TRY SOMETHING ELSE: CONTEMPT AND CONFUSION

Abstract: Effective systems of dispute resolution share two features: the power to enforce decisions and insistence on a civilised decision-making process. The law, ultimately of practical impact, without enforcement, withers and becomes a dead letter. Court proceedings, without the respect of those involved, may descend into farce. In the administration of justice, the key objectives of a fair hearing and an enforceable order depend markedly on the jurisdiction to punish those who make a mockery of the court process either by targeted ridicule or by treating a court order as a mere piece of paper. As a system, the common law may be admired as one of adaptation and correction; applying principle to novel issues and discarding that which has ceased to assist. But, in contempt, the law has developed towards the opposite, becoming a minefield that threatens to undermine the administration of justice itself. Hence, this article addresses the law of contempt, attempting to illuminate key areas where the common law has damaged itself and proposes the urgency of a full statutory restatement and reform.

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The Problem

Article 34 of the Constitution is predicated on a contract within the wider context of the 'true social order' that the Preamble states as one of the ultimate aims of Irish society: that courts will be independent of both government interference and of prejudice, and that the loyalty of citizens requires an ordered interaction with a justice system that will be empowered to play its role. But, from the time there have been courts, there have been those who would undermine their authority, essentially in three ways: by disrupting their function of considered deliberation through undermining their entitlement to the evidence of every person;[1] or, like the cards thrown up in the air during the court case in Alice in Wonderland, by attacking their smooth functioning through allegations of bias or injudicious conduct to their face; or, through turning the entire lengthy and expensive process into a nonsense by the simple expedient of disobeying a court order. The first of these, nobbling witnesses, must be as old as the legal process itself and gives rise to criminal liability for both individual offenders and those who conspire towards that aim. The second is as serious as invading a national legislature. Such actions seek the overthrow of a fundamental component of a state's power; making sure that the judicial function cannot work, thereby putting across the message that recourse to the courts is to be despised. The last is equally as undermining as revolution. where court orders are ignored, use of the court system is rendered futile and, thereby, the administration of justice is made worthy of being despised. In all of these, the common factor is that the court is treated with contempt.

Historical Origin

Once there is a process yielding a benefit as between contending parties, there will be those who will seek to render it worthless. Unsurprisingly, the law on contempt is 'as ancient as any part of the common law.'[2] The first code of Roman law; the Twelve Tables, drafted

[1] *The People (DPP) v JT* (1988) 3 Frewen 141.
[2] R *v Almon* (1765) Wilm 234 [254].

around 445 BC includes the delict of *iniuria* (contempt, insult) to the court process.[3] In the later part of 12th century England, references are made to contempt shown by a party to a suit who failed to appear before the court then thought of as disobeying the king's justice.[4] It was thus in consequence of simple need that rules emerged punishing contempt as indictable crime, enabling the immediate imprisonment of those who disrupted courts in session, and furnishing courts with the power of recourse to the civil power through enforceable remedies of fine and imprisonment in constraining those in disobedience of a court order. [5]

It should have been predictable that such powers would develop in an orderly and focused fashion, whereby as new forms of demonstrating contempt emerged, the remedies would prove ever more effective, and contemnors undermined in their purpose of attacking justice. That is not what has happened. Through historical development, this straightforward taxonomy became complex as it adapted to particular situations. While the current cornucopia of rules remain in force, the need for such a complex response may be questioned, especially as experience shows that but few are ever called on in aid of a court's power.

Despite a report in 1994 and a discussion paper in 2016,[6] and decades of contemplation,[7] contempt law has become a paradigmatic opposite of the wise development of the common law postulated as a quasi-article of belief by some commentators; that out of the pragmatism of judges in developing the common law came workable legal norms. According to Oliver Wendell Holmes, experience, judged by external standards of either blameworthiness or policy, leads the common law to just results.[8] An analysis of the courts' use of the contempt jurisdiction suggests that this is a less than universal outcome of legal evolution, revealing, instead, a struggle in precisely maintaining those external standards of culpability in administering justice in an increasingly recalcitrant society. The media is fraught with details of intransigent, often misguided, individuals and their asserted plight in the face of their own conduct and the response of the courts in the use of contempt powers.[9] In practice, judicial experience has been underscored by an increasing number of court room disruptions,[10] abusive attacks on the judiciary going unanswered,[11] and in civil cases, instances of those who

[3] Peter Birks, *The Roman Law of Obligations* (Oxford University Press 2014) 221.
[4] Sir John Fox, The History of Contempt of Court (Oxford University Press 1927) and Anthony Arlidge, David Eady and A.T.H Smith, *Arlidge, Eady & Smith on Contempt* (5th edn, Round Hall Sweet & Maxwell 2017) [1-1].
[5] These sources are available in John Frederick Archbold, *Archbold Criminal Pleading Evidence and Practice* (11th edn, Sweet Stevens & Norton 1849) and are expanded on in Cecil Turner, *Russell on Crime* (12th edn, Sweet & Maxwell 1986) 308 – 321.
[6] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1993), Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).
[7] Since September 2022, the LRC has been preparing a report on its 2016 Issues Paper.
[8] Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Company 1881).
[9] Ann O'Loughlin, 'Farmer jailed again for being in contempt of court orders to remove livestock from for-sale lands' *The Irish Examiner* (12 October 2018) < https://www.irishexaminer.com/news/arid-30874479.html> accessed 26 January 2024, Andrew Goudsward, 'Trump seeks to hold special counsel in contempt in election case' (5 January 2024) < https://www.reuters.com/legal/trump-seeks-hold-special-counsel-contempt-violating-pause-election-case-2024-01-04/ > accessed 26 January 2024.
[10] Mary Carolan, 'Four years, five courts, 29 judges… the Burkes of Castlebar and their never-ending legal battles' *The Irish Times* (12 May 2023) < https://www.irishtimes.com/crime-law/courts/2023/05/13/four-years-five-courts-29-judges-the-never-ending-legal-battles-of-the-burkes-of-castlebar/ > accessed 25 January 2024.
[11] The Australian decision in *O'Hair v Wright* [1971] SASR 436 provides an example. There, a man who announced to the court that he did not accept its authority was held not to have committed a statutory contempt in the face of the court. Another extreme example is found in Sir Robert Edgar Megarry, *Miscellany-at-Law* (1995) 295, note 19. The author describes the account of an English county court judge who, when a litigant had just thrown his dead cat at him simply said: 'I shall commit you for contempt if you do that again.'

refuse to purge their contempt of court orders.[12]

This situation provokes the question of whether contempt is useful to the courts in the first place? Answering this question in the affirmative, it is helpful to consider the historical relevance of the courts' contempt powers. As Holmes also states, 'Law embodies the story of nations' development through many centuries, it cannot be dealt with as if contained only the axioms and corollaries of a book of mathematics.'[13]

The Common Law

In Ireland, contempt of court is a common law doctrine. That doctrine applies to two broad areas; contempt in a civil or criminal trial which occurs inside the courtroom and contempt by failing to obey a court order. It is civil contempt to fail to obey a court order. Thus far the rule is simple. In contrast, criminal contempt was once a multi-faceted protection of the court process, with liability extending to those who confederated to ensure that any false evidence would be produced in evidence;[14] to those who waylaid a witness to thereby strengthen one side of a judicial contest:[15] and to those who engaged in a representation prior to a trial which asserted the guilt of an accused.[16] Various forms of contempt existed in 1922. These are found in Archbold's *Criminal Pleading Evidence and Practice*[17] and were later expanded on by developments in the common law and reflected in the 12th edition of *Russell on Crime*.[18] These are the sub-types of contempt that were found at common law. These are here to help; but in practice they are moribund.

Conspiracy to pervert the course of justice remains a living remedy, but difficult of proof since the most natural evidence of its existence is bound to come from within the group itself; both an unlikely source and, further, one which would oblige a judge to give an accomplice warning as to any such evidence.[19] Using threats or persuasion to induce them not to appear in court remains an offence, but while this is an ever-present danger, especially in violent crime, statutory reform has enabled the use of out-of-court statements to substitute for the (invariably futile) hostile witness procedure where a person arrives despite threats to ostensibly testify but says nothing,[20] and the judge allows the prosecution to cross-examine. Pragmatic legislative response to the obvious intimidation of witnesses led to the passing of the Criminal Justice Act 2006, s 16 of which enables a reluctant or silent witness to be by-passed through the introduction of their prior statement given in a formal interview context.[21] Such a reform, of itself, asks where contempt is as an available remedy, since it speaks to the bluntness of recourse to a weapon in aid of the administration of justice that has proven itself of little use.

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[12] Associated Press, 'Lawyer Is Released After Serving Over 14 Years on Civil Contempt Charge' *The New York Times* (11 July 2009) < Lawyer Is Released After Serving Over 14 Years on Civil Contempt Charge' *The New York Times* (11 July 2009) <https://www.nytimes.com/2009/07/12/us/12contempt.html> accessed 10 February 2024.

[13] Holmes, *The Common Law* (n 8).

[14] Cecil Turner, *Russell on Crime* (n 5) 308.

[15] ibid 312-313.

[16] *R v Tibbits and Windust* [1902] 1 KB 77.

[17] John Frederick Archbold, *Archbold Criminal Pleading Evidence and Practice* (n 6).

[18] *Russell on Crime* (n 5).

[19] For the procedure see *DPP v Fitzgerald* [2018] IESC 58, [2019] 3 IR 89.

[20] Peter Charleton, Paul McDermott, Ciara Herlihy and Stephen Byrne, *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury 2020) [6.25] 259.

[21] Seán Guerin, 'Witness Statements as Evidence: Part III of the Criminal Justice Act 2006' *8th Annual National Prosecutors' Conference*' <https://www.dppireland.ie/app/uploads/2019/03/PAPER_-_Sean_Guerin_BL.pdf> accessed 12 February 2024.

What does remain, in theory, is the protection of the court, at the instigation of a party to a pending action or prosecution, to ensure that it is not the court of public opinion, meaning the media, which substitutes itself as the judge or the jury. Any publication, exhibition or representation intended or calculated to interfere with the fair trial of a legal proceeding pending in any court is an offence at common law.[22] Applicable to both civil and criminal proceedings, both of which need protection against demeaning comment and pre-judgment, the usual remedy is to seek to attach an offender on a motion for contempt in the title of the proceedings. That remedy is little used in practice: surprising, in the era of unbridled Internet comment. No one has been recorded as having taken a contempt action in a civil case for breaching the *sub judice* rule since *Desmond v Glackin*.[23] Having the remedy, however, remains a deterrent factor. The temptation to injudicious comment arises more enticingly where a notorious crime is committed, and media attention focuses on a particular suspect. It was rare, and remains so, that journalists will target an accused and suggest obvious guilt prior to trial. What does happen, now more occasionally than in the 1980s when judges were regularly discharging juries because of newspaper reports, is that comments are drawn to the attention of a judge trying a criminal case and a newspaper editor being brought in to explain a breach of the 'fair and balanced' reporting rule. During the trial of Catherine Nevin, *The People (DPP) v Nevin*,[24] Carroll J made several orders against quite bizarre newspaper coverage of a sensational trial, including banning all colour pieces about the accused and banning all photographs of Catherine Nevin. The process there was of counsel for the defence, supported by the prosecution in some instances, drawing coverage to the judge's attention whereby the editors were summoned by the registrar. They appeared but Carroll J had endured enough interference in her efforts to ensure a fair trial, consequently making the restrictions in the form of court orders. Some regarded this as an attack on press freedom. The newspapers reacted by putting blank rectangles in places where the photographs of the accused would otherwise have been. When drawn to her attention, Carroll J was not tempted to push the contempt jurisdiction beyond its limits. She described the conduct as 'childish' and refused to take further action. As to what level of conduct, or comment, during or before a case will cause a trial to be unfair, requires an extreme interference. [25] The off-the-cuff remedy during criminal trials of contemporaneous application to the judge works. At least, it enables restraint before a trial descends into chaos, or to use a biblical epithet, is herded over the precipice.

Mockery from Without

Scandalising the court is the 'most controversial form of contempt.'[26] Those considering undermining the administration of justice may realise that there are two main ways in which to blacken a court's reputation; firstly, by publicly declaring that the judges making a particular decision are ill-motivated or idiotic or, secondly, by attending a court hearing and

[22] *R v Tibbits* [1902] 1 KB 77.
[23] *Desmond v Glackin (No 1)* [1993] 3 IR 1.
[24] *The People (DPP) v Nevin* (Unreported 117/2000, Central Criminal Court 11 April 2000).
[25] ibid.
[26] *Walsh v Minister for Justice and Equality* [2019] IESC 15 per O'Donnell J. See also, Victorian Law Reform Commission, *Contempt of Court* (VLRC 40 2020) which states that 'the breadth of the common law contempt of scandalising the court can no longer be justified.'

rendering it a farce through disrespectful comment or by disrupting calm consideration through outrageous conduct.[27]

The first form of scandalisation may be committed by words either spoken or written about a judge, but these must be such as would undermine public confidence in the judiciary.[28] Article 40.1.1° of the Constitution guarantees the 'right of the citizens to express freely their convictions and opinions.' There is a limit, even within that text, whereby 'rightful liberty of expression' is 'not to be used to undermine public order or morality or the authority of the State.' That, therefore, is the line which comment on the judgment of a court should not cross. Thus, in *Weeland v RTÉ*,[29] a broadcast on a land dispute judgment under appeal could not lead to an injunction to restrain further comment as to why Judge Gleeson in the Circuit Court got his decision wrong. Any judgment, according to Carroll J, can 'be criticised, provided it is not done in a manner calculated to bring the court of the judge into contempt' and that right of criticism was not confined to academic journals since the 'public take a great interest in court cases and it is only natural that discussion should concentrate on the result of cases.'[30] If reasoned, or logical, public criticism of the courts is permitted as is the statement of an opinion, even if wrong-headed,[31] however a line is crossed when personal motives, bias or charade are cast as plain insult.[32] Open hostility, in the sense of claiming, without foundation, that judges have pre-judged or that courts have a pre-ordained agenda or open vulgar abuse, including filthy language, is rightly classified as contempt. Such conduct is both a crime, prosecutable at the election of the Director of Public Prosecutions and a contempt that the parties to an action may bring to the attention of a judge hearing that case. Hence Russell observes: 'Generally, any contemptuous or contumacious words spoken *to* the judges of any court in the execution of their offices are indictable; and when disparaging words are spoken *of* the judges of the superior courts, the speaker is indictable at common law, whether other words relate to their office or not.'[33] In that regard, while the facts of some such case may now cause a wry smile, at the time, allowing such attacks to go unnoticed would destroy the foundation of confidence that is of the essence of the administration of justice.

The matter is so serious that the High Court, as in bail, enjoys co-terminus authority to deal with attacks as does the court of trial. In *AG v O'Ryan and Boyd*,[34] Judge Sealy had sentenced some farmers to imprisonment in the Circuit Court after they had pleaded guilty to riot, in an incident arising out of an agrarian dispute. He had not been moved by a plea for leniency from a local Catholic parish priest that men who had attacked an individual outside his own church should get no punishment. Mr O'Ryan, a county councillor, was dealt with by the

[27] In *Laois County Council v Hanrahan* [2014] IESC 36, McKechnie J described this category of cases as follows: 'It captures allegations such as those of corruption, malpractice, bias or impropriety… In fact, it is safe to say that the type or nature of conduct which could give rise to a finding within this heading remains open. Those who may be the target of such conduct include judges, those who perform judicial functions, or who are involved in administration of justice, officers of the court, juries, parties, witnesses, legal representatives and prosecuting gardaí, to name but some in this regard.' An extreme example is provided by Chicago Conspiracy Trial, where two of the accused were reported as entering the court room dressed in judicial robes which they apparently removed and stomped on. The US Court of Appeals agreed with the District Court that this was a contempt (7th Circuit), 502 F. 2d 813, 817 (1974). See also, Anthony Lukas, 'Two of Chicago 7 Don Black Robes' *The New York Times* (7 February 1970) <https://www.nytimes.com/1970/02/07/archives/two-of-chicago-7-don-black-robes-judge-soon-rules-they-are-still.html> accessed 11 February 2024.
[28] LRC, *Contempt of Court and Other Offences involving the Administration of Justice* (n 6) 1.02.
[29] *Weeland v RTÉ* [1987] 2 IR 662.
[30] ibid.
[31] Gerard Hogan, Gerry Whyte, David Kenny, Rachel Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [6.1.273] 839.
[32] Donal O'Donnell, 'Some Reflections on the Law of Contempt' (2002) 2 *Judicial Studies Institute Journal* 87, 109.
[33] *Russell on Crime* (n 5) 308.
[34] *AG v O'Ryan and Boyd* [1946] IR 70.

High Court as a contemnor in consequence of writing a letter to Judge Sealy, a non-Catholic, in these terms:

> As a humble member of the Catholic community of the diocese of Waterford and Lismore, I take expectation to your taunt and sneer at the Most Venerable Dean Byrne, PP of St. Peter's and Paul's Church, Clonmel, from your exalted perch on the bench of the Court in Waterford last Monday, 5th inst. – that he thought and expected that crime perpetrated outside his church should be exonerated. I fling that taunt back into the face of the worthy representative of the seed and breed of Cromwell. You, Sir, were foisted on the judicial Bench at a time when legal ability was not the qualification best fitting to lead it…

Even more stinging was the publication in Hibernia magazine of letters to the editor following the conviction of Noel and Marie Murray for the capital murder of a Garda Michael Reynolds; *Re Hibernia National Review Ltd*.[35] The first letter was signed by the 'Chairman of Trinity College Dublin – Student Christian Movement' and the second by the 'PRO of the Murray Defence Committee.' Both letters merit quotation as examples of comment for which the courts will not stand. The first read:

> While we must regret the death by violence of Garda Michael Reynolds, as of any human being, we feel we must give the strongest possible protest at the manner in which the 'trial' of Noel and Marie Murray was carried out ... They were tried without jury and virtually without evidence in circumstances which, to say the very least, cast strong doubt on the machinations of both Gardaí and Government in their efforts to procure a 'guilty' verdict. It is not enough that, following the appeal, the sentence be commuted to life imprisonment in a grand vote-catching gesture by the Government; they must be granted an immediate re-trial.

And in the second, the following passage jumped out:

> The very existence of the Special Criminal Court confers on its defendants a special status. The implication seems to be that people who are brought before it are somehow less innocent than those who appear before the ordinary criminal courts. In fact, many defendants are presumed guilty until they can prove their innocence against the belief of the Gardai. In the ordinary course of events this mixture of special justice and bias towards the police is a reversal of justice ... The only evidence against the Murrays were statements which they claim were extracted by the Gardaí under physical and mental torture. Indeed, Noel Murray offered to testify to the truth of his claim on oath but was turned down on a legal technicality.

Here, the point is that neither the Special Criminal Court itself, nor the High Court, reacted of their own motion. Nor was a prosecution brought by the Director of Public Prosecutions who, instead, sought a conditional order of attachment in the High Court against Hibernia, its editor and the two letter-writers. The President of the High Court refused the application and the Director of Public Prosecutions successfully appealed to the Supreme Court where Kenny J, giving the judgment, reasoned as to why such commentary had crossed a line into contempt and away from the free expression of opinion:

> These passages and the use of inverted commas in connection with the word 'trial' mean that the members of the Special Criminal Court conducted a travesty of a trial, that they did not give the benefit of the doubt to the accused, that they were involved in an effort by the Government and the Gardai to procure a false verdict of guilty,

[35] *Re Hibernia National Review Ltd* [1976] IR 388.

> and that the only evidence against the accused was their own statements. The members of the Special Criminal Court who conducted this trial were a retired judge of the High court, a judge of the Circuit Court and a District Justice. The charges made against them by these letters were very grave…
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> The Court wishes to emphasise that criticism of the retention of the death penalty of the Offences Against the State Acts or of any of their provisions, and of the establishment of the Special Criminal Court are not a contempt of court. These are matters which may validly be debated in public even if the comments made are expressed in strong language or are uninformed or foolish…. The two letters in issue impute improper and base motives and bias to the judges of the Special Criminal Court and, accordingly, are capable of being a contempt of court…[36]

The *Murray* case generated further litigation in *The State (DPP) v Walsh & Connelly*.[37] The two defendants had been attached on an application for contempt, brought by the Director of Public Prosecutions, in the form of scandalising the court, based on the content of a press release they had authorised, and which was published by The Irish Times newspaper. This attacked the legitimacy of the Special Criminal Court, asserting that the court had 'so abused the rules of evidence as to make the court akin to a sentencing tribunal.' The accused, at trial, did not dispute that the statement amounted to scandalising the court. On this point, the Supreme Court distinguished between scandalising the court from criticism of the court or judges. They ruled, however, that this meant those who were charged with a serious crime were entitled to a trial with a jury under Article 38.5 of the Constitution, as contempt could not be classified as a minor offence. The application for committal to imprisonment was treated as the same as a charge. The Supreme Court concluded, however, that the courts can deal with contempt cases summarily, that is, without a jury, where the facts, as here, were not in dispute. The Court, by a 3-2 majority, also decided that if the facts were contested, a person charged with contempt has a right to a jury trial under Article 38.5 of the Constitution. The facts here were, however, beyond contest.

That reasoning may add more confusion than clarity to a key branch of the law in upholding the administration of justice. A motion for attachment is not a prosecution, even though it arises out of criticism of the conduct of a criminal trial. It is the same as the civil remedy of attachment and committal for contempt that is regularly brought in civil proceedings. Had the common law been activated, clear authority enabled a prosecution to be brought through the simple expedient of charge. Since, however, the civil remedy was exercised, the respondents had been enabled in the thicket of confusion through which those seeking a remedy for contempt now must hack, further to confuse civil and criminal contempt. That is what brought in the seriously disruptive reference to a constitutional right to a jury trial; a process utterly inimical to what should be the simple remedy for civil contempt.

Scandalising the court may also occur where the defendant seriously misrepresents the nature of legal proceedings.[38] In *PSS v JAS*, Budd J held that the defendants had seriously misrepresented the nature of legal proceedings, by depicting the court as 'playing a cruel and inhumane role in a sinister and perverse caricature of justice, thus bringing the court into the odium of the people.'[39] Confusion as to remedy, as to constitutional right, and as to human rights, has so undermined the second category of mockery of a court, that of disrupting the

[36] *Re Hibernia National Review Ltd* [1976] IR 388 [390].
[37] *The State (DPP) v Walsh and Connelly* [1981] IR 412.
[38] Hogan et al, *Kelly: The Irish Constitution* (n 31) [6.1.282] 843.
[39] *PSS v JAS* (19 and 22 May 1995) HC.

proceedings themselves, as opposed to commenting after the event, that recourse to what was once a simple remedy of contempt has effectively dissolved.

Mockery Within

Scandalising the court is, at common law, an indictable offence which is most obviously committed by an attack in the face of the court.[40] Here, the reality is stark. A judge has the power to imprison, to order damages against a litigant who has wronged another, to remove children from the custody of one parent in favour of another, to attach the wages of a spouse who refuses to maintain offspring and to declare a marriage dead. Emotion will be held back by the responsible but, even then, they may be tempted into an outburst when a decision goes against them. Theatrical displays, calculated to attract media attention, may be the resort of pressure groups who see court proceedings as a convenient vehicle to air real or supposed grievances.

Hence, the courts have always had the power to protect themselves. The circumstances will be obvious. Open hostility in the sense of saying to a court that judges are prejudiced or that courts have a preordained agenda, or open vulgar abuse, including filthy language, are contempts. As Russell observes: 'Generally, any contemptuous or contumacious words spoken *to* the judges of any court in the execution of their offices are indictable; and when disparaging words are spoken *of* the judges of the superior courts, the speaker is indictable at common law, whether other words relate to their office or not.'[41] *Arlidge, Eady & Smith on Contempt* note that there is authority from as early as 1348 that it was contempt to draw one's sword to strike a judge in court.[42] Accordingly, contempt *in facie curiae* includes conduct that deliberately disrupts or obstructs court proceedings and is also prejudicial to the court or justice. Examples include an assault on a judge or judicial officer, threatening behaviour or a refusal to cooperate with the proceedings through dumb insolence. For instance, as in *R v Davison*, [43] a litigant in person who persistently introduces matters which are irrelevant and scandalous can be treated as being in contempt. Similarly, professional advocates may be drawn into high emotion and, while their misconduct must be gross, those who deliberately interfere with the course of justice commit a contempt. The High Court of Australia in *Lewis v Odgen* explained that: 'counsel [who] might yield to the temptation of seeking to divert the jury's attention away from the issues by promoting a dispute with the judge, in the belief that this tactic would advantage his client…calculated to interfere with the due course of the trial, would amount to a contempt even if it involves no insult to the judge.'[44]

But, as all of this disruption has happened from time immemorial,[45] and will happen again, what is a judge to do? If the abuse or disruptive conduct comes from the public gallery, *Arlidge, Eady & Smith on Contempt,* suggest that it may 'be wise for the judge to rise with a view to ensuring that misbehaviour takes place in [their] absence.'[46] While some may view this as judicial retreat, discretion may be the better protection of the courts' function than confrontation. Judges, being human, should remember that, while they hold an important office, an insult to them may emerge less from calculation than heightened emotion. In consequence, there is a cascade of response from retreat to enable calmer counsels, to the

[40] Law Reform Commission, *Contempt of Court and Other Offences involving the Administration of Justice* (n 6) [1.02].
[41] *Russell on Crime* (n 5) 308.
[42] *Arlidge, Eady & Smith on Contempt* (n 5) [10-98] 857 citing 1388 Y.B., 22 Edw. III, p.13, pl. 26.
[43] *R v Davison* (1821) 4 B & Ald 329.
[44] *Lewis v Ogden* (1984) ALJR 242 [344].
[45] One early example noted by CJ Miller, *Contempt of Court* (2nd edn, Oxford University Press 1989) 104, occurred in 1631 'when a condemned felon appearing before Richardson CJ at Salisbury Assizes is reported as having 'ject un Brickbat a le dit Justice que narrowly mist.'
[46] *Arlidge, Eady & Smith on Contempt* (n 4) [10-111] 860.

ultimate option of imprisonment. The decisions in *Tracey v District Judge McCarthy*[47] and *Walsh v Minister for Justice and Equality*,[48] solidified good sense into precedent. Hence, there is a cascade. While it is the duty of the judge to set the tone of dignity and of application in every court setting, and to continually bear in mind the vagaries of human mentality, conscious of the possibility that a disruptive person may genuinely have a just cause if the bench makes proper enquiry, the least worst remedy for disruptive behaviour should be the starting point. Putting a case back to after a break may cure a situation. But sometimes not. Hence, a judge should: begin with a warning that the disruptive person may be removed; continue with an opportunity for those who persist to explain, apologise or undertake not to continue; where the confrontationist will not engage, move on to removal from court, with the assistance of the gardaí if necessary; encourage a removed party to proceedings to participate through video-link; in the most serious cases of persistent contempt, make an appropriate warning that such conduct is an offence; while a case may proceed immediately where the disruptor is legally represented, put the original case back, then take out as a contempt case as this may help a cooling off; while in the worst of such cases, consider the power to remand in custody.[49]

The latter part of that helpful decision ladder is a reaction to the decision of the European Court of Human Rights in *Kyprianou v Cyprus*.[50] Stark facts made for a strong ruling that effectively removed from courts in Europe the power swiftly and effectively to react to the worst of insults thrown in their faces. Mr Kyprianou was a lawyer defending a person accused of murder before three judges of the Limassol Assize Court. Emotion came to the fore. He objected when the court interrupted his elaborate argument while he was cross-examining a witness, subsequently accusing the judges of exchanging 'ερωτικό γράμμα': literally, 'erotic writings', or as more blandly translated, 'love letters.' He was there and then held in contempt of court for attacking the judges personally. The European Court of Human Rights held the conviction a disproportionate violation of the applicant's rights under Articles 6 and 10 of the Convention. The same judges who were attacked by Mr Kyprianou took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and

[47] *Tracey v District Judge McCarthy* [2019] IESC 14.
[48] *Walsh v Minister for Justice and Equality* (n 26).
[49] This is the original text of O'Donnell J from the cascade from *Walsh* (n 26) (a) Where a person is behaving in a disruptive manner, a judge should warn him or her that the court has power to remove him or her from the courtroom; (b) If the conduct persists, the judge should explain to the person what it is that he or she has done that is considered disruptive, and give the person the opportunity of saying anything they wish to by way of explanation, excuse, and apology, and, if so, an undertaking not to repeat the behaviour in question; (c) Where an apology and undertaking (and, where appropriate, a satisfactory explanation) is forthcoming, it will normally be appropriate to take no further steps; (d) If no apology and undertaking, or satisfactory explanation, as the case may be, is forthcoming, a judge may order the person to leave the courtroom and, if necessary, direct the removal of him or her from the courtroom. It may be necessary to arrange for the attendance of the gardaí for this purpose; (e) Where there is more general disturbance, a judge may order that the court is cleared. While any court will be reluctant to take this course, it may nevertheless be necessary. In such cases, members of the public may still be entitled to enter the courtroom, if they agree to sit quietly during proceedings. Bona fide members of the media and members of the legal profession should be permitted to remain on the same basis; (f) Where the person engaging in disruptive behaviour is a party to the proceedings, a court should be correspondingly slow to take the step of removing them from the courtroom, particularly when they are dealing with the substance of the dispute, rather than procedural issues such as those involved in the present case. Some issues may require the presence of the party, and in other cases it may be preferable to adjourn the proceedings. Nevertheless, the judge may still order the removal of a persistently disruptive party. In such circumstances, the party should be informed that arrangements will be made to make available a copy of the relevant extract from the digital audio recording ("D.A.R."), if that is possible. If facilities are at hand to allow the person to continue to observe and participate remotely through video-link, these may also be availed of; (g) Where it is considered that the conduct at issue is serious enough, whether in itself, because of the persistence of the behaviour, or because of the involvement of others in a concerted way, then a court may consider that it is appropriate to proceed with a separate hearing of a charge of contempt, which, if established, may lead to the imposition of a punishment, whether by way of a fine or a period of imprisonment; (h) Where a court considers it necessary to invoke the contempt jurisdiction, the person concerned should be warned, told in simple terms of the conduct considered capable of constituting contempt, and given the option of obtaining legal representation (including legal aid if their means are insufficient).
[50] *Kyprianou v Cyprus* App No 73797/01 (ECtHR, 15 December 2005).

imposed the sanction. In support of that decision it might be argued, as the United States Supreme Court has on occasion accepted, that for a judge to impose a prison sentence in the face of a direct attack may put the principle that no one should be a judge in his or her own cause in jeopardy; *Mayberry v Pennsylvania*.[51] A judge may wonder if respect and order are not countervailing and essential attributes of a court's business.

The decision draws a distinction, or so it appears, between an insult to the general administration of justice and a personal affront to a presiding judge. This is less then helpful. Persons gripped by impassioned disturbance do not, for wrong or right, reason through such constitutional distinctions. While academic imagination may yield results that analyse insults as impersonal, pragmatic experience has always been that it the individual judge who is broadsided by personal insult. So, what is to be done where a judge is personally attacked? While O'Donnell J helpfully suggests a solution as the latter part of his cascade,[52] this is not presented as easy to implement. Hence: there should be legal representation and a time fixed for the contempt hearing; exceptionally, where there is cause, the accused may be remanded in custody, but usually not for more than the day on which the incident occurred; while the courts' digital audio recording system, DAR, can provide a basis in evidence, it should be a court official rather than the judge who provides the necessary evidence; and, almost invariably, cases of personal insult should be for disposal before a differently constituted bench. But, the court space is not necessarily exclusive. At common law, the Attorney General or Director of Public Prosecutions was entitled to prosecute various offences and, in this context, would presumably become the moving party. Where the person insulting the judge is also a sentenced prisoner, that direct challenge can be met by the loss of remission. Thus, in *Murray v The Governor of the Midlands Prison and Others*, during a sentence hearing a convicted prisoner chucked a bible at the sentencing judge. He was removed from the courtroom and the judge took no action on this rather obvious, if also if perhaps impersonal, contempt. The governor of Midlands Prison was less forgiving, docking him 40 days of his

[51] In *Mayberry v Pennsylvania* 400 US 455 (1971), an accused sentenced to 22 years by the bench for calling the judge 'a stumbling dog', 'a dirty tyrannical old dog' and 'a fool' was reversed by the US Supreme Court who held that a judge subjected to personal insult should have disqualified himself (*Mayberry v Pennsylvania* 400 US 455 (1971)).

[52] (i) Although the hearing can proceed immediately where lawyers are available (or, if having been offered the opportunity of representation, the individual refuses it) in some cases it may be necessary for the hearing to be postponed for short period to allow for the arrangement of legal representation. The adjournment may also allow a time for reflection. In any event, the person should be informed clearly of the time and date fixed for the contempt hearing, and the hearing should proceed within a short period of the original incident; (j) During the period of adjournment or deferral, the immediate disruption of the business of the court can be addressed, if necessary, by the removal of the person from the court. Furthermore, the court has the power ancillary to the contempt jurisdiction to detain the person temporarily pending the hearing. However, this power should be exercised with restraint, and the period of detention should not extend to more than a day, normally during the day on which the incident occurred; (k) The hearing can be straightforward, but the accused person must be given a fair opportunity of defending himself or herself. Since this is in its nature a criminal offence, even if a unique one, the criminal standard of proof beyond reasonable doubt must be applied. Furthermore, there is the same right of appeal as lies from any other decision of the court. However, given the availability of the D.A.R., there should be little room for dispute as to what was said, and it will be unlikely, therefore, that there could be any need to seek to have the judge (or indeed any other court officer) called as a necessary witness and in most, if not all, cases, it will be inappropriate to seek to do so. Production of the extract from the D.A.R., if required, by the clerk or registrar is all that would be necessary to establish the basic facts in most cases. It would then be a matter for the accused person to offer representations in their defence, whether by way of submissions as to whether the conduct amounts to contempt, or, if so, by offering an explanation or apology, or raising other matters which might be considered in mitigation. This may, if necessary, include the giving of evidence.

(l) When the alleged contempt consists of allegations against a judge personally in some respect, so that there could be a well-founded apprehension of the appearance of unfairness if the judge proceeded to deal with the contempt issue, it will be necessary to have the issue heard and determined by another judge, possibly via a referral to the Attorney General, who may bring the matter before the High Court. Once again, the availability of the D.A.R. should mean that this issue should not involve a dispute as to what was said in court. The judge should not be a necessary or, indeed, an appropriate witness in most, if not all, cases. (m) The criminal standard of proof must apply, and the decision should be capable of appeal, where appeal lies from the decision of the court. Where the contempt is alleged to occur before a court of final appeal, or in respect of which appeal is limited, the court may proceed, however it retains the option of directing that the matter be heard in the High Court, which has full and original jurisdiction in this regard.

statutory remission period by reason of his conduct. The Court of Appeal, on a judicial review, upheld the governor's decision on the basis that the responsibility for proper conduct within a court rested not only within the jurisdiction of the sentencing judge, but also within the responsibility of the governor having custody of the prisoner.

Contempt in the face of the court as a swift remedy has been effectively removed. Legislative intervention could have clarified how the response of a court is to be titrated.[53] In its absence, the common law has been compelled to improvise. But even considerations of *State (Healy) v Donoghue*[54] leads to wonder as to whether there should be a charge, in what form and with what particulars of offence, who should be the prosecutor and, where a mischievous accused alleges real, as opposed to inventive, misconduct against a judge, would *In Re Haughey*[55] rights enable a confrontation? These are real questions. What is beyond question is that the jurisdiction does not seem ever to have been exercised post-*Kyprianou*. Effectively, individual decisions as a reaction to stark situations, the lode-spring of the common law, have been taken by a European court to put a necessary response into abeyance.

But, retreating from the bench, putting the matter back for a few hours, tolerating outbursts as human failings, may be all very well, but given the close to insurmountable difficulties of *Kyprianou*, will a judge be in breach of duty where conduct becomes so bad that the administration of justice is rendered impossible?

Refusing a Remedy

Every person seeking a judicial remedy does so pursuant to the constitutional right of access to the courts. A right to litigate, however, cannot be absolute and is subject to the responsibility of conduct in a manner that enables a court fairly to uncover where the rights and wrongs of a case may lie. That is a judge's duty. Judges should do their level best; but is there a limit, albeit an extreme one?[56] Whether as an applicant or as a respondent, calm co-operation with the bench is a duty that lies on all litigants and their advisors. While fair procedures are, of course, afforded to litigants by the courts, these rights do not exist in isolation. Rather, procedures are mechanisms towards a fair adjudication.

Deliberate upsetting of the apple cart through continual interruption, shouting, and disregard of a judge's directions in aid of a court hearing, may disentitle even a litigant ostensibly endowed with a good cause of action from obtaining a remedy. In *Burke v Adjudication Officer and Workplace Relations Commission*,[57] Bolger J dismissed a litigant's application to where her conduct made it impossible to continue with the hearing of her case. The following remarks about the court's inherent jurisdiction to dismiss proceedings where a litigant's conduct amounts to an abuse of process merit an extended quotation:

> Rights can be exercised in a way that becomes an abuse of process. In *Crowley v Ireland* [1980] 1 I.R. 102 O'Higgins CJ said at 125:

[53] While there was an attempt to put contempt of court on a statutory footing with the Contempt of Court Bill 2017, this was a private member's bill that lapsed.
[54] *State (Healy) v Donoghue* [1976] IR 325.
[55] *In Re Haughey* [1971] IR 217.
[56] In this context, it may be instructive to consider the approach adopted in Canada in light of its Charter of Rights and Fundamental Freedoms. In *Paul Magder Furs Ltd v Ontario Att-Gen* (1991) 85 DLR 4th 694 Ontario CA there was persistent disobedience of an order to refrain from Sunday trading. The respondent was not permitted to be heard so long as remained in defiance. It was argued that the trading restrictions infringed the contemnors freedoms under the Charter, but the argument was rejected. The Court held: The Canadian Charter of rights and Freedoms is no license to break the law or defy an order of the court…it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force.
[57] *Burke v Adjudication Officer and Workplace Relations Commission* [2023] IEHC 360.

> Rights guaranteed by the Constitution must be exercised having regard to the rights of others. It is on this basis that such rights are given by the Constitution. Once it is sought to exercise such rights without regard to the rights of others and without regard to the harm done to others then what is taking place is an abuse and not the exercise of a right given by the Constitution. The abuse of such rights ranks equally with the infringement of the rights of others and should be condemned by the courts in protection of the Constitution.

The possibility of an applicant's conduct being an abuse of process was raised by Clarke J. (as he then was) in *Sister Mary Christian & ors v Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506 at 567:

> It is, of course, true that an order of certiorari is, in the terms of the jurisprudence, a discretionary order. I should start by noting that it seems to me that the term "discretion" can perhaps be misleading in this context. It is not that the court can decide simply to decline to make an order. Rather, the term "discretion" is designed to convey that the existence of the set of circumstances necessary to allow the court to reach the conclusion that an order might be made does not, of itself, necessarily give rise to an obligation on the part of the court to make the relevant order. Thus, judicial review orders are in a different category from, for example, claims for damages. In the ordinary way if a party establishes the necessary acts of negligence, causation and loss then that party is entitled, as of right, to an award in damages in the absence of some legally recognised defence such as, for example, the claim being barred under the Statute of Limitations or the existence of an estoppel.[58]

The maxim 'he who comes to equity must come with clean hands', signifies an entitlement within courts exercising that jurisdiction to look at the conduct of the litigant who seeks a remedy. The principle is, perhaps, of wider application. Whereas it remains the duty of the courts to do their level best to discover where the truth of a cause and any counter claim may lie, an extreme point may be reached whereby litigants may shut themselves out from a remedy, or from a defence through conduct which fundamentally abuses the nature of the process in which a court seeks to engage.

No judge would ever wish to resort to hand-washing.[59] The judicial duty is to adjudicate. But, no duty exists without corresponding supports and these may be knocked away where litigants treat a court process in such an abusive way as to undermine justice. There has to be a corresponding duty of cooperation with the process, one never thought about by any litigant, but which may in the most extreme cases undermine the right to recourse to the court system.

That duty on a court extends even to compelling an answer to a question directly relevant to the proceedings. Failing to answer a relevant question in the face of the court is contempt in the face of the court; but lying on oath is the notoriously difficult to prove offence of perjury, which would be prosecuted separately. In *Keegan v de Burca*, Ó Dálaigh CJ stated that: 'it is no offence to refuse to answer an irrelevant question. In *O'Brennan v Tully* Hanna J rightly emphasised that the question must be a relevant question. The same point is made by *R v*

[58] ibid [30].
[59] Matthew 27:24.

Charlesworth which was also a case refusing to answer Hill J in convicting, and which was careful to recite that the evidence sought was 'material to the question before the Court.'[60]

The power to imprison for contempt in disruptive circumstances is in aid of the duty to administer justice and exemplifies the weight of the burden cast on courts. But, even still, being armed with that authority may not enable court proceedings to conclude in the face of abuse. Having obtained an order, whether as applicant, plaintiff, respondent or defendant, it will also abuse the authority of the courts to ignore what the judge has, through due process, ordered.

Court Orders Ignored

The line between criminal and civil contempt has become increasingly blurred. Civil contempt is where a person is ordered by a court to do something (take down a wall) or desist from some conduct (making noise at night) but treats the order of the court as mere windy rhetoric. Whether civil or criminal, the standard of proof is beyond a reasonable doubt.[61] In *The State (DPP) v Walsh & Connelly*[62] a motion for attachment was turned, in effect, into a criminal prosecution. Further, it used to be that failing to do what a court had ordered resulted in imprisonment or fine or sequestration in aid of compelling a litigant to obey a court order. Since *Shell E&P Ireland Ltd v McGrath* ('The Rossport Five' case),[63] what may have once been a bright line as between prosecution and compulsion has dissolved.

Imprisonment smacks of criminal punishment, which is not the point of civil contempt. Further, it is a serious and dangerous remedy: how long will the person be imprisoned and are there no other steps that could have been taken? The Rules of the Superior Courts first reference attachment. And as to sequestration, why not consider freezing remedies or other punitive measures in a financial sense of constricting remedies first? O'Donnell J identified the 'two basic problems' with civil contempt:

> First how to ensure that a person who does flagrantly defy court orders is the subject of an effective enforcement mechanism, in other words how to get such a person in to jail and to keep them there – and second how to avoid such a person staying in jail for an unconscionable amount of time and creating stalemate which is often more awkward and embarrassing for the court than for the individual – in other words how to get them out.[64]

The 'Rossport Five' case illustrates both problems.[65] There, five contemnors spent 94 days in prison solely because of their refusal to comply with an interlocutory injunction restraining them from obstructing the land in which Shell's gas pipeline was to be constructed following a compulsory purchase order. The defendants refused to purge their contempt. Finnegan P noted that imprisonment for civil contempt is primarily coercive, and that punitive imprisonment should only be used in cases where there has been serious misconduct in order to preserve the authority of the court.[66] In that case, the Court was satisfied that the 94 days already served by the defendants was sufficient punishment for contempt, so it did not impose any further penalty.

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[60] *Keegan v de Burca* [1973] IR 223.
[61] *National Irish Bank v Graham* [1992] 1 IR 215 at 220.
[62] *The State (DPP) v Walsh & Connelly* (n 37).
[63] *Shell E&P Ireland Ltd v McGrath* [2013] 1 IR 247, [2013] IESC 1.
[64] Donal O'Donnell, 'Further Reflections on Contempt' (2016) (This is cited from an unpublished lecture with permission from the author) [10].
[65] *Shell E&P Ireland Ltd v McGrath* [2006] IEHC 109.
[66] ibid.

Arlidge, Eady & Smith on Contempt suggest that 'the only rationale behind punishing criminal contemnors is protecting the administration of justice in general.' While the same rationale may be said to lie behind the coercive element in civil contempt, the distinction continues to be made. In *Malone v McCann*,[67] the Court of Appeal accepted the contention that civil contempt should be coercive in the first instance, with an opportunity afforded to comply with the relevant court order so as to avoid committal.[68] That has to be correct. Further, a court is gifted a procedural maze with which parties seeking attachment must comply. Any deviation entitles refusal of the order, despite an obvious disobedience. The parties to proceedings drive this process, one of apparently protecting the court's authority, but in the context of a private dispute. The court may not be empowered to act of its own motion, as where a wall ordered to be dissolved is discovered by the judge to be in place on a drive home from work. But discretion extends to the order and the strictness of the procedural remedy enables a motion for attachment to be refused, perhaps in aid of wiser counsels emerging over the time it may take for a disgruntled party to start that process again. These procedural requirements include service of a court order marked with a penal endorsement and an evidential burden of proof beyond reasonable doubt; itself a further blurring of the civil/criminal distinction.[69] In *Ulster Bank Ltd v Whitaker,*[70] Clarke J refused to take any coercive step such as sequestration of assets in the absence of the relevant penal endorsement.

But, merely knowing of a court order even if you are not a party, provided there has been a sufficient effort to serve the persons involved it may be enough for the court to consider to attach for contempt. In *Pepper Finance*,[71] a number of flats were purchased by an investment company not knowing the residents. All that was done to leave notice to quit was a notice on a hall table. The Supreme Court held that this was not enough for attachment; which is an extremely serious step. The Court held that what was required was at least personal service, or an order for substituted service in accordance with Order 10, r 1 RSC, which could not be granted unless each flat had an envelope pinned to the door or placed under the door to ensure that there was proper notice of contempt proceedings. These obligations cross-apply to all civil contempt proceedings. The Supreme Court disagreed with Peart J's contention in *Laois County Council v Scully* that service of a contempt notice on the defendant's solicitor is sufficient to comply with the RSC.[72] Order 41, r 8 states that the service must be personal service; '…upon the copy of the judgment which shall be served upon the person required to obey same…'[73] with no distinction as between interim, interlocutory or final orders; *Laois County Council v Hanrahan*.[74] Fennelly J summarised the contemporary legal principles governing civil contempt as follows:

> (i) It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a

[67] *Malone v McCann* [2018] IECA 179.
[68] Hogan et al, *Kelly: The Irish Constitution* (n 31) [6.1.289] 847.
[69] See the decision in *Pepper Finance v Persons Unknown* [2023] IEHC 21. Notice of service includes 'take notice that if you disobey the within order that you are liable to a process of attachment and committal for contempt of court, the remedies for which can include imprisonment or sequestration of assets.' Also, Appendix F, Form 11 of the RSC provides for an order of attachment requires the moving party to take appropriate steps for notice.
[70] *Ulster Bank Ltd v Whitaker* [2009] IEHC 16.
[71] *Pepper Finance* (n 69).
[72] *Laois County Council v Scully* [2007] IEHC 263.
[73] RSC Ord 41, r 8.
[74] *Laois County Council v Hanrahan* [2014] IESC 34 [59].

> term of imprisonment, although there may be cases involving matters of purely private interest, where the court may be invited to exercise the jurisdiction.
>
> (ii) The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the court. The object is punishment, not coercion.
>
> (iii) A court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving a flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.
>
> (iv) Committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention.
>
> (v) Any imprisonment must be for a fixed term.[75]

Proportionality is a fine principle, first introduced to Irish law in *Heaney v Ireland*,[76] whereby even though an order is warranted, its imposition may be beyond what is a balanced approach.

Futility and Proportionality

There may be circumstances where no form of coercion, no matter how long a stay in prison it may be, is going to induce a civil contemnor to change his or her mind. If such a sentence has lasted a significant period, the court may decide to release the contemnor even though the order has still not been obeyed. While some courts reason that the sanction has proved to be ineffective in securing compliance, it may also be that proportion in punishment has been achieved. For example, Judge Carrol Moran SC in the Limerick Circuit Court ordered the release of a farmer after almost one year even after he refused to purge his contempt, observing that the defendant could not be 'indefinitely' kept in prison.[77] Some may argue that civil contempt should not be used with a view to coercing compliance if it is likely for any reason to be ineffectual. That may include a change of circumstances; *Enfield London Borough Council v Mahoney*.[78] Otherwise, while experience in Ireland speaks of imprisonment over years, more florid examples of courts eventually deciding enough is enough come from England and from the United States. In *Enfield* an amateur archaeologist, and former mould maker, Derek Mahoney, refused to deliver up to a local authority an object he purported to discover by metal detection, the Glastonbury Cross. But who made it: 10c monks or a 17c imitation or the man himself; a 20c model-toy maker?[79] The contemnor was committed for the maximum sentence of two years for contempt of court. He took no steps to obtain his own release and the Official Solicitor applied to the court for him to be released. After an adjourned hearing, the judge, having failed to persuade the defendant to give up the artifact, decided that he must stay in prison. The Court of Appeal then directed Mr Mahoney's release,

[75] ibid 161-162. See also *Meath County Council v Hendy* [2020] IEHC 42.
[76] *Heaney v Ireland* [1994] 3 IR 593.
[77] Barry Duggan, 'Freed farmer vows to continue fight for farm 'promised' to him' *The Irish Independent* (24 June 2012).
[78] *Enfield LBC v Mahoney* [1983] 1 WLR 749.
[79] In the aftermath of the case there has been much speculation of whether the whole affair was an elaborate hoax after it emerged that Derek Mahoney was once employed by a Toy company as a mould-maker. See Richard Mawrey, 'The Mystery of the Glastonbury Cross' *History Today* (April 2012).

noting that 'no useful purpose in any connection whatsoever is going to be served by this man being kept in prison' and observed:

> The order that he be imprisoned had no effect on Mr Mahoney. He has, we are told, been in every way a model prisoner. He has shown no marked desire to go home. His stay in prison has excited the interest of newspapers and television. His obduracy, and of course the novel of the subject of this obduracy, has prompted articles to be written about him and his struggle to keep this cross, and for television programmes to be made about him…Apparently, he is an eccentric – if not a genuine eccentric, he is behaving in a very eccentric way and so is his brother and so his mother. The whole family is subject to this manifestation, as is referred to in one of the reports, of eccentricity arising out of a whole constellation of ideas which are shared in this family.

While the law in England and Wales on disobedience of a court order enables a fixed term of imprisonment, Watkins and May LJJ also noted that it is trite law that in cases of disobedience of a court order, a court had an 'inherent power to release from prison a contemnor at any time.' In deciding when a person in contemptuous breach of orders should be released from prison where the contemnor refuses to purge his or her contempt, the court agreed with the proposition that a person committed for failure to obey a court order is not precluded from being released even where he continues to disobey a court order.[80] Traditionally, authority proposes that a person sent to prison for contempt can only secure his or her release by carrying out the order of the court.[81] The more persuasive view may be that ineffective endless imprisonment may amount to a circumstance which might enable the court to order the release of the contemnor. That, however, must depend. Not doing something, as in giving up money or an artifact, is different perhaps to an order restraining someone from positive action, such as continuing to build an abattoir in defiance of a planning injunction.

The most florid example of defiance must be *Chadwick v Janecka*.[82] This was the longest imprisonments a civil contemnor has served; over 14 years. This was a dispute over the disposition of $2,502,000 of marital assets. Mr Chadwick claimed that he had used the money to settle an overseas debt, and therefore compliance was impossible. His ex-wife retained an investigator who asserted that the money had been smuggled overseas before disappearing, with potentially provable suspicions that Mr Chadwick still had access. The state court ordered his detention for civil contempt until he complied with the court's order to repatriate the assets. Mr Chadwick had a total of two dozen appearances in the trial and appellate courts and filed a total of 7 federal and 10 state habeas corpus applications.

On his fifth federal habeas corpus petition, and after 7 years in prison, the District Court held his imprisonment for civil contempt had lost its coercive sting to become impermissibly punitive. Judge Shapiro was of the view that there existed more than Mr Chadwick's 'mere assertion that further confinement will not coerce compliance' to justify his release. The court was of the view that Mr Chadwick was willing to remain incarcerated for life rather than allow his ex-wife access to a share of the mystery funds. The court observed that no bright line rule exists for making a determination that imprisonment has lost a coercive effect, holding that:

> The protracted duration of his incarceration could not have been foreseen by the state court when civil confinement was imposed. The state contempt proceedings

[80] *In re Barrell Enterprises* [1973] 1 WLR 19.
[81] *Corcoran v Corcoran* (1950) 1 ALL ER 495.
[82] *Chadwick v Janecka* (Civil Action No 00-1130 ED Pa 3 Jan 2002).

> were adequate for the imposition of a civil sanction to coerce compliance. However, after such an extensive time period, Chadwick cannot remain incarcerated without the due process attendant to imposition of criminal sanctions.

This, it is suggested, is not an equivalent to a contemnor's intractability being permitted to thwart the authority of a valid court order. The court, however, noted other mechanisms available to the court within the rules of court including the power to institute criminal proceedings against Mr Chadwick, citing perjury or a criminal contempt prosecution.

This decision was reversed by the Third Circuit, which distinguished between a contemnor's ability to comply with a court order compared to a willingness to comply. In Mr Chadwick's ninth year of imprisonment, the court appointed a Special Master with limited authority to investigate. In his report, the Master found that Mr Chadwick 'does not possess or control the secreted assets and accordingly does not have the ability to comply with the July 22, 1994, order and should be released from his present incarceration.'[83] The Special Master was later found to have exceeded the scope of his authority in making findings about Mr Chadwick's continued incarceration. Further time passed. After 14 years' incarceration, Judge Cronin of the Delaware County Court of Common Pleas signed an order releasing Mr Chadwick.[84] He stated that he:

> concurs with the prior presiding judges . . . who conclude that petitioner Chadwick has the ability to comply with the court order of July 22, 1994, but that he had wilfully refused to do so. This court concludes that petitioner Chadwick continues to wilfully disobey the court order… In order to be lawful, the petitioner's confinement for civil contempt of court must have a coercive effect. However, if during the period of civil incarceration, a court concludes that future imprisonment will not induce compliance, the imprisonment is no longer coercive, becomes punitive and the petitioner must be released.

Similar intransigence emerged, apparently for religious reasons, in *Re Cueto*,[85] where a group of evangelical ministers refused to testify before an inquiry into terrorist bombings on the basis that this would undermine their religious mission of confidential resort by troubled souls. They were imprisoned, but here for a much shorter period of time, 10 months, which convinced the judge that any order continuing imprisonment would be futile.

These cases suggest that the longer the time that a civil contemnor spends incarcerated, the more difficult it becomes to justify. Thus, considerations beyond respect for court orders, such as manifest injustice arising from futility, may come into play. Crucial to disposal, is the thought given to the order that is appropriate at the very first stage when contempt becomes an issue. There can be circumstances where it may be better to direct parties in a civil case towards other remedies which are likely to have coercive effect, and which might more properly demonstrate that the courts will not be flushed into a state of disrespect through disobedience. There seems to be a choice of sanction in the initial penal endorsement. Should

[83] *Chadwick v Hill*, No 06-1709l 2008 US Dist. LEXIS 34431, at 17.
[84] In 2010, a reported for the Philadelphia Inquirer found that Chadwick Beatty had created an online dating profile in which he described himself as an 'athletic bachelor' with expensive taste that included subscriptions to the orchestra, ballet, opera, and theatre and a passion for European travel and wine tasting. Monica Yant Kinney, 'Beatty Chadwick, trolling Match.com, still defying the truth' (*The Philadelphia Inquirer* 10 November 2010) <https://www.inquirer.com/philly/columnists/monica_yant_kinney/20101110_Monica_Yant_Kinney__Beatty_Chadwick__trolling_Match_com__still_defying_truth.html > accessed 10 February 2024.
[85] *In re Cueto* 443 F Supp 857 (SDNY 1978).

a judge be more inclined to imprisonment, or to a remedy based on the imposition of a fine or sequestration of assets?[86]

Judges Commenting and Juries Disclosing

A judge gives a decision using a particular form of words, and that is that. She or he cannot revise or qualify what has been written. While the principle of *functus officio*, that the duty of office has been discharged, does not apply to the High Court, it is a bad idea for a judge who has given a decision to do more than revise grammar or spelling. Further, it is more than a bad idea to publicly qualify or defend a court decision; what is done is done.

While a judge is unlikely to speak as to a decision, in criminal cases which manifest a magnetic attraction of publicity, the UK Contempt of Court Act 1981 has specifically protected the jury process through making interviews with juries a contempt.[87] What if, in any jurisdiction, a jury is questioned by the press as to its acquittal on a murder charge of a person facing apparently coercive evidence? Does this not undermine the un-displaced presumption of innocence were some jurors to reply: 'Oh yes, we thought him guilty, but one of the police officers was a racist'? Or, where a person is convicted, what if press interviews disclose irrational thinking in the process whereby that verdict was recorded? Jurors are as much ministers of justice as judges and yet the law remains unclear, confused, and in the cases where there has been press interviews of jurors, unapplied.

Reform and Restatement

The early legal history of common law contempt powers was marked by clear principle; a journalist could not comment on a case before the courts; witnesses could not be interfered with; court decisions had to be spoken of with respect; those who disrupted court proceedings faced immediate and summary justice; and court orders that were defied resulted in possible imprisonment until obeyed. But, if not all has changed, much has: perhaps not for the better. Over time, the *sub judice* rule has diminished in contest with twenty-first century ideals of freedom of expression. The types of contempt recognised at common law that can be perpetrated by and against witnesses has met the similar fate of older criminal law; that of withering due to disuse. Criminal contempt and civil enforcement through the attachment and committal procedure used once be separated by an impassable line. But, now, on a motion for attachment due to civil contempt, the rights inuring to a 'trial in due course of law', specifically only in criminal cases under Article 38.1 of the Constitution, have been applied to those who comment unjustifiably and nastily on a court decision and are attached on a motion for civil contempt: *The State (DPP) v Walsh & Connelly*.[88] While some may question the application of such rights, the bigger question is surely where due process-type rights may take civil contempt.

[86] Proportionality in the context of imposing a fine for civil contempt was considered by the Court of Appeal in *Meath County Council v Hendy & Others* [2023] IECA 55. The Court stated at [97] 'The principle of proportionality in the context of imposing a fine for contempt means that a court must always have regard to the gravity of the conduct sought to be restrained, taking account of any harm caused and each contemnor's degree of personal culpability. The court must have regard to each contemnor's personal circumstances as at the date of the hearing. Such conduct should generally be serious, contumacious or wilful or otherwise constitute contumelious or a gross affront to the integrity of the court as the judgments in *Shell E. & P. Ireland Ltd. v. McGrath* [2006] IEHC 108, [2007] 1 IR 671 and *Dublin City Council v. McFeely* (supra) indicate.'
[87] Contempt of Court Act 1981, s 8.
[88] *The State (DPP) v Walsh & Connelly* (n 37).

Other questions confront the modern judge, faced with a plethora of authorities. Most stark is the extent to which a witness deliberately blanking a key question in the face of the court remains actionable against the European Court of Human Right's decision in *Kyprianou*. While, like the US Supreme Court decision in the 'dirty tyrannical old dog' case, *Mayberry v Pennsylvania*,[89] the principle sounds fine that an insulted judge should not react as prosecutor and sentencer, but where does stripping courts of the power to immediately react leave the administration of justice? *Kyprianou* opened a Pandora's box of endless dispute that contend against the ability of a court swiftly to exercise its jurisdiction for contempts committed *in facie curiae*. Probably, blanking a question is not an insult to the court, unless accompanied by a nasty comment, but rather a refusal of constitutional duty that undermines the court process. But, again, in modern times, one struggles to find instances of blanking a question being responded to by the presiding judge. In civil and in criminal cases, the hostile witness procedure can be engaged at the request of the party who is being blanked or giving evidence completely contrary to a written statement. In criminal cases, section 16 of the Criminal Justice Act 2006 may be used, rendering a prior statement admissible as actual evidence, which the hostile witness procedure does not admit of unless the witness agrees that a fact put is correct. Only then can a question become evidence through affirmation. But the distinction in *Kyprianou* of insults to justice generally, perhaps not answering a relevant question, and insults to a particular judge, is not one drawn by those who actually treat the courts with contempt. Now, they, and it may be those drawn into a motion on a civil attachment, may have full criminal trial rights. Like the treatment of tribunals of enquiry and fair procedures since *In re Haughey*,[90] the danger is that the erection of an attractive cathedral of law, based on ideal as a response to a problem as opposed to the traditional common law reaction of pragmatism, may have hollowed out an essential jurisdiction in the protection by the courts of their authority.

This is, perhaps, key to the issue that has plagued the development of contempt law, namely the distinction between criminal and civil contempt. This is compounded in the final uncertainty with contempt in the entitlement of the court to institute proceedings. In criminal contempt, ultimate control over the proceedings usually lies with the Director of Public Prosecutions. But, if necessary, it may be uncontroversial that in a case of criminal contempt, but only in the face of the court when actually sitting, a court can act of its own motion provided the facts are not disputed (if such a dispute arises the Digital Audio Recording, as proved by the registrar sitting that day, will provide a record of what occurred in court). In relation to a contempt of a court order, in our adversarial system it is not the court that takes notice of disobedience but, rather, it is the parties to litigation who bring the disobedience to the court's attention. However, there are judicial hints that there may be cases where the court, alert to the public interests involved, acts on its own motion; but thus far this is limited to not acquiescing when a party withdraws an application and a contemnor is already in jail: *Shell v McGrath*.[91] On occasion, however, the Attorney General as guardian of the public good has brought contempt proceedings. But what are the limits of that duty and when must the Attorney General act? Why saddle that high constitutional officer with responsibility and not the court itself? Possibly that question may be answered by the difficulty that a court noticing contempt against itself is turning itself into a prosecutor? Again, *Kyprianou* may be thought

[89] *Mayberry v Pennsylvania* (n 51).
[90] *In re Haughey* [1971] IR 217; and see Peter Charleton, Ciara Herlihy and Paul Carey, 'Clochaí Ceangailte agus Madraí Scaoilte: How Tribunals of Enquiry Ran Away from Us' (2019) 41 *Dublin University Law Journal.*
[91] *Shell v McGrath* (n 63).

to loom large. Is acting as a quasi-prosecutor similar to being the supposed victim of an insult?

Following two papers about reforming contempt law by the Law Reform Commission, and one lapsed private members' Bill before Seanad Éireann, the situation is increasingly difficult to classify as satisfactory. Contempt is not merely a relic of authoritarian rule. The effective due administration of justice and the enforcement of court orders remain pillars of the judicial role and a key protection of the judicial function in our republic. The wide scope of contempt, as it once was prior to what has now developed, reflected the myriad of ways in which protection of the courts can be jeopardised in a society. Traditional acceptance of authority may increasingly be challenged by fashionable disenchantment with authority figures. While the role of the courts is to administer justice, there is a corresponding duty on citizens to engage with a civilised decision-making process. This is not merely fine theory. As Moskovitz has observed, 'the value of a right to a litigant is no greater than the available remedy…[which] is worth no more than its sanction, contempt.'[92] Notwithstanding the undeniable need for clarity in the use of key protections of court decisions, contempt has been led into a thicket of contradictory and uncertain rules. This is, regrettably, now part of the burden of a key legal area that Paul Anthony McDermott SC, two decades ago in 2004, noted as one 'where almost no two lawyers or commentators can agree on many of the most fundamental aspects.'[93]

The irony is that through judicial decision, the power of the contempt jurisdiction has arguably been weakened to the extent that some may be tempted to exploit humane developments in the law as a retreat. Try something else: this has become a key principle. The time for restatement and codification of what has become a legal maze is long overdue.

[92] Moskowitz, 'Contempt of injunctions, Civil and Criminal' (1943) 43 *Colorado Law Review* 780.
[93] Paul Anthony McDermott, 'Contempt of Court and The Need for Legislation' (2004) *Irish Judicial Studies Journal* 185, 188.