# SOME REFLECTIONS ON THE LAW OF CONTEMPT

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## I. INTRODUCTION

After 30 years of experience in dealing with the law of contempt, Lawrence Gray, an Assistant Attorney General in New York, concluded:

> In one way or another, the law of contempt permeates all law because force - not morality - is the ultimate sanction. Those who will not obey, or disrupt, are to be coerced and punished in the name of the law. In law school, contempt is a word used frequently but seldom defined beyond a few maxims, such as something about the key to one's own jail cell. After law school, contempt becomes a word secretly feared by those who threaten it - probably as much as those who are threatened with it.[1]

It is, I think, not unduly controversial to suggest that the law of contempt is feared by the judiciary more than by the assorted collection of stubborn, contrary, unhappy or misguidedly principled zealots and hard-nosed members of the media who are subject to it. It may, however, be useful to consider why this is so.

It was suggested to me that it might be useful to look at this topic with some concrete examples in mind. A fairly

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[1] Lawrence Gray, "Criminal and Civil contempt: Some sense of a hodge podge", (1998) 72 St. John L. Rev 337.

simple example might be the following. Local people become incensed by plans of a new owner of a local beauty spot to turn it into a theme park for songs in the Eurovision Song Contest which have received *nul points*. So incensed are the local people that, following a media campaign, a number of people announce that they are going to occupy the premises and prevent any work on them. The owner obtains an interlocutory injunction restraining a number of named individuals (who are now well known from television and other media appearances) from continuing to trespass. A number of those persons, however, announced that they have no intention of discontinuing their occupation and although served with the orders (containing the appropriate penal indorsement) remain in defiant occupation of the property.

The first question which arises is whether that is civil or criminal contempt. In either case, is there any entitlement to trial by jury? What if any of the other safeguards normally apparent in a criminal trial will apply? Is there a requirement of mens rea? If there is, what is it? Can the contemnors be sent to jail for a fixed term or can they only be sent to jail until they undertake to purge their contempt? If they can be sent to jail for a fixed term, can they be released before the end of that term on undertaking to abide by the Orders of the Court? Is hearsay admissible? What is the standard of proof?

The obtaining of the injunction creates even greater controversy and a number of individuals with experience from anti-globalisation protests arrive at the site announcing their intention of supporting the occupiers of the premises and their willingness to take their place with a view to demonstrating that the law is only the tool of the property owning classes. Again the same questions arise: is it civil or criminal contempt if the plan is carried out? Are they entitled to trial by jury? If not, do any of the safeguards of criminal proceedings apply? Is there a requirement of mens rea and what is it? Can the individuals be sent to jail for a fixed term? Must they be sent to jail until they undertake to purge the contempt? If sent to jail for a fixed term, can they be released

before the end of that term? Is hearsay admissible? And what is the standard of proof?

In the course of the committal motion, the charismatic ringleader of the occupiers insists on giving evidence because he believes that this will be a platform which will allow him to obtain further publicity for their cause. During the course of his evidence, he is, however, asked by the judge to reveal the names of a number of persons occupying the premises who had not been previously identified. He refuses to do so on the grounds of principle. He is warned of the consequences and given time to consult with his lawyer. He persists in his refusal. Again, the same questions arise.

By now, the matter is something of a *cause célèbre*. The local newspaper, which has just obtained the services of a new editor from Fleet Street, campaigns demanding the withdrawal of the injunction and any contempt proceedings and publishes a front page which contains only a picture of the judge on the day of his or her call to the Inner Bar complete with full bottomed wig, which is printed upside down with the legend "You Fool". Again, all the same questions arise with the added complication of whether the court can or should act itself.

The competing newspaper, not to be outdone, conducts a paparazzi style pursuit of the judge with 24-hour surveillance of the judge and daily reports and photographs.

Finally, the owner of the premises announces that he has come to an agreement with the local people and, in return for the erection of a permanent big screen for world cup football matches, all aesthetic objections have been overcome. He announces that, although he felt he had no option but to "take out" an injunction, now that the matter is all over his counsel will tell the judge to release the imprisoned protestors. Can this be done? Can the court of its own motion continue to treat something as contempt and worthy of committal even if the civil action underlying it has now been settled? If there has been imprisonment for a fixed term, can that be revised?

These are all issues which have arisen, many of them in Irish courts, and a wide range of different answers have been suggested. It is quite difficult to say what the superior courts have decided in relation to these issues, but almost impossible to predict what they would say if asked again. The difficulties an Irish court faces with what has been described as the protean nature of contempt are compounded by a problem which is almost unique. Not only must the ancient and somewhat anomalous common law of contempt be tested against the demands of the European Convention of Human Rights (as is the case in the United Kingdom) but it must also be tested against the demands of the Irish Constitution, which has well established requirements of civil and criminal procedure, and in particular by Article 38.5 (and like the U.S. Federal Constitution but unlike the European Convention of Human Rights) requires trial by jury on non-minor criminal charges.

Furthermore, I regret to tell you that this is only the pass paper! The honours paper requires candidates to address the question of the law of contempt in inferior courts and the issues which arise when counsel or solicitors are thought to be disrespectful in court. Other difficult questions arise when public comment is made concerning the subject matter of the litigation and, in particular, criminal trials and matters which are *in camera*.

## II. Civil Contempt

The current answers to the questions are, I think, that the breach of an injunction is a civil contempt and there is no entitlement in any circumstances to trial by jury.[2] Hearsay is admissible.[3] The better view seems to be that a contempt

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[2] See for example *The State (Commins) v. McRann* [1977] I.R. 78, although in *McEnroe v. Leonard* (unreported, High Court, 9 December 1975), Parke J. had held that such contempt was, in essence, a crime and required trial by jury.

[3] See *Arlidge, Eady and Smith On Contempt* (2nd ed., 1999), para 3-39 and Order 40, Rule 4 of the Rules of the Superior Courts, 1986. On the

cannot necessarily be waived by the injured party.[4] Committal to prison for such contempt was normally understood to mean committal until the contempt was purged or waived or the court thought no further purpose could be served. In *Keegan v. de Burca*[5] O'Dalaigh C.J. said:

> Civil contempt, on the other hand, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made.[6]

On the other hand, aiding or abetting a breach of a civil injunction constitutes a criminal contempt. Accordingly, at least in Ireland presumably, hearsay is not admissible. There may be an entitlement to trial by jury if there is a disputed issue of fact or facts. This is the burden of the majority judgment (albeit possibly *obiter*) in *The State (DPP) v. Walsh and Conneely*.[7] There may be a requirement of *mens*

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other hand, it appears that the standard of proofs is proof beyond reasonable doubt: see *NIB v. Graham* [1994] 1 I.R. 215.

[4] See *Arlidge, Eady and Smith On Contempt* (2nd ed., 1999), para. 3-30 and in Canada, at least, flagrant defiance of a civil order may constitute criminal contempt. See *Tony Pojé v. Attorney General British Columbia* (1953) 2 D.L.R. 785 and *United Nurses of Alberta v. Attorney General for Alberta* (1992) 89 D.L.R. 4th 609.

[5] [1973] I.R. 223.

[6] [1973] I.R. 223 at 227. See, however, *Flood v. Lawlor* (unreported, Supreme Court, 12 December 2001), where the Supreme Court endorsed a sentence of one week's imprisonment in respect of a refusal to comply with an Order of the High Court made under s. 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997.

[7] [1981] I.R. 412.

*rea*[8] and, if there is a conviction of criminal contempt, the sentence must be determinate: *Keegan v. de Burca*.[9]

A refusal to answer a relevant question is a contempt: *Keegan v. de Burca.* The same case decides that it is a criminal contempt and the same rules (or lack of them) apply. Significantly, and perhaps counter-intuitively, the same case decides that because it is a criminal contempt, there can be no imprisonment for coercive purposes (i.e. to require the individual to answer the question) and any sentence must be determinate.[10]

Finally, it may be of some comfort to know that, at least in Hong Kong, *paparazzi* style pursuit of a senior judge (at least if coupled with articles vilifying the judiciary containing abuse and racist slurs) will constitute a contempt.[11] However, in the immediate aftermath of the Spycatcher litigation, the Daily Mirror published upside down photographs of the Law Lords who had injuncted Spycatcher under the banner headline "You Fools", but criminal proceedings were not initiated.[12] It is hard to see how, if this is permissible, there is much life in the concept of scandalizing the court.

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[8] See *Kelly v. O'Neill* [2000] 1 I.R. 354.

[9] [1973] I.R. 223.

[10] Although the persuasive dissent of McLoughlin J. argues that the penalty for criminal contempt could be both punitive *and* coercive in an appropriate case, and that therefore, a sentence of imprisonment until the contempt was purged was unlawful. It may be that this view may gain support in the light of the acknowledgement in *Flood v. Lawlor*, (unreported, Supreme Court, 12 December 2001) that a sentence for civil contempt could be both coercive *and* punitive. Interestingly, in the United States of America, a refusal to answer a question is a civil contempt giving rise to coercive penalties. It is hard, however, not to think that the Supreme Court was influenced by a desire not to make Mairín de Burca a martyr.

[11] See *Secretary for Justice v. The Oriental Press Group* (1998) 2 H.K.C. 627.

[12] See Robertson and Nichol, *Media Law* (4th ed., 2002).

If some or all of these propositions seem surprising to you, you should not despair. At some time or another, it seems that at least some judges, in some jurisdictions, have taken the opposite view. Accordingly, it is a case of being wrong today: tomorrow you may be right. This is, I think, one of the reasons at least why the courts might fear the law of contempt. In most areas of the law, I suspect a court has a reasonable intuition of what the correct result is, or at least what the range of possible results might be. In the area of contempt, however, the internal compass does not seem to function. There seems to be a large number of reversals of first instant decisions on appeal, itself indicative of an area where the law is unsettled and unpredictable.

There is, therefore, a strong argument that the law of contempt in Ireland is hopelessly confused. The excellent Law Reform Commission publications on contempt[13] have been ignored. The manner in which many contempt cases are dealt with shows an understandable nervousness on the part of the court in attempting to deal with an area where there are so few guiding principles and such principles as there are seem difficult to reconcile with established constitutional principles of civil and criminal procedure.

However, before discussing further the difficulties of this area, it may be appropriate to try to set out even in very broad terms, what comes under the Irish law of contempt.

There are, I think, five distinct areas. First, there is the division between civil and criminal contempt. Civil contempt is constituted by disobedience to the order of a civil court. Criminal contempt, however, can be divided into three different categories. The first of these is contempt in the face of the court i.e. disruptive behaviour in or immediately outside the precincts of a court. The next is scandalising the court: the scurrilous abuse of courts or judges which can be said to be calculated to bring the administration of justice into disrepute. The third category of criminal contempt is

[13] Law Reform Commission, *Consultation Paper on Contempt of Court* (July 1991) and *Contempt of Court*, (L.R.C. 47-1994).

constituted by words or conduct calculated to interfere with the administration of justice either by the interference with a witness or judges or lawyers, breach of the in camera rule, or by statements prejudicial to a fair trial. The fifth distinct area is a uniquely Irish one and it is the concept of "contempt of the courts" announced and operated for the first (and so far only) time in the famous case of *The State (Quinn) v. Ryan.*[14] Taking that very rough division, however, it can be said that there is virtually no fixed or settled point in the Irish jurisprudence of contempt. This can be illustrated by a number of examples:

(i) In *Cullen v. Toibín*,[15] there was an appeal pending in the Court of Criminal Appeal. *Magill* published an article setting out some horrifying details about the conduct of the accused and the circumstances of the victim. In the High Court, Barrington J. was prepared to grant an injunction restraining publication of the article while the appeal before the Court of Criminal Appeal was pending, stating that if he had been on the court and had read the article, he would have asked to be excused. He suggested that it was unwise to assume that judges were totally immune from the frailties commonly held to affect jurors. However, this decision was overruled by the Supreme Court which held that since the judges in the Court of Criminal Appeal were dealing purely with matters of law, they could not be influenced prejudicially or at least could not be so influenced that they could not put the matter out of their minds. This became a touchstone of the commentary on the Irish law of contempt even if it was, in my view, unduly optimistic. However, the balance shifted in *Kelly v. O'Neill*[16] where the

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[14] [1965] I.R. 70.

[15] [1984] I.L.R.M. 577.

[16] [2001] 1 I.R. 354.

Supreme Court[17] had to deal with the issue of publication of information prejudicial to an accused between conviction and sentence. While the court was careful to distinguish *Cullen v. Toibín* and suggested that it was based on the fact that the Court of Criminal Appeal was dealing only with issues of law, (whereas sentence could be said to be an issue of fact), the court held that publication in such circumstances amounted to a contempt of court, and in doing so, effectively overruled the decision in *Cullen v. Toibín* or at least reduced its impact substantially.

(ii) In *Keegan v. de Burca*[18] and *The State (Commins) v. McRann*[19] the Supreme Court had emphatically stated that civil contempt was very distinct from criminal contempt and, in particular, was not punitive and its object and was instead (or so it appeared from the judgment) purely coercive. In *Keegan v. de Burca* O'Dalaigh C.J. stated that:

> ... civil contempt ... is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived...[20]

However, in *Flood v. Lawlor*[21] the High Court had imposed a one week sentence for civil contempt and, on appeal, it was argued that this was purely punitive (since it punished the contemnor for a previous failure to comply with an order for discovery) and, therefore, an inappropriate sanction for civil contempt. The

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[17] Of which Barrington J. was now a member.

[18] [1973] I.R. 223.

[19] [1977] I.R. 78.

[20] [1973] I.R. 223, at 227

[21] Unreported, Supreme Court, 12 December 2001.

Supreme Court, carefully distinguishing *Keegan v. De Burca*[22] concluded that "it cannot be said that a sentence imposed in respect of contumelious disregard of the orders of the tribunal and High Court is coercive only in its nature."

If I may respectfully say so, I think that this is quite correct and undoubtedly consistent, not just with a clearly established English authority[23] but, perhaps more importantly, with common sense. It has been said, and correctly in my view, that the public at large no less than the individual litigant have a very real interest in justice being effectively administered. It is, nevertheless, telling that there should be such a significant disparity between two of the very few decisions of the final court of appeal in this jurisdiction.

(iii) A similar confusion arises regarding the nature of the distinction between civil and criminal contempt. In *State (Keegan) v. De Burca*[24] a clear distinction was drawn which became critical in *The State (Commins) v. McRann.*[25] It was suggested, in that case, that there was, in truth, no significant distinction and that, therefore, civil contempt giving rise to the possibility of imprisonment should have the constitutional safeguards applicable to criminal matters - most notably trial by jury. It was, perhaps, understandable that in reaction to this argument, the court seemed to draw an exceptionally sharp distinction between civil and criminal contempt. This was done, no doubt, in a desire to insulate the important power of committal for civil contempt from the possibility of

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[22] See page 47 of the judgment of the Chief Justice.

[23] See *Arlidge, Eady and Smith On Contempt* (2nd ed., 1999), paras 3.3 to 3.11.

[24] [1973] I.R. 223.

[25] [1977] I.R. 78.

constitutional challenge but it was, nevertheless, unfortunate and, in any event, contrary to common-sense. Civil contempt is quite unlike any other civil proceeding. In the United Kingdom, Salmon L.J. (as he then was) has observed that the distinction is an "unhelpful and almost meaningless classification"[26] and Laws J. (as he then was) stated that "the distinction between civil and criminal contempt, not only lacks utility, I believe it also lacks principle".[27] The Phillimore Committee on Contempt of Court recommended the abolition of the distinction[28] and in the related area of the distinction between civil contempt for breach of an injunction and criminal contempt for aiding and abetting that breach, Lloyd L.J. stated that "[t]hat is the sort of nonsense which does no credit to the law".[29]

(iv) Furthermore, even the fixed and simple point that breach of a civil injunction is civil contempt is a point which is not universally accepted. For example, in the United States of America, which has a very similar contempt jurisdiction, breach of a prohibitory order is regarded as a criminal contempt.[30] On the other hand,

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[26] *Jennison v. Baker* [1972] 2 Q.B. 52 at 61G; [1972] 1 All E.R. 997.

[27] Lowe, "Current Problems in the Law of Contempt" (1990) 43 C.L.P. 99.

[28] Report of the Committee on Contempt of Court (1974) Cmnd 5794. The Committee was established in 1971 to determine whether any changes were required in the law relating to contempt of court. It reported in 1974 and made a number of significant recommendations for change. See generally, *Arlidge, Eady and Smith On Contempt* (2nd ed., 1999), para. 1-85.

[29] *Attorney General v. Newspaper Publishing plc* [1988] Ch. 333. As long ago as 1913, in *Scott v. Scott* [1913] A.C. 417, Lord Atkinson said "it would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this".

[30] See *Gompers v. Buck Stove & Range Company* 221 U.S. 441 and *Shillitani v. United States* 384 U.S. 364.

and contrary to *Keegan v. de Burca* refusal to answer relevant questions is a civil contempt.[31]

(v) Somewhat anomalously, breach of an absolute order of *habeas corpus* was always regarded as a criminal contempt and was so treated in *In re Earle*.[32] Accordingly, in 1972 in *Keegan v. de Burca*[33] Ó Dálaigh C.J. listed it as one of the examples of criminal contempt. However, less than nine years later, Henchy J. in *The State (DPP) v. Walsh and Conneely*[34] stated that breach of an absolute order of habeas corpus was "perhaps, only a civil contempt now".[35] I think one is entitled to wonder what happened in the intervening nine years and what would have occurred if there had been such a breach between 1972 and 1981.

(vi) In 1999, the Supreme Court raised the question (apparently for the first time) in *Kelly v. O'Neill*[36] whether the modern law of criminal contempt required an element of *mens rea*. It is, of course, somewhat surprising that this should be an open question at such a relatively late stage in the development of the jurisprudence and of course, even if the offence was held to require *mens rea*, a further complex issue would arise as to what would constitute *mens rea.*

(vii) In 1994, in *National Irish Bank v. Graham*,[37] Keane J. (as he then was) held that civil contempt required proof beyond reasonable doubt. This would, I think,

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[31] *Shillitani v. United States* 384 U.S. 364.

[32] [1938] I.R. 485.

[33] [1973] I.R. 223.

[34] [1981] I.R. 412.

[35] [1981] I.R. 412 at 430.

[36] [2001] 1 I.R. 354.

[37] [1994] 1 I.R. 215.

meet with the approval of most people and is, furthermore, consistent with the established English jurisprudence (*In Re Bramblevale Limited*[38]) but sits somewhat uncomfortably with the decision in *Banco Ambrosiano S.P.A. v. Ansbacher Co.*[39] which seemed to hold that there was only one standard of proof in civil cases, normally proof on the balance of probabilities.

(viii) Perhaps most importantly of all, it is surprising that since at least 1981, there has been abiding confusion over the extent to which trial of an issue of criminal contempt requires trial by jury under Article 38.5 of the Constitution. The argument in favour of such trial is simple: criminal contempt is a crime, it carries a potentially unlimited penalty and, accordingly, it cannot be said to be a minor offence and Article 38.5, therefore, requires trial by jury. If this is correct, it would be inescapable that all the other procedures and protections available in criminal cases would follow and further difficult issues would arise as to the position of the court in the case of criminal contempt where the court might be both the injured party and the complainant. Nevertheless, in *The State (DPP) v. Walsh and Conneely*[40] the majority of the Supreme Court seemed to indicate that trial by jury was a requirement - at least in a case where there were contested issues of fact, but it is a revealing feature of the Irish jurisprudence that since that date, no alleged contemnor has ever succeeded in having the issue tried by a jury. Accordingly, a fundamental confusion lies over the area of criminal contempt.

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[38] [1970] 1 Ch. 128. It would also be less vulnerable to any challenge under the European Convention on Human Rights.

[39] [1987] I.L.R.M. 669.

[40] [1981] I.R. 412.

It is, I think, fair to say that it is very difficult to find any solid ground in either the recent or early Irish jurisprudence on contempt and the observation of Keane J. (as he then was), in *Kelly v. O'Neill* that "our law in this area is, in many respects uncertain and in need of clarification by legislation"[41] is, if anything, a substantial understatement.

There is, I think, a further significant problem. There is a notable lack of precedent dealing with an area which arises almost daily and such judgments as there are, are if I make respectfully say so, somewhat unconvincing. They bear the hallmarks of being *ad hoc* responses to perceived difficulties and are either unwittingly pompous or unduly tentative for fear of pomposity. I would like to focus on three examples.

The first arises in relation to the contentious, and for me, interesting, question of the entitlement to trial by jury in a case of criminal contempt. The case against is really quite simple: criminal contempt is not a "criminal charge" as contemplated by Article 38 of the Constitution and, accordingly, no issue arises as to whether it is a minor or non-minor offence. Adherents to this view were, for example, Finlay P. (as he then was), in *The State (Commins) v. McRann*[42] and O'Higgins C.J. (with whom Parke J. agreed)[43] in *Walsh and Conneely*.[44] Both judgments expressed the view that criminal contempt, although a criminal matter, did not fall within Article 38. A central reason, found compelling by the respective judges, was that if criminal contempt fell within Article 38, it necessarily followed that Article 30.3 applied and it was an offence which could only be prosecuted by or on behalf of the People by the Attorney General or the Director of Public Prosecutions. Both judgments considered

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[41] [2000] 2 I.R. 354 at 374

[42] [1977] I.R. 78.

[43] Parke J. had earlier held that trial by jury was required even in cases of civil contempt!

[44] [1981] I.R. 412.

that it would be an intolerable interference with the separation of powers if the court were beholden to the Executive in the enforcement of contempt powers which might, on occasion, involve cases in which a member of the Executive was the very subject of the litigation and the alleged contempt. There are, I think, many good reasons why criminal contempt does not, in fact, require trial by jury under Article 38 but this, at least, in my view, is not one of them. It is what I might respectfully call Chinese meal jurisprudence: sufficient at the time, but not very sustaining. It is, in fact, a fundamental feature of the separation of powers that the courts are indeed beholden to the Executive in the enforcement of their orders. The reason that the courts are the "least dangerous branch" of the separation of powers is precisely because they do not hold either the purse or the sword.[45] Courts are always entirely dependent on the Executive for the provision of funds, courthouses and appointment of judges and ancillary staff on the one hand, and for the enforcement of all orders made by the Courts on the other. Notwithstanding the rhetorical impact of the argument, it is, therefore, I think, difficult to say that there is something so necessarily offensive about the idea of Executive enforcement of the law as to require a departure from what would otherwise appear to be the plain meaning of Article 38.

A second example of somewhat unsatisfactory and unconvincing reasoning can be found on the other side of the same debate. The principal judgment holding that trial by jury may indeed be required in certain cases, is that of Henchy J. in *Walsh v. Conneely*[46] with whom Griffin and

[45] "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Alexander Hamilton, *The Federalist Papers* (No. 78) (New American Library edition, 1961), p. 465 (first published in 1787).

[46] [1981] I.R. 412.

Kenny JJ. agreed. This is, on any view, an impressive piece of judicial craftsmanship. It is, as many of the judgments of Henchy J were, elegant, resourceful and clever, and seeks to achieve a practical and effective result which is, nevertheless, consistent with principle. It is clear that the Supreme Court (as with all previous courts which had dealt with this since the mid-1970s) was troubled by the apparent anomaly that Article 38 clearly requires trial by jury in non-minor criminal charges, but that it was difficult to see how criminal contempt (particularly involving the dignity or the rulings of a judge) could properly or practically be tried by a jury. Incidentally, Irish courts are not unique in viewing the prospect of trial by jury on this issue, with some alarm. In *In Re Lonhro*[47] the House of Lords stated that a trial on indictment was an experiment which simply should not be contemplated, endorsing the statement to the same effect by the Court of Appeal in *R. v. D.*[48] I think it is fair to say that the only issue is whether trial by jury is constitutionally required: I do not think there are very many people who argue that it would, otherwise as a matter of principle, be a sensible or desirable course.[49] The judgment of Henchy J. has the undoubted benefit of avoiding the charge that the courts have simply departed from constitutional principle to suit themselves. However, having acknowledged the possibility of trial by jury, the judgment then seeks to reduce to vanishing point the practical significance of the ruling. It suggests, uniquely, that there is a class of non-minor offences, which can nevertheless be disposed of without a jury and without the consent of the defendant. Accordingly, what is conceived of by the judgment is something quite different from the trial by jury which Article 38.5 requires in every other criminal charge.

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[47] [1990] 2 A.C. 154.

[48] [1984] A.C. 778 at 791H-792E. However, the United States Supreme Court did finally hold, in *Cheff v. Schnackenberg* (1966) 384 US 373, that trial by jury was constitutionally required.

[49] Indeed, one of the most eloquent statements of the reasons why such a course is undesirable is contained in the judgment of Henchy J.

What appears to be contemplated is that a court would determine whether there was, in truth or in fact, an issue of fact, and ask the jury to resolve that fact alone, and not the broader question of the accused's guilt of the charge. In effect, the roles of judge and jury would be reversed. In the normal trial on indictment, the judge instructs the jury as to the law and the jury returns a verdict; in this case, the jury are to find limited facts and the judge is to draw the conclusions and deliver the verdict. Pages 439 and 440 of the report contain the most eloquent explanation of why a jury cannot be the arbiter of contempt issues:

> The ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges. They cannot abdicate that responsibility, which is what they would be doing if they allowed juries of laymen to say whether the conduct proved or admitted amounted to criminal contempt. It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards.[50]

This is, in fact, a powerful and persuasive argument against the use of traditional trial by jury in cases of criminal contempt. It is arguable, therefore, that the judgment undermines what it seeks to achieve, namely, consistency of principle. The contempt jurisdiction so carefully constructed in the judgment of Henchy J. is, on closer inspection, no more principled (or indeed consistent with Article 38) than the approach of O'Higgins C.J. in the same case. I think it can be said that the judgment was designed to concede on the issue

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[50] [1981] I.R. 412 at 440.

of principle but to do so in a way which would make it virtually impossible for any trial by jury ever to be held. Significantly, not only did that occur in *Walsh and Conneely*[51] but notwithstanding the theoretical availability of trial by jury (and the significant attraction of such a course for any defendant)[52] there has, nevertheless, been no subsequent trial of a contempt issue by a jury.

The essential problems in the approach were shown up, in almost embarrassingly quick order by the further progress of the case. Henchy J. had held that although trial by jury was, in principle, available, there was, in truth no issue of fact arising in this case, which would require resolution by a jury. However, showing a high degree of *chutzpah*, the accused marched back into court and announced that now that it was clear that there could be a trial by jury on contested facts and that they wished to contest a number of factual issues, such as, whether Mr. Walsh was responsible for the article when he did not know of its contents and whether Mrs. Conneely could claim that she acted under coercion of her husband because the statement was read out in her husband's presence. In one sense, notwithstanding the clear opportunism of the accused's approach, if Article 38 was truly applicable, the game was up. An accused cannot be forced to admit that there is no issue of fact: every accused can demand that the issues of fact be proved. Nevertheless, the court disposed of Mrs. Conneely's claim by abolishing the rule of law that acts done by a wife in the presence of her husband could be said to be carried out under duress, and analysed the facts so as to conclude that, in truth, Mr. Walsh could not be heard to say that he was not responsible for the article (although this surely had to be an issue for a jury).

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[51] [1981] I.R. 412.

[52] For example, in *De Rossa v. Independent Newspapers plc* [1998] 2 I.L.R.M. 293 case, an affidavit was put in by the defendants stating that the challenge was to each and every matter of fact raised by the plaintiffs. This was obviously an attempt to secure trial by jury or, at least, frustrate the plaintiff's application.

Finally, and if any further demonstration was necessary, the judgment on the principal issue contains a remarkable and somewhat unconvincing argument. *Walsh and Conneely's case*[53] arose out of the *Murray* capital murder case.[54] An article had been published by the so-called Association for Legal Justice stating that the Special Criminal Court had "so abused the rules of evidence as to make the court akin to a sentencing tribunal". At page 443 of the judgment, Henchy J. observed that each member of the Supreme Court had first-hand knowledge either by being a member of the Court of Criminal Appeal or the Supreme Court which heard the further appeal in the *Murray* case that the trial of the Murrays had been fair and the rules of evidence rigorously applied. Thus, he said, the point which the appellant now wished to have opened for decision by a jury was already *res judicata*. However, whatever else this was, it could not be said to be *res judicata*. There was a determination of an issue between the people and the Murrays but not between the court (or indeed the people) and Mr Walsh or Mrs Conneely.[55] If, in truth, the same issue did arise, the fact that all the members of the Supreme Court had previously heard the *Murray* trial and had expressed concluded views on the issue, that might be thought to be a reason why it was inappropriate that they should hear the *Walsh and Conneely*[56] case. In any event, the issue was not the sole issue in *Walsh and Conneely* but only one of them. There were other issues such as whether the State could prove the publication of the statement, the responsibility of

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[53] [1981] I.R. 412.

[54] *The People v. Murray* [1977] I.R. 360.

[55] It is also difficult to reconcile this decision with that of the Supreme Court in *Corporation of Dublin v. Flynn* [1980] I.R. 357 that there must be in every criminal trial, a determination of every point constituting the offence charged against the accused: a point decided against him in earlier proceedings was not *res judicata* for the purpose of later criminal proceedings.

[56] [1981] I.R. 412.

the individual defendants for it, whether they had the requisite *mens rea* (or whether indeed *mens rea* was required) etc.

It might be said, therefore, that neither side of the arguments in Walsh and Conneely are particularly convincing.

A third example arises when we look closely at one of the sacred cows of Irish jurisprudence, *The State (Quinn) v. Ryan*.[57] If personal experience is anything to go by, I doubt very much if any law student or practitioner consults that case for anything other than the famous passage on page 122:

> … no-one can with impunity set these rights at nought or circumvent them, and ... the courts' powers in this regard are as ample as the defence the Constitution requires. Anyone who sets himself such a course, is guilty of contempt of the Courts and is punishable accordingly.[58]

This was one of the decisive moments in (relatively) modern Irish jurisprudence and until recently, has never been the subject of anything but respectful indorsement and acclaim.[59] However, a reading of what preceded and in particular, what followed that passage is perhaps a little disturbing.

It is worth recalling the facts of the case. The prosecutor was Philip Anthony Quinn. A warrant had been issued for his arrest naming him, apparently incorrectly, as Patrick Anthony Quinn. He was charged with larceny of certain property belonging to Dansette Products Limited valued at £3,000. The available (and only) statutory

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[57] [1965] I.R. 70.

[58] [1965] I.R. 70 at 122.

[59] See, however, Hardiman J. in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at 708 *et seq*. and in *T.D. v. Minister for Education* (unreported, Supreme Court, 17 December 2001).

procedure for securing the attendance of a person in the Republic of Ireland in answer to a warrant issued in the United Kingdom was that provided by sections 29, 30 and 31 of the Petty Sessions (Ireland) Act, 1851 which permitted for a backing of British warrants in Ireland. The first warrant was backed but challenged immediately by way of *habeas corpus* application raising the issue of identity. While those proceedings were pending before the President of the High Court, the British authorities (no doubt in consultation with the Irish authorities), issued a second warrant naming the prosecutor as Philip Anthony Quinn and (as, indeed, the Divisional Court subsequently held) valid in every other respect. The Gardaí then consented to an absolute order of *habeas corpus*. Mr Quinn was then released but subsequently rearrested on the second warrant and in the words of the judgment, "whisked" out of the jurisdiction, in a manner which appeared to particularly irritate the Supreme Court, not directly to Great Britain, but rather via Northern Ireland. The prosecutor's solicitor was frustrated in seeking to obtain information as to his whereabouts when he commenced the second application for habeas corpus, which was heard by a Divisional Court over a number of days and ultimately held that since the second warrant was valid, Mr. Quinn was in lawful custody and that the return of the Garda Authorities was a proper return, i.e. that they had passed him into lawful custody. There was an appeal to the Supreme Court which was, it is fair to say, incensed. The Supreme Court took the step of joining the Attorney General to consider the constitutionality of the sections of the Petty Sessions (Ireland Act), 1851 and decided unanimously that the Act undoubtedly permitted the removal of a citizen/applicant from the jurisdiction without having the opportunity of challenging the arrest and, on that interpretation, was unconstitutional. This judgment was delivered on the 31st July 1964.

Having made the ruling, the court was obliged to follow through on it. The self-same court which had expressed itself in such trenchant terms about the conduct of

the police then, some 15 months after Mr Quinn's original arrest, embarked upon a trial in the Supreme Court on the issue of the police officer's alleged contempt. This involved the Supreme Court becoming a criminal trial court of first and last instance. However, a number of awkward issues were not addressed. Service was directed on the English Police officers and affidavits required. No one addressed the question of the privilege against self-incrimination. More particularly, no one addressed the problem of how to secure the attendance of the English police officers, in particular. What would have happened if they didn't turn up? It was, to say the least, rather unfortunate that the only statutory method for securing the attendance before an Irish Court of persons in England was none other than section 27 of the Petty Sessions (Ireland) Act.

This difficult issue was avoided by the attendance (or at least the representation) of the English police officers. However, that was the end of their assistance. While the Irish Gardaí apologised at the outset, the English police officers rather unhelpfully stated that they would not apologise unless found to be in contempt.

The Supreme Court ultimately found, by a majority of 4 to 1, that they had been guilty of contempt. There is, however, a very perceptive dissenting judgment of Haugh J. which points out the many real problems with the procedures. Effectively, the English police officer's crime was in not appreciating that the Act (which had been held to permit precisely what the English police officers had done) would nevertheless be held unconstitutional. If this was a failing, it was shared not only by the Attorney General (who made trenchant submissions to the Supreme Court in support of the constitutionality of the Act) but the Divisional Court in the High Court who had not suggested any constitutional frailty in the procedure. Furthermore, the Petty Sessions (Ireland) Act had previously survived constitutional challenge (although not precisely on the same point) in *The State (Dowling) v. Kingston (No. 2)*[60] and *The State (Duggan) v.*

[60] [1937] I.R. 699.

*Tapley*.[61] Ultimately and revealingly, the English police officers were given the same sentence on conviction after trial as the Irish Gardaí received; having pleaded, their apology was accepted. By now, Mr Quinn seems to have been long forgotten. Was he tried? Was he convicted or acquitted? Was he by then living quietly in England having adopted the name Patrick Anthony Quinn because he thought it suited him? One thing seems clear however: notwithstanding the fine words on page 122, his constitutional rights remained stubbornly without vindication. This points up another recurrent and unsatisfactory feature of the jurisdiction. Many contempt cases seem to start with a bang and end in the whimper of an apology which few believe is heartfelt.

A third unsatisfactory feature of the contempt jurisdiction is that it is a little bit like giving judgment on roller skates: it seems very difficult to do at all but is impossible to do with any dignity. This is perhaps most clear in the often-criticised jurisdiction of scandalising the court. The leading case is *The State (DPP) v. Walsh and Conneely*.[62] In that case, the conviction of the Murrays in the Special Criminal Court, was met by a public campaign. The *Irish Times* published a statement from a body calling itself the Association for Legal Justice stating that the Special Criminal Court had "so abused the rules of evidence as to make the court akin to a sentencing tribunal". This case took almost five years from the date of the original statement to the final determination by the Supreme Court. The Supreme Court was careful to attempt to distinguish scandalising the court from strong and emphatic criticism of the court or judges. It is clear, therefore, that scandalising the court involves some difference of quality or degree from even quite intemperate and unjustifiable criticism. When one considers the type of casual comments that are made by disappointed and disgruntled litigants and their lawyers, it is hard to see

[61] [1952] I.R. 62.

[62] [1981] I.R. 412.

what line of principle was crossed. In this case, I suspect the court was more exercised by the fact that the *Irish Times* placed the statement on the front page than by the Association for Legal Justice itself. The decisions of the courts would suggest that the line is drawn when criticism becomes scurrilous abuse or wild and baseless allegations. If there is indeed a clear distinction at this point, is there any real benefit in maintaining it? Allegations which are clearly wild and baseless may in many cases be less damaging than plausible and restrained criticism.

Other examples are equally underwhelming. In 1930, the *Daily Worker* stated that "the judge who sentenced Comrade Thomas was the bewigged puppet and former Tory MP chosen to put communist leaders away in 1926. The Defending Counsel, able as he was, could not do much in the face of strong class bias of the judge and jury". I cannot imagine that the average *Daily Worker* reader was a great believer in the class system and would have had his belief shaken by the report of this trial. By the same token, somebody who was not a card carrying party member who came across the *Daily Worker* would hardly be surprised by this statement, other than the comradely appreciation of the labours of counsel.

The classic case of scandalising the court (of which there are very few) is *R. v. Gray*.[63] Darling J., a flamboyant judge at the turn of the century, was presiding over a trial for the publication of obscene materials and the uttering of obscene words. At the outset, and perhaps rather unwisely, he took it upon himself to warn the press that publication of obscene matter would not necessarily be protected as a fair and accurate report of court proceedings, but could rather constitute the separate offence of publication of obscene matter, and if this occurred, he would see to it that a prosecution was initiated. This can hardly have filled the accused or his representatives with confidence. The *Birmingham Daily Argus* launched an attack on Darling J

[63] [1900] 2 Q.B. 36.

which was described as "scurrilous" but neither Lord Russell of Killowen who gave the main speech, nor the court reporter thought it proper to repeat it verbatim. In fact, it appears what the *Birmingham Argus* wrote was that Darling J was "an impudent little man' and a "microcosm of conceit and emptyheadedness". It stated that:

> No newspaper can exist except upon its merits, a condition from which the bench, happily for Mr Justice Darling, is exempt. Mr Justice Darling would do well to master the duties of his own profession before undertaking regulation of another.

Again, it seems to be widely accepted that this would not constitute contempt if uttered today. Incidentally, *R. v. Gray* also shows that no one emerges unscathed from the difficulties of contempt of court. The burden of the *Birmingham Argus*'s attack upon Darling J. was not freedom of speech or the entitlement of newspapers to fall upon every salacious detail of a court hearing and to publish it to its readers because the public might be interested in it, but rather to attack the judge for insulting the media by suggesting that such an event might even occur.

It is undoubtedly the case, therefore, as Keane J. observed in *Kelly v. O'Neill*[64] that the law is, in many respects, uncertain and in need of clarification by legislation. Even then, legislation may not be a panacea. Contempt is *sui generis* but is, I think, best understood as a necessary adjunct of the administration of justice pursuant to Article 34 of the Constitution. In this context, it is interesting to note that in the Canadian case of *McMullen Blodel v. Simpson*, the Supreme Court had to consider whether some part of the contempt jurisdiction could be subtracted or transferred by Statute. The particular circumstances were relatively innocuous: it was desired to ensure that all criminal issues involving young persons, including criminal contempt of

[64] [2000] 1 I.R. 354.

court, would be tried before a special youth court. A slender majority of the Supreme Court held that the contempt powers were within the core jurisdiction of the Superior Courts and it was beyond the jurisdiction of Parliament to remove any part of it from those courts. In other words, a young person could continue to be dealt with for contempt by the court before which the alleged contempt was committed.

However, notwithstanding all the problems which exist in relation to the contempt jurisdiction, it would, in my view, be a grievous mistake to conclude that contempt should be abolished, abandoned or even avoided. I think that on any analysis, it becomes apparent that important and indeed even vital interests of the administration of justice are protected by the law of contempt.

One striking feature is the persistence of the jurisdiction over time in all common law countries. One of the earliest explanations of the jurisdiction is contained in *Almon's case*:

> The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Vent. 1. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the 'lex terrae', and within the exception of Magna Charta, as the issuing of any other legal process whatsoever.[65]

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[65] Wilmot's notes (1765) Wilm. 243 at 254; 97 E.R. 94 at 99; 16 Digest (Repl.) 6 at 12.

In other words, in 1765, it was said that the basis of the contempt of court jurisdiction could be found in time immemorial. Indeed, there is a record of an Irish case in 1331 where, almost inevitably, a judgment at first instance was overruled.[66] I would be prepared to bet, that if we looked hard enough, we would also find contemporaneous statements and comments criticising the law of contempt as inconsistent with the principles of Magna Carta.

The very persistence of the jurisdiction is a telling and eloquent testimony to the necessity for it. The job of the law is not, I think, to make individual circumstances fit with a later announced principle: it is instead to consider adjusting the principle to accommodate an existing phenomenon. As Oliver Wendell Holmes wisely and famously observed, the lifeblood of the law is not logic, it is experience and felt necessity.[67] The law of contempt of court is, perhaps, the clearest example of a necessity felt in all common law courts in all jurisdictions by nearly all judges well known or obscure, quick tempered or calm. In analysing judgments, it is as important to look at what judges do as much as what they say. In my view, there is something telling in the lengths to which distinguished judges in this jurisdiction have gone in seeking to protect the jurisdiction of contempt. As far as I can see, this does not appear to have been generated by any desire to protect the individual judges themselves or the judiciary as a whole. Indeed, to abandon the law of contempt, at least contentious elements of it, would probably be met with praise rather than criticism. The very existence of the decisions quite apart from their reasoning, shows an inarticulate belief in the necessity of the jurisdiction.[68] It is, I think, therefore,

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[66] On the ground that it did not provide for trial by jury!

[67] Wendell Holmes Jr., *The Common Law*, p. 1.

[68] In *Kelly v. O'Neill* [2001] 1 I.R. 354 at 364, Denham J quoted, with approval, the following observation of Lord Reid in *Attorney General v. Times Newspaper* [1974] A.C. 273 at 300: "As in so many other matters, strong feelings are based on one's general experience rather than on specific reasons, and it often requires an effort to marshal one's reasons.

important to attempt to identify what might be described as the core values of the law of contempt and to consider whether the criticisms of it can be met only by abolition, rather than adjustment.

Very little of the academic or media criticism of the law of contempt focuses on civil contempt, which is, nevertheless, probably the single most important aspect of the law of contempt. There is, in truth, a most compelling argument for civil contempt power. It is fundamental that a court should be a place of calm and measured consideration to facilitate the specific settlement or at least adjudication of disputes. Many reasonable people would, I think, accept that the procedures which courts adopt are designed to achieve that end and that the necessity that there should be decisive results means that decisions and judgments must be arrived at and obeyed. However, the courts are not visited by reasonable people who have agreed to submit their disputes to the arbitration of wise individuals. In fact, a large proportion of litigation is made necessary because of the very unreasonableness of individuals. Those persons can only ultimately be made obey by force, if necessary, and can only be persuaded to avoid testing the limits of the court's jurisdiction by the knowledge that punishment and coercion is a possibility. As the late Professor Kelly observed, no matter how humble or innocuous the procedure, it is connected by a number of steps (however long) to the prospect of a man or woman rattling the keys of a prison.

However, I do not think that the law of civil contempt merely exists to deal with that unfortunate band of misguided and unhappy people who push the patience of individuals and the indulgence of the court beyond all reasonable limits. It is, I think, an important feature in maintaining order among all other litigants that there is at least the knowledge that disobedience to the orders of the court (e.g. in relation to discovery) can ultimately lead to contempt of court, the

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But public policy is generally the result of strong feelings, commonly held, rather than cold argument".

possibility of punishment and being prevented from defending or prosecuting the claim. To take a humdrum example, nothing irritates the ordinary citizen more than the idea that, while they have been patiently queuing in a line which has been proceeding at a snail's pace, someone should be allowed to skip the queue and get away with it. By the same token, all litigants have to submit to a system which is, at times, unsatisfactory, which makes orders which are not necessarily either intelligible or immediately persuasive, and run the risk of unsatisfactory judgment. It is important from their perspective that they believe that obedience to this system is not simply a matter of choice and that other litigants will, if necessary, be obliged to comply with the same rules.

This is not to say that the courts should willingly commit someone to jail for contempt of court. In many ways, that is the last resort and it appears to me, at any rate, that the courts are acutely aware of the difficulty of dealing with people who are not deterred by the prospect of prison. There is much merit in the approach of O'Hanlon J. in *Ross Co. Ltd. v. Swan*[69] where he refused to order the committal for contempt of trespassers because there was a reasonable alternative course open (in that case, prosecution under the Prohibition of Forcible Entry and Occupation Act, 1971). A similar example is provided by the case of *Enfield LBC v. Mahoney*[70] where the Court of Appeal released a contemnor "because of his eccentricity and stubbornness"[71] the contempt appeared to be taking a satisfaction from his predicament and the attention it was receiving. Tasker Watkins L.J. stated:

> ... prison is not to be used for such a purpose; neither are orders of the court to be abused for

[69] [1981] I.L.R.M. 416.

[70] [1983] 2 All E.R. 901.

[71] [1983] 2 All E.R. 901 at 906.

> such a purpose ... it is high time that the prison service was rid of this man.[72]

I also believe that there is merit in the provision of the UK Contempt of Court Act, 1981 which sets a two year limitation on imprisonment for any contempt whether civil or criminal. It might also be useful to build in a procedure for automatic review by another court within say one to two weeks of committal.

In truth, the main criticism of civil contempt relates to the anomalous procedural protections and the difficulty of fitting civil contempt easily within either a criminal or civil template. I can fully understand the arguments which persuaded the court in *Keegan v. De Burca*[73] and *The State (Commins) v. McRann*[74] to draw very clear and sharp distinctions between civil and criminal contempt. The object was to avoid the argument, based on theory, that, since a person could end up in prison and could only be committed there if proof was provided beyond a reasonable doubt, in truth, civil contempt was so criminal in nature that the safeguards provided for under the Constitution for criminal trials should apply. In an effort to insulate civil contempt from that type of challenge, the distinctive features of civil contempt, its civil nature, and the coercive nature of committal were emphasised. However, in many ways, I think that that was unfortunate. Logically, the distinction is deeply unpersuasive. Furthermore, by seeking to sharply distinguish civil contempt from criminal contempt, the remaining aspects of criminal contempt were, if anything, made more vulnerable to challenge. I think it would be wiser to admit that all contempt is *sui generis* and that civil contempt has much more in common with criminal contempt than with any other civil proceedings. The task really is not one of classification as of the identification of sufficiently fair

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[72] [1983] 2 All E.R. 901 at 906.

[73] [1973] I.R. 223.

[74] [1977] I.R. 78.

procedure to satisfy both the Constitution and the European Convention of Human Rights.

### III. CRIMINAL CONTEMPT

Much the same argument can be made in favour of the jurisdiction of criminal contempt where it is committed *in facie curiae*. No one seriously doubts that it is essential that order and decorum be maintained in court proceedings. It is, in many ways, one of the highest attributes of civilisation that it can ensure the measured, careful, rational and dispassionate resolution of disputes. It is critical to the success of the process that all parties should observe that decorum. Once again, it is particularly important for the law- abiding majority that they should see that there is a limit to behaviour which is tolerated.

The only real question is whether the court should take upon itself to deal with incidents such as this in a summary fashion or whether it should be left to the criminal law. Again, this is really an argument from legal principle. In fact, where the interference with the courts of justice is particularly serious, or where the interference can readily be tried after the conclusion of the matter which is before the court, it will normally be wrong to pursue the issue of contempt during the trial and any conviction will be overturned; see, for example, *In re Kelly*[75] and *Balogh v. St Albans Crown Court*.[76] The question, therefore, is whether all contempts in the face of the court no matter how importune, no matter how much they are interfering with and disrupting the administration of justice, should, nevertheless be postponed to a possible future criminal trial. There are, I think, two reasons why this course should not be followed unless it was required by the Constitution or the European Convention of Human Rights, an issue that I will address below. First, it would I think greatly reduce the authority of

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[75] [1984] I.L.R.M. 424.

[76] [1975] Q.B. 73.

the courts and their effectiveness, if all interferences with the administration of justice were to be postponed to some future trial, say in the District Court or in the Circuit Criminal Court, on indictment. The difficulties which the Tribunals had, prior to the 1997 Act, in obtaining enforcement of their orders (and securing respect for their rulings) demonstrate this. The prospect of deferred trial and possible punishment does not have the same deterrent effect as an immediate determination.

Furthermore, such a course runs counter to another accepted principle of justice. Litigation is not an end in itself or indeed a good in itself. It is, at best, the least offensive alternative method of resolving disputes. There is something utterly unsatisfactory about the prospect of cases generating further cases about the content of the earlier cases with the real prospect that one court could come to an apparently different result to the original court. Therefore, as a matter of practicality at least, it seems to me that the position is well explained by Henchy J. in *Walsh and Conneely*:

> It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards.[77]

## IV. Serious Interference with the Administration of Justice

There are a large class of criminal contempts which occur outside the courtroom, or what is deemed to be the face of the court. Contempt can be committed by action (e.g. by intimidation of witnesses, judges, litigants or lawyers) or by words such as comment prejudicing a fair trial or words

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[77] [1981] I.R. 412 at 440.

which are comment or statements in breach of the *in camera* rule.

There must clearly be a capacity to punish, and punish severely, any interference with the administration of justice such as the intimidation of witnesses. It would make the business of the courts a hollow, though expensive, sham if the courts were not available to ensure that all relevant matters are properly before the court. Again, the only question is whether this should be left entirely to the criminal law. For the reasons set out above, I think that serious cases should indeed be the subject of criminal prosecution. Nevertheless, there are less serious cases which may usefully be dealt with in a summary fashion by the court itself. I believe that this has a salutary benefit for the entire system. It encourages good behaviour by litigants and lawyers if it is known that there is some immediate sanction. I also think that there is a practical argument in favour of summary disposal of matters which are, while not trivial, nevertheless sufficiently immediate to require attention. If this is the case, it seems sensible and desirable that the trial judge, who is familiar with all the facts and circumstances of the case, should deal with the matter. In every case, there is a right of appeal from any order. An alternative blanket rule that everything should be referred to the DPP would, I think, substantially weaken the position of the courts *vis-à-vis* litigants and those who were disposed to disrupt its proceedings. However, the real question is whether this process, even if desirable, is consistent with the Constitution.

## V. Trial by Jury

It is remarkable and unsatisfactory that it should still remain an open question whether trial by jury is possible in cases of criminal contempt. It follows from the uncertainty about this fundamental issue that it is even more unclear whether criminal contempt is to be treated in all respects as a crime and subject to the same procedures as apply to the prosecution of all other breaches of criminal law. It should be

pointed out that this is essentially an issue of Irish Constitutional law: as long as the procedures adopted are sufficiently fair, there would be no infringement of the European Convention of Human Rights guarantee of a fair trial.[78]

In my view, the minority in *Walsh and Conneely*[79] were closer to being correct. The Law Reform Commission has suggested that trial of an issue of criminal contempt is, nevertheless, not a trial of a criminal charge pursuant to Article 38 of the Constitution. There are, I think, a number of plausible reasons why this is so. As the Law Reform Commission point out, Article 50 of the Constitution was not adverted to on either side of the debate in *Walsh and Conneely*.[80] In fact, it is useful, and indeed important, to consider how the law has developed. Contempt of court, with all its anomalies and in particular, the possibility of private prosecution by an injured party and prosecution by the court and without trial by jury, was a well established feature of the common law system which existed prior to 1922 and which became part of the law of the new State, unless inconsistent with the Irish Free State Constitution. In fact, the Free State Constitution provided a guarantee of trial by jury. It appears reasonably clear, that it was certainly not intended by this general formulation to effect a radical alteration of the law of contempt, a distinctive feature of the common law system. In 1937, the same essential terminology was used, but the argument that contempt of court was not within Article 38 was, if anything, much stronger. By that stage, it had been unsuccessfully argued that contempt required trial by jury: see *Attorney General v. O'Kelly*[81] and *Attorney General v. Connolly*.[82] It appears an inescapable conclusion that, if in

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[78] Although there might possibly be an equality argument.

[79] [1981] I.R. 412.

[80] [1981] I.R. 412.

[81] [1928] I.R. 308.

[82] [1947] I.R. 213.

1937 it was intended to depart from that understanding of the nature of the criminal trial (and the exclusion from that category of criminal contempt) some specific change in terminology would have been adopted.

Finally, the argument in *Walsh and Conneely*[83] might be turned upon itself. One of the arguments made there, was that trial of criminal contempt (and possibly civil contempt) in their current form, was not consistent with the Constitution because not only was there no trial by jury in non-minor matters, but also because the criminal matters were not prosecuted on behalf of the people by the Attorney General or the DPP as was required by Article 30.3. In fact, this is something of a circular argument and might, with profit, be put the other way around. The criminal charges contemplated by Article 38 of the Constitution are necessarily the self-same criminal matters which are to be prosecuted under Article 30.3. Since it is an established feature of contempt that it can be initiated by the court itself or indeed an injured party, it must follow, it is respectfully submitted, that such proceedings are not included within the generalised Article 38 guarantee. There is, I think, much to be said for this interpretation of the Constitution which locates contempt of court, not within the strained template of civil or criminal proceedings, but rather sees it as *sui generis* and as an adjunct of Article 34 of the Constitution.

An interesting comparison can be made with the Australian case *Re: Colina ex parte Torney*.[84] There, the prosecutor had protested outside the court buildings blaming the courts for the death of innocent persons, suggesting that the courts had been terrorised by women's groups and suggesting that if people knew of the nature of orders made by judges, the likely consequence would be violent action towards the judges. The respondent was the Chief Justice of the Family Court. The prosecutor was charged by the

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[83] [1981] I.R. 412.

[84] (1999) 26 Fam. L.R. 431

Marshal of the Court with contempt and sought an order prohibiting the respondent from hearing it, contending, inter alia, that he was entitled to trial by jury pursuant to Section 80 of the Commonwealth Constitution. The High Court of Australia held that the acts alleged against the prosecutor were not offences against any law of the Commonwealth, the power to deal summarily with contempts being an inherent power of self protection or a power incidental to the administration of justice, the Court held that the summary procedure had been for at least a century, the usual procedure and that the prosecutor could not claim the protection of section 80 since he was not "charged on indictment". While the context is different, it seems to me that the approach is instructive.

An alternative argument might be that the non-minor nature of any change for the purposes of Article 38 should be judged on the actual, rather than the potential, sentence. While in theory, there is no limit to the penalty for criminal contempt, in fact, it is extremely rare that a contemnor goes to prison let alone serves more than one year. This approach is taken in the U.S.A. Thus, if a trial results in a sentence of less than 6 months, it is a petty offence and does not require trial by jury. This, after all, is the same calculation a court must make on an application for legal aid and, if a jail sentence, is a possibility *in the particular case* legal aid may be required. There might be some mileage in this argument, but it would leave unresolved the question of whether, in every other respect, the trial must conform to the procedures at a criminal trial. For that reason, I think the argument that contempt is *sui generis* and demands its own fair and distinct procedures, is neater.

## VI. Scandalising the Court

Perhaps the most difficult aspect of contempt of court is the concept of scandalising the court. If it is indeed the case that a judge cannot be described as an "impudent little man" but that the senior Law Lords can be described as "you

fools", there might be said to be little point in maintaining such a jurisdiction. It is no answer to this argument to say that the law is invoked only on very rare occasions: it can be argued that the existence of an uncertain and anomalous jurisdiction creates an unacceptable chilling effect on free speech. Moreover, the wilder and more scurrilous the comment, the less likely it is to be effective in undermining the administration of justice.

However, this argument does not take sufficient account of one point. The argument against scandalising the court, as a component of criminal contempt, is essentially an argument of free speech. The argument runs that the more speech there is the better, and in the marketplace of ideas, truth wins out. If a court is not entitled to respect, then no order whether by way of criminal contempt or otherwise can produce that respect; by the same token, if an issue is sufficiently discussed and understood, the position of a court will be appreciated. That might be thought unduly optimistic. It assumes a free market in speech in which everyone is an equal actor. That, of course, is not true, but more importantly, it is an argument which does not take account of those who do not *want* to speak or, pertinently in this regard, *cannot* speak.

If, as I believe it to be the case, it is important that judges should not become embroiled in public controversy about their judgments and should, furthermore, be slow to prosecute libel proceedings in respect of statements made about them in the course of their work, then both these features of the judicial task involve a very significant restraint on the freedom of speech of the individual judge and interference with his or her good name. It is, I think, an important part of the administration of justice that the judges observe restraint in what they say about the subject matter of a controversy both before and after its determination. In other words, judges are confined to speaking once and once only (in the form of a judgment) about the subject matter of a case which comes before them. On any view, this is a significant

restriction on freedom of speech. In those circumstances, some very limited restriction on what can be said about those judges or about their judgments, is arguably not only acceptable, but in one sense constitutionally required (since otherwise there would be such a fundamental imbalance as to amount to inequality and unfair procedure and a lack of protection of the good name of the individual judge). In other words, the existence of a jurisdiction of scandalising the court does create a chilling effect, but that, in my view, is beneficial. It creates some sense of limit on the extent to which newspapers and other media may comment upon judicial decisions and forces some modicum of accuracy and restraint upon them, which otherwise would either be absent or provided by increased resort to libel proceedings.

Finally, it remains to be considered what can be said in favour of the concept of "contempt of the courts" advanced in *The State (Quinn) v. Ryan*.[85] In my view, notwithstanding the criticisms a lawyer might make of the process and procedures and reasoning, it is still difficult to say that the administration of justice in Ireland has not benefited from the robust rhetoric of the *The State (Quinn) v. Ryan*. Even if the Divisional Court was technically correct (and I am not sure it was), the broader approach of the Supreme Court has received widespread acceptance. It is, nevertheless, unlikely that we will see many more successful attempts to invoke the contempt of the courts jurisdiction.[86]

My conclusion, at any rate, is that the core of contempt is still sound. There is still conduct which ought to be the subject of some sanction and there is a demand in practice for summary proceedings before the court which is most familiar with the underlying facts. Many of the problems faced by Irish courts in the recent past have been due to a concern about the inability of the courts to reconcile

[85] [1965] I.R. 70.

[86] In any event, it would probably not be necessary now once it has been acknowledged that there is a horizontal right of action for breach of constitutional rights.

the practice of contempt with what were perceived as constitutional principles or the dictates of the ECHR. If it were acknowledged that contempt is *sui generis* and does not have to be made compatible with either the civil or criminal law, then the focus of the courts (and perhaps legislation) could be upon the procedural protection which ought apply however contempt is described analysed or categorised. There is much to be said for the approach of the U.S. Supreme Court in its most recent foray into this area, *International Union v. Bagwell*[87] where the court observed that most contempt sanctions share punitive and coercive characteristics and that the fundamental question underlying the distinction between civil and criminal contempts is what process is due for the imposition of any particular contempt sanction. Many of the perceived problems might then disappear quite readily. A single piece of legislation along the lines recommended by the Law Reform Commission, together with some clarification by an authoritative Supreme Court judgment would remove a lot of the uncertainty and unpredictability which currently bedevils the law. The courts should not, at least in my view, be unduly apologetic about the unique nature of the contempt jurisdiction. It is a product of practical necessity. Ultimately, as Henchy J. observed in *DPP v. Walsh*, it is necessary to accept that "in such matters judges have to be trusted".[88] The ultimate test for the judiciary is whether it can secure sufficient public acceptance of, and confidence in, its behaviour.

One further and final reason why I, for one, would not draw the conclusion from the incoherence of the jurisprudence on contempt that the law of contempt serves no useful purpose is that the Irish law is not necessarily any more incoherent than any of the available alternatives. It is true that in 1981, the UK introduced a form of strict liability contempt by statute but that left intact the existing jurisdiction. The law of contempt has produced at least two

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[87] (1994) 512 U.S. 821.

[88] [1981] I.R. 412 at 440.

cases, which in the words of Lord Bingham, cannot be said to be "the finest flower of English jurisprudence"[89] and have resulted in reversals in the European Court of Human Rights, namely, *Sunday Times v. United Kingdom*,[90] and *Harman v. United Kingdom*.[91] In addition, the saga of *Re Lonrho plc*[92] is no more impressive and convincing than the approach of the Supreme Court in *The State (Quinn) v. Ryan*.[93]

The United States of America also has a guarantee of trial by jury. For almost 170 years after the adoption of the Constitution, that was held not to have any impact on the trial of contempt charges. Nevertheless, as Henchy J noted in Walsh and Conneely in 1964, only six years after the reaffirmation of the traditional doctrine, the Supreme Court executed a startling volte face, and in *Cheff v. Schnackenberg*,[94] held that in certain circumstances, trial by jury was required. Significantly, however, Henchy J. was not prepared to follow or adopt that reasoning, considering that the differences in the legal system in the United States were such as to reduce its value as a precedent. Indeed, on any reading the majority judgment in that case is deeply unimpressive; the finding that in cases attracting more than six month imprisonment penalty, a trial by jury was required, is disposed of in 5 lines in reliance not on the constitutional entitlement but rather on the supervisory jurisdiction of the Supreme Court. It would be a mistake, therefore, to believe that the law in the United States is any more principled or persuasive than the current uncertain law in Ireland.

One instructive example is the cautionary tale of Mr. Daniel T. Taylor III who achieved his Andy Warhol five

[89] Bingham, *The Business of Judging: Selected Essays and Speeches*, p. 245.

[90] *Sunday Times v. United Kingdom* (1980) 2 E.H.R.R. 245.

[91] *Harman v. United Kingdom* (1985) 7 E.H.R.R. 146.

[92] [1990] 2 A.C. 154.

[93] [1965] I.R. 70.

[94] (1966) 384 U.S. 373.

minutes of fame by becoming the petitioner in Supreme Court proceedings entitled *Taylor III v. Hayes the Judge of Jefferson Circuit Court Criminal Branch 2nd Division in the State of Kentucky*.[95] Mr Taylor acted for the accused in a trial on a charge of murdering police officers. He conducted himself in a way which the Kentucky Court of Appeals described as creating "such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three ring circus".[96] Daniel Taylor III seems to have resisted the temptation to observe that at least he was not the clown in the circus but resisted little else. On nine occasions during the trial, the judge told him in chambers that he considered him to be in contempt. Among the examples of such contempt were being "disrespectful to the Court by his tone of voice and manner when he replied 'I'll certainly keep that in mind your Honour'".[97] For this and other offences, the trial judge, at the conclusion of the case, called Mr. Taylor back declaring "I have you" on nine counts, and proceeded to impose a jail term on each of the counts totalling some four and a half years, directed his detention, refused bail and a few days later, barred him from practising law in his division of the criminal branch of the Jefferson Circuit Court in Kentucky. Subsequently, the court reduced the jail sentence to six months and on that basis, the Supreme Court was prepared to accept that this had been the trial of a petty offence and, therefore, the accused was not entitled to trial by jury. The Supreme Court of the United States found no fault with the court's conduct in any of this but considered that the trial court had gone a little far in refusing to hear any submissions by or on behalf of Mr Taylor, having informed him that "[y]ou're not responding to me on anything"[98] and indicating

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[95] (1974) 418 U.S. 488 at 494.

[96] (1973) 494 S.W. 2d 739 at 740.

[97] (1974) 418 U.S. 488 at 493.

[98] (1974) 418 U.S. 488 at 497.

that he might be gagged if he insisted on defending himself. This procedure, the Supreme Court observed rather drily "does not square with the Due Process clause of the Fourteenth Amendment"[99] and on that basis, his conviction, upheld by the Kentucky Court of Appeals, was quashed.

This brings me back to the observations of Mr Lawrence Gray:

> From a personal perspective as one who has read and studied contempt for close to thirty years, the latest erroneously-reasoned decision holds no awe because there is always an inventory of other erroneous decisions available to neutralize its pontifications about being 'well settled' - leaving the comparatively precious few classics, which had been soundly reasoned and correctly decided, free to fix the right. An intramural reassessment should take place on all levels, right up to the United States Supreme Court. With rare exception, appellate contempt law decisions are of extraordinarily poor quality. Bearing the marks of hurried carelessness and shockingly poor judgment, these decisions seem to mix and match truth with falsity and inaccurately cite or conveniently ignore precedent, resulting in a virtual jurisprudence by nomenclature.[100]

It may be of poor comfort, but it is of comfort all the same, that however bad things are here, it seems, there is always somebody worse off.

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[99] (1974) 418 U.S. 488 at 497.

[100] (1998) 72 St. John's L. Rev. 337.