matter relating to civil proceedings. The committee's recommendations are given effect in a draft Bill. The main recommendations are as follows

(a) A statutory definition of contempt of court in relation to publications should not be enacted. The approach to definition should be by way of exclusion.

(b) No contempt of court to publish material when no direct reference to proceedings and publication takes place prior to setting down of action for trial or the fixing of a date for hearing in the magistrates' Court.

(c) In criminal proceedings the law of contempt should cease to apply after the time for giving notice of appeal has expired.

(d) In civil proceedings, it should cease from the date of delivery of judgment or, when there is a jury, the date when judgment given.

(e) When an appeal is brought the law of contempt should again apply.

(f) Publication of civil pleadings be not contempt if fair and accurate.

(g) Availability of defence of fairness and accuracy of report of legal proceedings in open court published contemporaneously and in good faith.

(h) A defence of "general public discussion" be enacted.

(i) A provision similar to section 11 of the Administration of Justice Act, 1960 (U.K.) be enacted.

(j) The concept of "absolute responsibility" for publications be reduced and defences be made available for editors, etc.

Singapore

Order 52, rules 1 to 9 of the Rules of the Supreme Court of Singapore 1970 set out the procedure for the High Court of Appeal when punishing contempt of court by an order of committal.

Section 175 of the Penal Code (Cap. 103), provides that it is an offence if a person legally bound to produce a document to a public servant fails to do so. It is punishable with imprisonment for a term not exceeding one month or a fine of not more than $500, or both. If the document is to be produced to a court of justice, it is punishable with imprisonment for a term up to 6 months, or with a fine up to $1,000 or both.

Sections 178 and 179 provide that refusing to take the oath when duly required to do so by a public servant or refusing to answer a public servant who is authorised to question is an offence punishable with imprisonment for a maximum term of 6 months, or with fine of not more than $1,000 or with both.

Section 180 provides that refusing to sign a statement when duly required to do so by a public servant may entail a sentence of imprisonment not exceeding 3 months or a fine of not more than $500.

Section 228 states that it is an offence for any person to insult intentionally or to interrupt a public servant sitting in any stage of a judicial proceeding. The maximum penalty is 6 months' imprisonment and a fine of $1,000.

Section 8 of the Subordinate Courts Act (Cap. 14) provides for the summary procedure to deal with contempt committed in the face of a subordinate court. The maximum penalty that can be imposed is imprisonment for 6 months and a fine of $1,000. The court may, in its discretion, discharge the offender or remit the punishment on his making an apology to the satisfaction of the court.

The United Kingdom

The Report of the Phillimore Committee in 1974 (Cmnd. 5794) recommended that legislation be enacted to clarify the law of contempt. In March, 1978, a Green Paper was issued inviting public comment on the law of contempt. Argument was advanced principally concerning contempt by

publication and issues were raised about the proper balance between freedom of the press and the right of an individual to a fair trial.

As a consequence of the Report, the Green Paper and discussion an Act was enacted in 1981 which deals with the proposed change in the law. Its principal provisions can be summarised as follows :- Sections 1 to 6 make amendments to the rule of law (described in section 1 and called in the Act the "strict liability rule") whereby conduct tending to interfere with the course of justice may be treated as contempt of court regardless of intent.

Section 2 limits the scope of the strict liability rule by providing that it applies only to publications (as defined in subsection (1)) and then only if the publication creates a risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced; and then only if the proceedings are "active". Schedule 1 defines the times when proceedings are to be treated as active for this purpose. Criminal proceedings are active from the time they are commenced (for example, by arrest without warrant or the issue of warrant or summons) until they are concluded (for example, by acquittal or sentence). Civil proceedings are active from the time when arrangements for the hearing are made or, if no such arrangements are previously made from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn. Appellate proceedings (civil and criminal) are active from the time when they are commenced (for example, by application for leave to appeal) until disposed of or discontinued.

Section 3 re-enacts without substantial change the defence of innocent publication or distribution which already exists for England and Wales under section 11 of the Administration of Justice Act 1960.

Section 4(1) provides a new defence by which a person is not guilty of contempt under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously (as defined by subsection (3)) and in good faith. Subsection (2) empowers the court, where necessary to avoid prejudice to the same or to another case, to order that the publication of any report of the proceedings before it be postponed.

Section 5 provides a further new defence for a publication made in the discussion in good faith of public affairs if the creation of a risk of prejudice to particular proceedings is merely incidental to the discussion.

Section 6 saves existing common law defences to contempt under the strict liability rule.

Section 7 makes it clear that the contempt jurisdiction of the superior courts extends to the proceedings of all inferior courts and tribunals which are constituted by law and exercise any part of the judicial power of the State.

Section 8 makes it contempt to publish certain information about the deliberations of a jury in such a way as to enable the case or any of the jurors to be identified, or to disclose or solicit the disclosure of such information with a view to its publication. Proceedings are not to be instituted except by and with the consent of the Attorney General.

Section 9 makes it contempt of court to use a tape recorder in court (except for official transcripts) or bring a tape recorder into court for such use except with the leave of the court, which may be granted subject to conditions, or to publish a recording of legal proceedings by playing it in public, or to dispose of it with a view to such publication, or to use a recording made in breach of a condition imposed by the court.

Section 10 empowers a court which allows a name or other matter to be withheld from the public to give directions prohibiting the publication of that name or matter.

Section 11 gives magistrates' courts jurisdiction to deal with anyone who wilfully insults any justice, witness, officer of the court or solicitor or counsel having business in the court, or who wilfully interrupts the proceedings or otherwise misbehaves in court. Such an offender may be committed to custody for a specified period of up to one month and fined up to 500, or both.

Section 13 provides that legal aid may be granted to any person liable to be committed or fined for contempt in the face of the court and in Scotland for contempt in general.

Sections 14 to 17 are concerned with penalties for contempt and kindred offences. Section 14(1) provides that where a person is committed to prison by a superior court for contempt the committal shall be for a fixed term of not more than two years. Section 14(2) prohibits committal to prison of persons under 17; subsection 3 provides appropriate powers for dealing with persons suffering from mental illness or severe abnormality. Subsection 4 increases certain penalties which may be ordered by county court and magistrates' courts for offences akin to contempt.

Section 16 enables any fine for contempt of court imposed by other superior courts in England and Wales to be enforced through magistrates' courts in the same way as a fine imposed by the Crown Court.

Annexure 7

List of Materials

UNITED KINGDOM

Articles and Comments

1. Halsbury's Laws of England (4th edition) vol. 9 pp. 1-74

2. 'Contempt of Court' by C.J. Miller

3. 'The Law of Contempt' by Borrie and Lowe

4. 'The Law of Contempt' by Arlidge and Eady

5. Report of the Phillimore Committee (Cmnd. 5794)

6. Law Commission No. 96: Criminal Law, Offences relating to interference with the course of justice, paras. 3.19 to 3.79

7. Meeting of Commonwealth Law ministers - Memorandum, by Commonwealth Secretariat LMM (80) 18

8. 'Contempt by publication in the U.S.' (1961) 24 M.L.R. 239

9. 'Contempt of Court' (1961) 24 Crim. L.R. 263

10. 'Civil and Criminal Contempts of Court' (1962) 25 Crim. L.R. 181

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