‘Délits de Presse’

(A) Introductory Note: The Constitutional Background to Press Freedom

1. The right to freedom of expression is afforded constitutional protection by section 12(1) of the Constitution.[1]

2. Section 12 of the Constitution also guarantees the freedom of the press.[2]

3. The right to freedom of expression, as is afforded protection by section 12(1) of our Constitution, is not absolute. Section 12(2) lays down the grounds on which limitations may be imposed by law. The restrictions imposed do not infringe the right guaranteed unless the provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.[3]

   As pointed out by the Supreme Court in *DPP. v. Boodhoo* (1992) MR 284:

   > "*Because its irresponsible use and unbridled abuse can nevertheless jeopardise those very foundations [of a democratic society], [freedom of expression] is expressed to 'carry with it special duties and responsibilities' as proclaimed in article 19 of the International Covenant on Civil and Political Rights and article 10(2) of the European Convention on Human Rights. For the same reason, this fundamental right, in common with certain other fundamental rights, is not absolute but is subject to limitations ...*
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   > *These limitations are incorporated in express terms in section 12(2)(a), (b) and (c) of our Constitution which sets out the specific aims of those limitations but which*

[1] Section 12(1) of the Constitution provides inter alia that, except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference.

[2] Vide *Duval v Commissioner of Police* (1974) MR 130.

[3] Section 12(2) of the Constitution is to the effect that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, public morality or public health;
(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or
(c) for the imposition of restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.

subjects those limitations themselves to the governing norm of what is reasonably justifiable in a democratic society.

The necessity for any constitutionally permissible limitations must ... be narrowly construed and must respond to what has generally been understood to be a 'pressing social need'. Thus, the application in practice of limitations which are permissible in principle must be closely monitored so as to ensure that they stay, in any particular case, within the limits proportionate to the legitimate aim pursued."

4. The European Court of Human Rights has repeatedly stressed "the pre-eminent role of the press in a state governed by the rule of law".[4] Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[5]

   It has, moreover, declared that:

   "*Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2) of the European Convention] ... it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of `public watchdog'.*"[6]

   In emphasizing that the press' role includes the communication of ideas and opinions, the Court expressly rejected the contention that "the task of the press was to impart information, the interpretation of which had to be left primarily to the reader".[7]

   Penalties against the press for publishing information and opinions concerning matters of public interest are intolerable except in the narrowest of circumstances owing to their likelihood of "deter[ring] journalists from contributing to public discussion of issues affecting the life of the community".[8]

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[4] *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43.

[5] *Castells v. Spain*, para. 43.

[6] *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43; *The Observer and Guardian v. United Kingdom* (*Spycatcher* case), para. 59(b); *The Sunday Times v. United Kingdom (II)* (companion *Spycatcher* case), para. 65.

[7] *Lingens v. Austria*, para. 45.

[8] *Lingens v. Austria*, para. 44.

The European Court has frequently noted the relevance of a restriction directed against the press in ruling the restriction incompatible with Article 10; namely, in challenging defamation convictions;[9] prior restraints;[10] the confidentiality of judicial proceedings;[11] and injunctions against allegedly unlawful advertising.[12]

5. The Inter-American Court of Human Rights has declared that:

> "*When freedom of expression is violated ... it is not only the right of that individual [journalist] that is being violated, but also the right of all others to `receive' information and ideas*."[13]

Since freedom of expression "cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible,"[14] journalism is in effect "specifically guaranteed by the Convention."[15] The Court concluded that "freedom and independence of journalists are assets that must be protected and guaranteed" and that "it is the mass media that make the exercise of freedom of expression a reality."[16]

6. The Indian Supreme Court has stated that newspapers constitute the Fourth Estate of the country, and that, while press freedom is not expressly protected by the Constitution, it is implicitly protected by the guarantee of free speech and expression. Freedom of expression serves four broad purposes: (1) it helps an individual to attain self-fulfillment; (2) it assists in the discovery of truth; (3) it strengthens the capacity of an individual to participate in a democratic society; and (4) it provides a mechanism by which to establish a reasonable balance between stability and social change. In sum, what is at stake is the fundamental principle of the people's right to know.[17] More lyrically stated, "[f]reedom of the press is the ark of the Covenant of democracy."[18]

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[9] Ibid. at paras. 41-42, 44; *Oberschlick v. Austria*, para. 58; *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43.

[10] *The Observer and Guardian v. UK (Spycatcher* case), para. 60.

[11] *The Sunday Times v. United Kingdom*, para. 65.

[12] *Barthold v. Germany*, para. 58.

[13] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 30.

[14] Ibid. at para. 31.

[15] Ibid. at para. 73.

[16] Ibid. at para. 81.

[17] *Indian Express Newspapers (Bombay) v. Union of India*, AIR [1986] SC 515, [1985] 2 SCR 287; 13 *Common L Bull* (1987) 40.

[18] *Bennet Coleman and Co. v. Union of India*, AIR 1973 SC 106.

(B) Constitutionally Permissible Restrictions on Freedom of Expression/Press Freedom: Overview of Offences

7. Our law sanctions some acts of expression, which amount to an abuse of the right to freedom of expression. These include

   (a) Publishing matter without description of author;[19]

   (b) Publishing matter conducive to crime;[20]

   (c) Outrage against public and religious morality;[21]

   (d) Stirring up racial hatred;[22]

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[19] Section 202 of the Criminal Code:

> Any publication, or distribution of any work, writing, advertisement, notice, newspaper, periodical paper, or of any other printed writing, which does not contain the real description of the name, profession, and place of abode of the author of the manuscript, or of the printer, as the case may be, shall, on this account alone, make every person, who knowingly contributes to the publication or distribution thereof, liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding one year.

[20] Section 204 of the Criminal Code:

> (1) Where such manuscript or printed writing contains any instigation to a crime or a misdemeanour, the crier, bill sticker, vendor or distributor shall be punished as the accomplice of the instigator, unless such crier, bill sticker, vendor or distributor makes known the person from whom he has received the manuscript or printed writing containing such instigation.
> (2) Where such disclosure is made, the crier, bill sticker, vendor, or distributor shall only be liable to imprisonment for a term not exceeding 1 year, and the punishment for being an accomplice shall only apply to those who have not made known the persons from whom they received the manuscript or printed writing, and also to the printer, where he is known.

[21] Section 206 of the Criminal Code provides inter alia that:
(1) (a) Any person who -
(i) by words, exclamations or threats used in a public place or meeting;
(ii) by any writing, newspaper, pamphlet or other printed matter, or by any drawing, engraving, picture, emblem or image, sold or distributed or put up for sale or exhibited in any public place or meeting; or
(iii) by any placard or handbill exhibited for public inspection, commits any outrage against any religion legally established, or against good morals or against public and religious morality ('la morale publique et religieuse'), shall on conviction be liable to imprisonment for a term not exceeding 2 years and to a fine not exceeding 100,000 rupees.
(b) Matters of opinion on religious questions, decently expressed or written, shall not be deemed to be an outrage.
(2) Any person who hawks for sale, or circulates, or exhibits any such writing, newspaper, pamphlet, or other printed matter, drawing, engraving, picture, emblem or image, placard or handbill, shall, on conviction, be liable to the penalty specified in subsection (1).

[22] Section 282 of the Criminal Code:
(1) Any person who, with intent to stir up contempt or hatred against any section or part of any section of the public distinguished by race, caste, place of origin, political opinions, colour or creed -

(e) Sedition;[23]

(a) publishes or distributes any writing which is threatening, abusive or insulting;
(b) uses in any public place or at any public meeting or procession any gesture or word which is threatening, abusive or insulting; or
(c) broadcasts any matter which is threatening, abusive or insulting,
shall commit an offence and shall; on conviction, be liable to a fine not exceeding 100,000 rupees and penal servitude for a term not exceeding 20 years.
(2) Any person who prints, publishes, posts up, distributes, exhibits or circulates any writing, gesture, word or matter mentioned in subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 4 years.
(3) ….
(4) In this section -
'broadcast' means using radio-communication whether by sound or vision, for reception by members of the public;
'writing' means -
(a) any newspaper, pamphlet or other printed matter; or
(b) any writing, drawing, engraving, picture, illustration, emblem or image, sold, or put up for sale or distributed to the public or exhibited at any public place or meeting or procession or any poster or writing exposed to the public view.

[23] Section 283 of the Criminal Code, entitled "Sedition", provides that:

(1) Any person who, by any means specified in section 206 -
(a) holds or brings into hatred or contempt, or excites disaffection towards, the Government or the administration of justice;
(b) raises discontent or disaffection among the citizens of Mauritius or promotes feelings or ill will and hostility between different classes of such citizens,
shall commit the offence of sedition and shall, on conviction, be liable to imprisonment for a term not exceeding 2 years and a fine not exceeding 100,000 rupees.
(2) A person shall not commit an offence under this section or section 284 where the writing or words used show that such person intended merely -
(a) to express disapprobation of the measures of the Government with a view to obtain their alteration by lawful means; or
(b) to express disapprobation of the measures of the administration or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection.

According to section 286 of the Criminal Code, entitled "Importing Seditious Publication":

(1) Where the President is of opinion that any publication is seditious, he may, if he thinks fit, by Proclamation prohibit the importation into Mauritius of that publication and also, in the case of a periodical publication, of any past or future issue of that publication.
(2) Any person who imports, sells, distributes, posts, prints, publishes, copies, reproduces, or has in his possession, power or control, any publication of which the importation is for the time being prohibited by Proclamation, shall commit an offence, and the publication shall be forfeited.
(3) Any person to whom a publication of which the importation is for the time being prohibited by Proclamation is sent without his knowledge or privity or in execution of an order given before the prohibition on its importation came into effect, or who has such a publication in his possession, power, or control, at the time when the prohibition or its importation comes into effect shall forthwith deliver it to the officer in charge of the nearest police station, and, if he fails to do so, he shall commit an offence.
(4) Any person who complies with subsection (3) or is convicted of a breach of its provisions shall not be fined or imprisoned for having imported the same publication or for having it in his possession, power, or control.
(5) The Postmaster-General or any person authorised by him who suspects that any postal packet contains a publication of which the importation is for the time being prohibited shall send the packet to the Comptroller of Customs.

(f) Incitement to disobedience or resistance to law;[24]

(g) Defamation;[25]

(h) Insult;[26]

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[24] Section 284 of the Criminal Code:

> Any person who, by any of the means specified in section 206 instigates to disobedience or resistance to the laws, or to the authorities entrusted with their execution, shall be liable to imprisonment for a term not exceeding 2 years, and a fine not exceeding 25,000 rupees.

[25] Section 288 of the Criminal Code:

(1) Any imputation or allegation of a fact prejudicial to the honour, character or reputation of the person to whom such fact is imputed or alleged is a defamation.
(2) Any imputation or allegation concerning the honour, character or reputation of a deceased person is a defamation where it is calculated to throw discredit on or be hurtful to the feelings of the family or relatives of the deceased.
(3) Any person who, by any of the means specified in section 206, is guilty of defamation shall be liable to imprisonment for a term not exceeding 5 years and a fine not exceeding 50,000 rupees.
(4) No offence is committed under this section where the writing or words –
(a) impute or allege anything which is true concerning any person, where the publisher can show that it was for the public good that the imputation or allegation should be published;
(b) are a fair and bona fide comment or criticism of the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct and no further;
(c) are a fair and bona fide comment or criticism of the conduct of any person touching any public question, and respecting his character so far as his character appears in that conduct;
(d) are an impartial and accurate report of the proceedings of any Court or of the result of any such proceedings, unless the Court has itself prohibited the publication, or the subject-matter of the trial is unfit for publication, or the subject-matter of the proceedings is blasphemous or obscene;
(e) are a fair and bona fide comment or criticism of the merits of any case, civil or criminal, which has been decided by any Court, or respecting the conduct of any person as a party, witness, or agent in any such case, or respecting the character of such person, so far as his character appears in that conduct;
(f) are a fair and bona fide comment or criticism of the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance;
(g) are written or uttered by a person having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, and pass in good faith any censure on the conduct of that other to any person having an interest in such conduct, or in a newspaper if there was no other way for the writer efficiently to protect his interest or the interests of society in matters to which such lawful authority relates;
(h) prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter or accusation;
(i) amount to an imputation or allegation on the character of another, provided that the imputation or allegation is made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good;
(j) convey a caution in good faith to one person against another, provided that such caution is intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested or for the public good; or
(k) publish an impartial and accurate report of the proceedings of any public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of the Assembly or of a municipal council.

[26] Section 296 of the Criminal Code provides as follows:

> Any injurious expression or any term of contempt or invective, or other abusive language, not carrying with it the imputation of a fact, is an insult (*injure*) and any person who is guilty of the offence shall be liable to

(i) Publication of Reply by Newspaper;[27]

(j) Publishing false news;[28]

(k) Contempt of Court.[29]

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the following penalties—

(a) where the offence is committed by means of words, exclamations or threats not made use of in public, a fine not exceeding 50,000 rupees;

(b) where the offence is committed by means of words, exclamations or threats made use of in public, a fine not exceeding 100,000 rupees;

(c) where the offence is committed by means of any written or printed matter, drawing, picture, emblem or image, imprisonment for a term not exceeding 2 years and a fine not exceeding 100,000 rupees.

[27] Section 289 of the Criminal Code:
(1) (a) The owner or editor of any newspaper shall further be bound to insert gratuitously within 3 days (or in the next number where the paper is not a daily) the reply of any person named or referred to in the newspaper, provided such reply does not contain any matter amounting to an offence under any enactment, and provided such reply is not foreign to the subject in connection with which such person has been named or referred to in the newspaper, without prejudice to the other penalties to which the article may give rise.
(b) This insertion shall be made in the same place and in the same type as the original article and shall be published without charge provided it does not exceed twice the length of the article.
(c) In that case the excess shall be charged for at advertisement rate.
(2) Any owner or editor who contravenes subsection (1) shall be liable to a fine not exceeding 10,000 rupees, and shall insert the reply within 3 days of such conviction (or in the next number, if the paper is not a daily), failing which he shall be liable to a further fine not exceeding 100,000 rupees.

[28] According to section 299 of the Criminal Code:

The publication, diffusion or reproduction, by any means, of false news or of news which though true in substance has been altered in one or more parts or falsely attributed to some other person, if the publication, diffusion or reproduction is of such a nature as to disturb public order or public peace, shall be punished -
(a) where the offence is committed by means of any spoken words by a fine not exceeding 100,000 rupees and imprisonment for a term not exceeding 2 years;
(b) where the offence is committed by means of any writing, newspaper, pamphlet or printed matter or by any means other than spoken words, by a fine which shall not be less than 20,000 rupees and not more than 50,000 rupees and imprisonment for a term not exceeding one year, unless it is proved by the accused that the publication, the diffusion or reproduction was made in good faith and after making sufficient inquiries to ascertain its truth.

[29] Section 18C of the Courts Act is to the effect that:

Where the Supreme Court, on a motion made to that effect supported by affidavit, finds that a person has committed a contempt, the Court may –

(a) sentence that person to imprisonment for a term not exceeding one year or to a fine not exceeding 300,000 rupees;
(b) make such other order as it thinks fit.

8. Our law provides for instances where a publication may be seized and forfeited.[30]

   Provision is also made for the suspension of the publication of a newspaper containing seditious publication.[31]

9. It must be stressed that any prescribed limitation on freedom of expression/freedom of the press must be in furtherance of the one of the specific aims mentioned in subsection (2) of section 12 of the Constitution.[32]

   The prescribed limitation must also be reasonably justifiable in a democratic society.

10. In *DPP v. Masson* (1972) M.R. 204, the Supreme Court pronounced itself on which interpretation of our law of sedition to retain in the light of section 12. Whilst in *Rex v. Millien* (1949) MR 35 the view was taken that under the law of Mauritius it was not a necessary ingredient of the offence that the publication should be calculated to incite people to commit violence, in *Levieux & anor v. Rex* (1911) MR 25 it was held that incitement to disorder was an essential ingredient of the offence. The Supreme Court considered that if the offence of sedition were to be given the meaning ascribed to it in *Millien's case*, the law

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[30] Vide section 205 of the Criminal Code as to seizure and forfeiture of publication without description of author or conducive to crime.
In respect of publication constituting an outrage against public and religious morality, section 206(3) of the Criminal Code provides that the copies of any obscene writing, newspaper, pamphlet, or other printed matter, drawing, engraving, picture, emblem or image, placard or handbill, which are exposed to public view, or hawked for sale, may be seized and forfeited.
According to section 282(3) of the Criminal Code, any writing in respect of, or in connection with, an offence of stirring up racial hatred shall be forfeited.
Section 286(2) of the Criminal Code provides for the forfeiture of any seditious publication whose importation has been prohibited by the President of the Republic by Proclamation.
The Director of Public Prosecutions may, pursuant to section 287A of the Criminal Code, make an application to a Judge or a Magistrate that the issue or circulation of a seditious publication is or, if commenced or continued, would be likely to lead to unlawful violence or appears to have the object of promoting feelings of hostility between different classes of the community. If satisfied, the Judge or Magistrate shall make an order prohibiting the issue and circulation of that publication and requiring every person having any copy of the prohibited publication in his possession, power, or control, forthwith to deliver every such copy into the custody of the Police.

[31] According to section 287 of the Criminal Code:
(1) Where any person is convicted under this Code of sedition in any newspaper, the Court may, if it thinks fit, either in lieu of or in addition to any other punishment, make orders as to the following matters -
(a) prohibiting, either absolutely or except on conditions to be specified in the order, for any period not exceeding one year from the date of the order, the future publication of that newspaper; and
(b) that for the period aforesaid any printing press used in the production of the newspaper be used only on conditions to be specified in the order or that it be seized by the Police and detained by them for the period aforesaid.
(2) Where any person contravenes an order made under this section, he shall commit an offence.

[32] In *Hector v. Attorney General of Antigua and Barbuda & ors.* (1990) 2 All ER 103 (PC), it was considered that section 33B(b) of the Antigua & Barbuda Public Order Act of 1972, which made it a criminal offence 'to print or distribute any false statement likely to undermine public confidence in the conduct of public affairs', contravened the constitutional safeguard of freedom of expression since the law in question was not shown to be reasonably required in the interests of 'public order'.

creating the offence would be inconsistent with the Constitution, and therefore void, because it would violate the fundamental right to freedom of expression, protected by section 12(1) of the Constitution, and would not come within the permissible restriction as provided in section 12(2)(a) of the Constitution. The Court therefore expressed the view that the meaning given to the offence in *Levieux case* was consistent with section 12: the gist of the offence of sedition is thus "incitement to disorder or tendency or likelihood of public disorder or the reasonable apprehension thereof".

Hostility to constituted authority or to a particular form of political Government can therefore only be punished if there is incitement to commit acts of violence or do unlawful acts. It is generally understood that advocacy of abstract doctrine on the desirability of changing the political regime cannot be sanctioned.

11. In *R. v Boodhoo* [1990] MR 191, the Supreme Court expressed itself on the constitutionality of section 299 of the Criminal Code (publishing false news). Section 299(1) of the Criminal Code sanctions the diffusion, or publication, of news which is false, or which though true in substance has been altered or falsely attributed to another person, where the publication or diffusion is of such a nature as to disturb public order or public peace. It is provided that to avoid punishment the diffuser or publisher must show he has made "une vérification suffisante des faits". The Court considered that the objective of the limitation is of sufficient importance and the means chosen are reasonable and demonstrably justified, in as much as it is not required of the diffuser or publisher for him to be exonerated that he verified the accuracy of all statement of fact, but rather 'une vérification suffisante'.

12. In *Seneque & anor v DPP* [2002] UKPC 42 (PC), their Lordships had this to say about section 299 of the Criminal Code:

> "*Their Lordships accept that public indignation or outrage at some act of the Government or Government policy may be such that a false statement about such act or policy could be capable of creating a likelihood of disturbance occurring i.e. could be of such a nature as to disturb public order or public peace. The mere fact that such a statement is critical of Government and even that people, and particularly voters, will not like it, however, is not in itself enough*."

(C) Defamation, Insult and Right of Reply

13. A distinction is drawn in the Criminal Code between defamation and insult. Defamation is "an imputation or allegation of a fact prejudicial to the honour, character or reputation of the person to whom such fact is imputed or alleged."[33] An insult (*injure*) is "any injurious expression or any term of contempt or invective, or other abusive language, not carrying with it the imputation of a fact".[34]

    Our law on defamation and insult has been borrowed from Article 29 of the French Loi of the 29th July, 1881, (dealing with the liberty of the press) which reads as follows: -

    > *Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé est une diffamation.*
    >
    > *Toute expression outrageante, terme de mépris ou invective qui ne renferme l'imputation d'aucun fait est une injure.*

14. As pointed out in *Atchia v R* (1955) MR 21, the essential difference between the two offences of criminal defamation and insult is tersely set out in Dalloz, Répertoire Pratique,, Vo. Presse-Outrage-Publication, § 682:-

    > *La diffamation et l'injure ont un élément commun : l'une et l'autre supposent l'existence d'une expression outrageante. La différence essentielle, c'est que la diffamation exige l'imputation d'un fait déterminé, c'est-à-dire suffisamment précis pour que la preuve de son existence puisse en être rapportée, et que, au cas d'injure, il n'y a qu'une allégation vague et indéterminée, parfois même qu'une invective grossière.*

15. In *Coralie v R* (1957) MR 271, the Court analyzed, in the light of French case law and doctrine, the meaning to be ascribed to the expression "imputation d'un fait":

    > *In Encyclopédie Dalloz, Droit Criminel, Vo. "Diffamation", note 25, is set out the meaning attached to the expression "imputation d'un fait":*
    >
    > > *La diffamation suppose par définition que le fait allégué ou imputé soit un fait précis c'est-à-dire susceptible d'être reconnu effectif ou réel de telle sorte que la vérité du fait puisse être idéalement l'objet d'un débat contradictoire…*

[33] Vide section 288(1) of the Criminal Code. Section 288(2) of the Criminal Code also considers as defamatory any imputation or allegation concerning the honour, character or reputation of a deceased person, where it is calculated to throw discredit on or be hurtful to the feelings of the family or relatives of the deceased.

[34] Section 296 of the Criminal Code.

This is supported by a decision of the court of Cassation, reported in D.P. 66.1.48, which is constantly quoted with approval by the courts in France and by the commentators on the subject.

Barbier in his Code Expliqué de la Presse, Vol. I, commenting on the difference existing between defamation and insult, says, at no. 404 bis:

> *D'une façon générale et doctrinale, la question revient à se demander quand l'imputation ou l'allégation revêt un caractère de précision suffisant pour constituer, non pas une simple injure, mais une diffamation. La loi, à cet égard, nous fournit elle-même un critérium auquel il convient de recourir dans tous les cas embarrassants. En autorisant en effet (au moins quand il s'agit de diffamation envers les personnes publiques) la preuve des imputations diffamatoires, la loi nous indique que les imputations qui ont ce caractère sont les imputations suffisamment précises pour être susceptibles d'être prouvées en justice; de telle sorte qu'il est permis de dire que là où l'imputation ne se présente pas avec un degré de précision suffisant pour être susceptible d'une preuve judiciaire, il peut bien y avoir injure, mais non diffamation. La diffamation, dit un arrêt de la Cour de cassation du 29 juillet 1865 (D. 66.1.48), suppose un reproche se produisant "sous la forme d'une articulation précise de faits de nature à être, sans difficulté, l'objet d'une preuve ou d'un débat contradictoire.*

The note to a case reported in Gaz. Pal., 1928.2.612, is in the same sense:

> *Pour apprécier si un propos est diffamatoire ou seulement injurieux, il faut rechercher si sa véracité ou sa fausseté peut être établie par une preuve; si cette preuve est normalement impossible, il n'existe point de diffamation.*

The test for determining whether a statement constitutes a defamation and is not a mere insult is to find out whether the statement contains an imputation of fact sufficiently precise as theoretically to be susceptible of proof in an inquiry or debate.

16. It is to be noted that the same expression could be a statement of fact in one context and a mere insult in another. As said in *Atchia v R* (1955) MR 21: "The imputation of a word can be judged only in its context".[35]

[35] Barbier-Code Expliqué de la Presse, Tome I, No. 404 bis:-

> Il en résulte qu'une même expression peut, sans contradiction, être considérée tantôt comme une diffamation, tantôt comme une injure. Par exemple, l'expression de **galérien**, prise dans son sens propre, renferme en elle-même l'imputation d'un fait précis, parfaitement susceptible de faire l'objet d'une preuve, et présente ainsi les caractères d'une véritable diffamation. Mais si celui auquel cette expression est adressée n'a jamais été aux galères, et s'il résulte des circonstances que l'auteur de cette expression n'a ni voulu faire croire en réalité à personne que celui auquel il s'adressait fut réellement un ancien galérien, il est évident que cette qualification ne présente plus, alors, que le caractère d'une invective, d'un terme de mépris, en un mot d'une simple injure.

17. When a defamatory statement is published, the author is presumed in law to have the intent that it should be defamatory unless there is proof to the contrary, the burden of which lies upon the party charged.[36]

18. Under our law, an imputation or allegation of a fact prejudicial to the honour, character or reputation of the person to whom such fact is imputed or alleged would not constitute an offence where the fact alleged is true or when the fact alleged, even if untrue, was a bona fide comment on a matter of public interest.[37]

    In a democratic society, restrictions on the right to freedom of expression, with a view to protecting the honour and reputation of someone, would only be reasonably justifiable if the fact alleged is false and has been uttered with reckless disregard for the truth.[38]

19. Section 289 of the Criminal Code makes it an offence for the owner or editor of a newspaper not to publish the reply of any person named or referred to in the newspaper.

20. Our case-law indicates that section 289 of the Criminal Code should be read on its own, without reference to section 288.

    In *Adler v Ducray* (1904) MR 107, the Supreme Court had this to say about section 289:

> "*The text is clear and admits of no restriction: there is nothing in it that would justify the limitation of the exercise of the right of reply to cases in which the publications complained of are insulting or defamatory.*
>
> *The right is expressly conferred to any person named or referred to in a newspaper. As no difficulty can arise in the interpretation of the article, we would have thought it unnecessary to refer to the analogous provision of the French law, had it not been*

[36] Vide *Coralie v R* (1957) MR 271, quoting Gazette du Palais, 1948.1.195,where it was held that-

> Les amputations diffamatoires sont de plein droit réputées faites avec une intention coupable, et si cette présomption peut être combattue par des circonstances particulières, c'est au prévenu qu'en incombe la preuve.

[37] Vide section 288(4) of the Criminal Code.

[38] In *New York Times v. Sullivan* (1964) 376 US 255, the view was taken that one who utters defamatory speech concerning a public figure is immune from liability notwithstanding the falsity of such speech unless such speech was made with knowledge of its falsity, or with reckless disregard of the truth.
In the *Lingens case* (1986), the European Court of Human Rights considered that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. The Court was of opinion that unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. The Court also expressed the view that it is necessary in defamation cases to draw the distinction between facts and value judgments, the existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.

appealed to from the bar: We note then that according to the invariable jurisprudence of the Court of Cassation both under art. 11 of the law of the 25th March 1822 and under art. 13 of the law of 29th July 1881, the right of reply is held to be general and absolute, and the person who has been named or referred to is the sole judge of the expediency or necessity of replying (see the reports of the decisions referred to in Dalloz: Rep. Vo. Presse–Outrage–Publication Nos. 328 p. 99, supplément. ed. Verbo. No. 304, 5th decennial table of Sirey's Recueil Général des Lois et Arrêts. Vo. Journaux et écrits périodiques § 4) our view of the law is thus strengthened by that of the Court of Cassation".

21. In *Ducray v Morel* (1908) MR 49, the Supreme Court stressed that the right of reply given by section 289 to any person named or referred to in a newspaper is subject to two restrictions:
    (i) The reply must not contain any matter amounting to an offence;[39]
    (ii) It must not be foreign to the subject in connection with which such person has been named or referred to in the newspaper.[40]

[39] In *Ducray* v *Morel*, (supra), Davson, J., who delivered the judgment of the court said: -

> "If then the reply contains any passage which on the face of it would, if published, amount to an offence (e.g. a defamation) the journalist is justified in refusing to insert it: it may be that the imputation is true and that its publication would be for the public good, which would be a good defence on a prosecution for defamation, but the Court cannot go into this question in deciding a case under art. 289. If the writer of the reply is confident of the truth of his assertion it is open to him to publish it in the ordinary way and if action is taken against him he can raise the defence referred to, but he cannot compel the editor of the paper containing the article in which he (the writer) is named to open his columns to what is on the face of it defamatory ..."

[40] Vide Rivet v Forget & Procureur-General [1953] MR 334.

(D) Publishing False news

22. In *Bérenger v R* (1989) MR 282, the Court observed that section 299 of the criminal Code was enacted in 1965. This section was copied from the relevant French law. Article 4 of the 'loi du 27 Juillet 1849' regulated the publication of false news which was "de nature à troubler la paix publique". In 1881 the 'Code de la Presse', in Article 27, provided only for the offence of publishing false news which did in fact disturb public peace. The element of "de nature à troubler" was reinserted in 1944. Mauritius law, while copying the French text, only retained the latter element, so that it is immaterial that the news did or did not actually provoke a serious alar, except that if it actually did, "the proof of the pudding would have been in the eating".

23. The constitutive elements of the offence of publishing false news are
    (a) «La publicité»;
    (b) «Le caractère faux de la nouvelle»;
    (c) «Nouvelle de nature à troubler la paix publique;
    (d) «L'intention coupable».

24. Regarding the element of «publicité », this is what is said in Dalloz, Répertoire Pénal, Vo. Fausses Nouvelles, at para. 9 & 11:

> *9. La poursuite des délits prévus et punis par la loi du 29 juillet 1881 est subordonnée à l'existence d'un élément de publicité ... Le texte de l'article 27 n'exige qu'une «publication, diffusion ou reproduction, par quelque moyen que ce soit». Cela englobe les écrits, les paroles et, plus généralement, les moyens de publicité prévus par l'article 23 de la loi, mais aussi, tout autre moyen de diffusion.*
> *...*
>
> *11. L'article 27 de la loi de 1881 n'exige pas que le lieu où les propos constitutifs d'une nouvelle fausse ont été tenus soit public. Il a, en effet, été jugé que la loi ne fait résulter le délit «que de la volonté de publier et de la publication, c'est-à-dire de cette circonstance que les fausses nouvelles ont été répandues dans le public, et non de la nature du lieu où elles ont commencé à se produire» (Cass. crim. 8 déc. 1854, Bull. crim., no 338 : même si la solution a été rendue sous l'empire du décret du 17 févr. 1852, elle est transposable à la loi du 29 juillet 1881).*

25. As to what amounts to the «caractère faux de la nouvelle», this is what is said in Dalloz, Répertoire Pénal, Vo. Fausses Nouvelles, at para 16 seq.:

> ***16.*** *Dans le silence du texte de l'article 27 de la loi du 29 juillet 1881, les juridictions ont dû préciser la notion de nouvelle. Elle est aujourd'hui prise dans l'acception « d'annonce d'un événement arrivé récemment, fait à quelqu'un qui*

n'en a pas encore connaissance » (Cass. crim. 13 avr. 1999, no 98-83.798, Bull. crim., no 78, Dr. pénal 1999, comm. 115, obs. M. Véron ; adde : Y. MAYAUD, À ne pas confondre : commentaires tendancieux et fausses nouvelles, Rev. sc. crim. 2000.203, Légipresse 2000.165. III. 145). La nouvelle doit donc avoir trait à un événement ou un fait d'actualité, ce qui exclut le récit d'un fait passé ou, tout du moins, déjà connu du public. Ainsi, l'article 27 réprime «l'annonce d'un fait précis et circonstancié, actuel ou passé, mais non encore divulgué » (CA Paris, 18 mai 1988, D. 1990.35, note G. Drouot).

…

***18.** Le délit de l'article 27 de la loi de 1881 suppose que la nouvelle soit fausse, «c'est-à-dire mensongère, erronée ou inexacte dans la matérialité du fait et dans ses circonstances » (CA Paris, 11e ch., 7 janv. 1988, Dr. pénal 1988, comm. 63, obs. M. Véron). La loi ne vise donc que la fausseté objective d'un fait et seuls les dires ou écrits concernant les éléments matériels et objectifs sont retenus.*

***19.** La fausseté de la nouvelle ne s'entend pas seulement du récit d'un fait inventé ou imaginaire. Lorsque l'événement rapporté est exact, mais que le récit qui en est fait comporte des erreurs, les juges recherchent si les éléments erronés entachent d'inexactitude la nouvelle dans son ensemble. Les tribunaux s'attachent donc à rechercher si, sous couvert de relater un événement qui s'est réellement passé, ce dernier n'est pas présenté de manière telle à le dénaturer ou à en changer le caractère. Face à un récit où des éléments véridiques et des éléments erronés se mêlent et coexistent, les juridictions constatent l'existence d'une nouvelle fausse, dès lors que la présentation du fait constitue un ensemble où le mensonge l'emporte. En revanche, le caractère mensonger de certains détails secondaires n'entache pas de fausseté la nouvelle, dès lors que ces détails restent d'une importance mineure et n'ont pas pour conséquence de transformer le sens ou la nature du fait relaté.*

26. The false news should be of "nature à troubler la paix publique".

In *Hurnam v Khodabux* (1989) MR 236, the Supreme Court examined the meaning of the expression "to disturb the public peace" or "troubler la paix publique" and had this to say:

According to Encyclopédie Dalloz, Droit Pénal, Vol II, Vo Fausses Nouvelles, the notion of "trouble à la paix publique est relative au péril et au danger qui affectent la sécurité des personnes et des biens et qui sont de nature à susciter des désordres matériels ou une émotion collective assez profonde pour impressionner l'esprit public et entraîner la panique. Peu importe son aire géographique: le trouble peut être limité à un canton, ou à un village…".

Again, note 34 makes the point that where there is likelihood of disturbance of the public peace or "virtualité de trouble, celle-ci résultera de l'objet de la nouvelle et notamment de sa gravité, rapprochés des circonstances de temps, de lieu, d'ambiance et de milieu qui rendent le trouble plausible".

27. Regarding the criminal intent that is required, this is what is said in Dalloz, Répertoire Pénal, Vo. Fausses Nouvelles, at para 25 seq.:

> *25. Connaissance du caractère erroné. - L'intention coupable est caractérisée par la connaissance de la fausseté de la nouvelle par celui qui la diffuse. La preuve de la mauvaise foi ne peut être induite de la seule constatation de la fausseté de la nouvelle (CA Paris, 7 janv. 1998, préc. supra, no 20). Par conséquent, la mauvaise foi ne saurait être retenue, dès lors qu'il résulte des circonstances de fait que le prévenu a pu croire exacts ou même vraisemblables les événements qu'il annonçait (T. corr. Lille, 7 févr. 1959, JCP 1959. IV. 131). On ne peut assimiler la négligence ou l'imprudence à la mauvaise foi (Cass. crim. 21 juill. 1953, préc. supra, no 24|). Ainsi, la seule négligence consistant à ne pas vérifier une information ne saurait constituer à elle seule la preuve de la mauvaise foi (Cass. crim. 19 mars 1953, Bull. crim., no 100, D. 1953.390). Il en est de même du fait de n'avoir pas cité la source de l'information (Cass. crim. 12 déc. 1957, Bull. crim., no 837) ...*
>
> *26. Preuve de la mauvaise foi. - La preuve de la mauvaise foi est difficile à établir. En dehors de l'hypothèse où le prévenu avoue lui-même avoir eu connaissance de la fausseté de la nouvelle, la mauvaise foi doit être déduite des faits eux-mêmes, de leurs circonstances ou encore de la gravité de la faute considérée subjectivement. Ainsi, «le plus souvent, le ministère public devra se contenter de faire état de toutes les circonstances de fait permettant d'établir une certitude » (J.-P. POUSSIN, Le délit de fausses nouvelles in Liberté de la presse et droit pénal, XIIe journées de l'Association française de droit pénal en hommage au doyen F. Boulan, 1994, PUAM, spéc. p. 258).*
> *...*
> *31. Étendue de l'élément intentionnel. - La doctrine s'interroge sur le point de savoir si l'intention coupable doit également porter sur la volonté de troubler la paix publique ... Certains auteurs considèrent que ce n'est pas nécessaire, la volonté de troubler la paix publique ... n'étant qu'un mobile qui n'a pas à être pris en considération (V. A. CHAVANNE, Délit de fausses nouvelles, J.-Cl. communication, spéc. no 30, p. 5). Au contraire, d'autres estiment qu'au-delà du dol général - l'auteur doit savoir qu'il publie une fausse nouvelle -, s'ajoute un dol spécial, à savoir que l'intention doit également porter sur le fait de vouloir ... troubler la paix publique (V. C. DEBBASCH [sous la dir. de], Droit des médias, 1999, Dalloz, no 2673, p. 812). Ces auteurs se réfèrent à deux jurisprudences. La première est le fait de la chambre criminelle de la Cour de cassation qui, dans un arrêt en date du 21 juillet 1953 (préc. supra, no 24), énonce à propos de la bonne foi que cet « élément se caractérise par la connaissance tant de la fausseté du fait publié, que du trouble qui pouvait en résulter ». La seconde espèce est le fait de la cour d'appel de Paris qui juge en 1964 que, « en l'absence de toute présomption légale, la preuve doit être rapportée que le prévenu avait connaissance, tant de la*

fausseté du fait publié, que du trouble qui pouvait résulter de cette publication pour la paix publique» (CA Paris, 4 nov. 1964, préc. supra, no 29). Ces deux arrêts ne paraissent n'exiger qu'un dol général, à savoir la connaissance de la fausseté de l'information et de sa nature à troubler la paix publique, sans ajouter l'intention chez l'auteur de la fausse nouvelle de troubler cette même paix publique (en ce sens, V. note S. 1954.1.26). Cependant, le doute est permis dans la mesure où d'autres arrêts mentionnent expressément l'intention de celui qui a diffusé la fausse nouvelle. Ainsi, en est-il de l'espèce où les juges, constatant le nombre élevé de contre-vérités dans un article, précisent que cela révèle un désir évident d'aggraver une situation de crise préexistante (Cass. crim. 18 déc. 1962, préc. supra, no 20 ; et V. supra, no 27). Il en de même dans une affaire où les juges, après avoir démontré la connaissance de la fausseté de la nouvelle, précisent que le directeur de la publication a manifesté son intention de combattre une politique qui n'avait pas son approbation (Cass. crim. 7 nov. 1963, préc. supra, no 28). Dans un sens assez voisin, il arrive fréquemment qu'un arrêt fasse expressément référence au fait que le prévenu savait que l'information ne pouvait que troubler la paix publique (par ex., V. CA Paris, 18 mai 1988, préc. supra, no 16). L'incertitude gouvernant l'exigence d'un dol spécial s'explique par le fait que, le plus souvent, la connaissance de la fausseté de la nouvelle ne fait que traduire une intention de nuire.

(E) Contempt of Court

28. The law on contempt sanctions any act done or anything published tending to obstruct, impair, or interfere with the fair administration of justice or to lower the authority of the courts or to suggest that it is not independent.

    Contempt of Court can be either civil or criminal. Contempt can be 'in facie', that is in the face of the Court (i.e. conduct which tends to disrupt orderly court proceedings), or 'ex facie' or constructive contempt (i.e. conduct outside the court room which constitutes an attack on the administration of justice.)

    Criminal Contempt ex facie may be categorized under two main headings:-
    (a) *Scandalizing the court*, such as:
        (i) Scurrilous abuse, directed at a judge, the jury or the court;
        (ii) Allegation that a judge may be biased against some parties owing to his personal convictions, political affiliation and religious beliefs;
        (iii) Imputation of corrupt or improper motives on the part of the judge.
    (b) *Comments on pending judicial proceedings* (The sub-judice rule)
        This aspect of the offence serves to ensure that proceedings are conducted without outside interference, and that decisions are reached solely on the basis of evidence admitted by the court.

(a) Comments on Pending Judicial Proceedings

29. The law on Contempt of Court does not prohibit prior discussion of the merits of a civil case, e.g. in the press. In the *Sunday Times case*, the European Court of Human Rights considered that

    > "*Whilst ... the courts are the forum for the settlement of disputes, that does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large ... Not only does the media have the task of imparting such information and ideas: the public also have a right to receive them*".

    Discussion in a moderate manner of the merits of a pending civil suit should not therefore be contempt nor warrant the issue of an injunction to prevent publication, where the subject-matter is one of public concern.

30. When there is a criminal trial, the concern is to ensure a fair trial, as guaranteed by section 10 of the Constitution, so that an article which imputes guilt to an accused person or which publishes a confession or admission prior to its introduction into court as evidence constitutes contempt.

The 'trial of an accused by the press' is regarded as a grave form of contempt, since it may result in an accused being deprived of his right to a fair hearing by an impartial court.[41]

In *State v. Bacha* (1996) MR 240, the question arose whether extensive news coverage can affect the outcome of a trial, in that the jury who are exposed to such news coverage may be swayed by what they read or hear. The Court considered that the key question in free press/fair trial disputes is the point at which publicity creates prejudgment in such a large number of potential jurors that empanelling an impartial jury becomes impossible as a practical matter. This would only be so when the prejudice is so indelibly impressed on the minds of potential jurors that it is unlikely that an unbiased jury could be obtained.

(b) The Offence of Scandalizing the Court

(1) General Remarks about the Constitutionality of the Offence of Scandalizing the Court

31. The offence of scandalizing the Court consists of abusive, insulting or slanderous remarks directed against a judge or any remarks that would cast doubt on his authority, independence and impartiality.

The offence of scandalizing the Court requires that criticisms must be directed against a judge in his judicial capacity: *Badry v. DPP of Mauritius* (1982) 3 All ER 973 (PC).

Judges however enjoy no general immunity from criticism of their judicial conduct. In *Ambard v. Attorney General for Trinidad and Tobago* (1936) 1 All ER 704, the Judicial Committee of the Privy Council considered that

> "*No wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice ... Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune.*

[41] *R v. Shummoogum* (1977) MR 1 and *State v. Bacha* (1996) SCJ 105 [MR 240].

Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."[42]

32. In *DPP. v. Boodhoo* (1992) MR 284, the view was expressed that

"*One of the permissible limitations of freedom of expression is the need to maintain "the authority, independence and impartiality of the courts" as recognised in international instruments and, indeed, in section 12(2)(b) of our Constitution. Such a need has always been demonstrable, given the particular role which the Judiciary has always been called upon to play in systems which are based on the rule of law. This is the reason why the law of contempt has been part of the panoply of laws of those systems. The history of our own case law exemplifies this (vide Lalouette's The Mauritius Digest, (Mauritius Printing Co. Ltd., Port Louis) Volume 1 pages 335-342).*

It is true that, since the introduction of entrenched fundamental rights in our successive Constitutions since 1964, the possible conflict between certain kinds of contempt and freedom of expression has been brought into sharper focus. But it is necessary to recall that those Constitutions have conferred on the Judiciary an even greater role so as to ensure the proper functioning of a democratic society. It may not be out of place to recall that the Judiciary under our Constitution is made to operate within a system where the legislative and executive powers of the State are separate from those of the Judiciary. It is charged with the special duty of ensuring that legislative and executive powers are exercised in accordance with the Constitution and within the limits authorised by the Constitution. And it is also charged with the duty to safeguard fundamental rights themselves often at risk in the exercise of legislative or executive powers.

We refer to all this in order to underscore the independence which the Constitution itself requires the Judiciary to have not only vis-à-vis the Legislature and the Executive but also vis-à-vis other political or social forces, as further illustrated by the special provisions governing the appointment of Judges, their terms of office and security of tenure, the special provisions governing their removal in case of misconduct and the oath which they are required to honour under Chapter VII of the Constitution. A democratic society would be at serious risk if the Judiciary were not given, in these circumstances, the means to protect itself and to maintain its independence and integrity in the face of a purported exercise of freedom of expression without regard for the "duties and

[42] In *R v Gray* (1900) 2QB 36, Lord Russell considered that "Judges and Courts are alike opened to criticism and if reasonable argument is offered against any judicial act as contrary to law or public good, no court could treat that as contempt of court."
The same view was maintained in *Ex parte Blackburn* (1968) 2 ALL ER 319 that "...no criticism however vigorous can amount to contempt of court, provided it is kept within the limits of reasonable courtesy and good faith."

responsibilities" which the legitimate exercise of that freedom requires in a democratic society.

Clearly one of the means of protecting the authority, independence and impartiality of the Judiciary, including its reputation therefor, is by way of contempt proceedings of various kinds. It may be open to question whether a particular form of judicial prohibition or order, the violation of which is punishable by contempt, is or is not itself a violation of the exercise of freedom of expression in a democratic society. An example would be an injunction to stop by way of prior restraint, in relatively innocuous circumstances, the publication or discussion of a matter of public interest when proceedings about that particular matter are pending in Court. Vide, in this regard, The Sunday Times v. United Kingdom, European Court of Human Rights, Judgment delivered on 27 October 1978 concerning the publication of an article on the Thalidomide tragedy when legal proceedings were pending; The Observer and the Guardian v. United Kingdom; and The Sunday Times v. United Kingdom (No. 2), Judgments delivered on 26 November 1991, relating to injunctions preventing the publication of activities of State Secret Services revealed in a book called The Spycatcher when the book was already freely available. But these were cases of potential civil contempt in the event that the injunctions were breached.

Contempt by way of sanctions for disobedience of Court judgments and orders is one thing. Scandalising the Court is, however, a different matter. It threatens the very fabric of the Judiciary, in particular, its authority, independence and impartiality which it must necessarily enjoy and the protection of which is necessary to ensure the performance of its constitutional role.

It is for this reason that scandalising a Court has always been and will continue to be regarded in principle as not falling within the legitimate exercise of freedom of expression. We are in no doubt that the application in practice of this principle to the present case, given the gravity of the contempt alleged, would not be beyond the limits proportionate to the object envisaged for the protection which the Court should enjoy."

33. In *Ahnee & ors v DPP* (1999) (Privy Council Appeal No. 28 of 1998), the Judicial Committee of the Privy Council considered that in order to enable the Judiciary to discharge its primary duty to maintain a fair and effective administration of justice, the Judiciary must, as an integral part of its constitutional function, have the power and duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it. The protection against scandalizing the Court, given its narrow scope, does not offend freedom of expression.

The Judicial Committee addressed the following issues:

(A) Did the inherent power of the Supreme Court to punish for contempt survive the adoption of the Constitution?

(B) If the answer to (A) is in the affirmative, is the inherent power to punish for contempt nevertheless in conflict with specific guarantees under the Constitution on any of the following grounds, viz. -
    (a) that it conflicts with freedom of expression;
    (b) that there is no definition of the form of contempt under consideration;
    (c) that there is no prescribed penalty;
    (d) that there is no right of appeal.
(C) If the arguments based on the Constitution fail, is *mens rea* a necessary ingredient of the offence of scandalising the court?
(D) Finally, counsel for the appellants put forward arguments addressed to the merits of the decision of the Supreme Court and the propriety of the penalty.

This is what the Judicial Committee of the Privy Council had to say:

"*ISSUE A: <u>The Existence of the Power to Punish for Contempt</u>*

In 1850 the Courts Act established the Supreme Court as a Superior Court of Record. Section 15 of the Courts Ordinance 1945 provided that the Supreme Court "shall possess and exercise all the powers, authority, and jurisdiction that are possessed and exercised by His Majesty's Court of King's Bench in England". Since at least the decision in Procureur General v. Hitié [1908] M.R. 43 the Supreme Court on occasions before and after the coming into force of the Constitution on 12th March 1968 exercised the powers to punish for the offence of scandalising the court. But counsel for the appellants argued that the inherent power to punish for contempt was abrogated by the establishment of the Constitution.

Counsel for the appellants invited attention to the following provisions of the Constitution:-

<u>Section 5:</u>

"(1) No person shall be deprived of his personal liberty save as may be authorised by law -

...

(b) in execution of the order of a court punishing him for contempt of that court or of another court ..."

<u>Section 12:</u>

"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of ... maintaining the authority and independence of the courts ...

(c) ...

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

Section 76:

"(1) There shall be a Supreme Court for Mauritius which shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law and such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

Counsel for the appellants also drew attention to sections 2 to 5 of the Mauritius Independence Order 1968 which provides for the continued operation of "existing laws", which by definition do not include the common law. This is a special instrument designed to ensure the continued operation of primary and subordinate legislation. In the Constitution itself "law" is undefined but counsel submits that it does not include the common law. It follows, he argued, that the inherent power to punish for contempt cannot prevail in the face of the provisions of sections 5 and 12 of the Constitution. He said there was a vacuum: after the establishment of the Constitution Parliament ought to have legislated for a power to punish for contempt of court but Parliament failed to do so. Counsel also drew attention to section 15 of the Courts Ordinance 1945 which in its original form provided that the Supreme Court "shall possess and exercise all the powers, authority, and jurisdiction that are possessed and exercised by His Majesty's Court of King's Bench in England". In 1981 the legislature amended section 15 to read as follows:-

"The Supreme Court shall be a superior Court of record and, in addition to any other jurisdiction conferred on it, shall have all the powers and judicial jurisdiction necessary to administer the laws of Mauritius."

Counsel argued that even if the original provision embraced a power to punish for contempt the provision introduced in 1981 is incapable of covering a power to punish for contempt. For all these reasons counsel submitted that the Supreme Court of Mauritius has no power to punish for contempt.

Counsel acknowledged that his main argument involves the remarkable proposition that the Supreme Court is powerless to act to protect the administration of justice even in the face of wilful interference with its basic processes. It could, for example, not punish a person who physically prevented a witness from attending to give evidence in a trial. That he said was the consequence of Parliament failing to legislate. Their Lordships are satisfied that this argument, carefully presented as it was, must fail. The proposition that under the Constitution an express provision is needed to provide for a power to commit for contempt misconceives the constitutional role of the Supreme Court and the extent of its powers under the Constitution.

The structure of the Constitution of Mauritius is important. Chapter I provides that Mauritius shall be a sovereign democratic state: section 1. Mauritius is a parliamentary democracy on the Westminster model: Hinds v. The Queen [1977] A.C. 195, at 212B-H; Duport Steels Ltd. v. Sirs [1980] 1 W.L.R. 142, at 157. The Constitution is the supreme law of Mauritius: any law inconsistent with the Constitution is invalid: section 2. Chapter II spells out various provisions for the protection of fundamental rights and freedoms of the individual. Sections 5 and 12 to which their Lordships have referred are part of this Chapter. Chapter V deals with Parliament. Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Mauritius: section 45(1). Parliament may only amend the Constitution in accordance with the manner and form prescribed: section 47. Subject to the Constitution, the sole legislative power vests in Parliament. Having dealt with the special position of the Governor-General in Chapter IV, the Constitution makes general provision for the powers of the Executive in Chapter VI. This Chapter provides for the exercise of executive authority. Under the Constitution Chapter VI is the exclusive foundation of executive authority. Chapter VII then deals with the third department of government - the Judicature. The Constitution entrusts the Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law: section 76. It provides the Supreme Court with a supervisory jurisdiction over all inferior courts "for the purpose of ensuring that justice is duly administered by any such court": section 82(1). It confers upon the Supreme Court original jurisdiction in questions of interpretation of the

Constitution and the enforcement of fundamental rights including the right to the protection of the law: sections 3, 17, 83 and 84. It provides for a power of constitutional and judicial review over all persons and authorities exercising functions under the Constitution: section 119. The independence of the court is protected by provisions relating to the appointment and tenure of the judges: sections 76-78. In addition, the court is given appellate jurisdiction from subordinate courts where there is no other mode of appeal: section 82(2). The Courts of Civil and Criminal Appeal are made divisions of the Supreme Court: section 80.

From these provisions the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it. A similar point was well expressed by the majority of the Canadian Supreme Court in MacMillan Bloedel Limited v. Simpson [1995] 4 S.C.R. 725. The context was the constitutionality of the power to punish for contempt. Speaking for the majority Lamer C.J. observed (at 754):-

> *"The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The in facie contempt power is not more vital to the court's authority than the ex facie contempt power."*

Their Lordships would respectfully adopt these observations. The principle of the separation of powers and the constitutional role of the judiciary rule out the technical and semantic arguments on which the appellants rely. All this is apparent on the face of the Constitution.

But there is also strong support for this reasoning in decisions of high authority. The strength of the doctrine of separation of powers is shown by the decision of the Privy Council in Liyanage v. The Queen [1967] 1 A.C. 259. After an unsuccessful coup d'état the legislature of Ceylon passed legislation ad hominem to deal with perpetrators of the insurrection by widening the class of offences for which trial without a jury by three judges nominated by the Minister could be ordered. The Privy Council upheld a decision of the court in Ceylon that under the Constitution the legislation "was an infringement of the judicial power of the State which cannot be reposed in anyone outside the judicature": at 288. Lord Pearce further observed about the impugned legislation (at 291-292):-

> *"If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid."*

In Noordally v. Attorney-General [1987] L.R.C. (Const.) 599 the Supreme Court of Mauritius concluded that a statutory prohibition of bail was unconstitutional. Moollan C.J. (with whom Glover J. agreed) observed (at 603-604):-

> *"The whole of our Constitution clearly rests on two fundamental tenets, the rule of law and the juxtaposition (or separation as it is more often called) of powers. More particularly, according to section 10 and Chapter VII, the trial of persons charged with criminal offences and all incidental or*

preliminary matters pertaining thereto are to be dealt with by an independent judiciary. ... We conclude therefore that it is not in accord with the letter or spirit of the Constitution, as it presently stands, to legislate so as to enable the Executive to overstep or bypass the Judiciary in its essential roles, namely those of affording to the citizen the protection of the law and, as guardian of the Constitution, to ensure that no person's human rights or fundamental freedoms are placed in jeopardy."

These dicta underscore the essential role of the judiciary in protecting the due administration of justice and reinforce their Lordships' view that the Supreme Court of Mauritius has power as part and parcel of its constitutional role to punish for contempt. See also Mahboob v. Government of Mauritius [1982] M.R. 135 and Director of Public Prosecutions v. Boodhoo (unreported), 23rd December 1992, Supreme Court of Mauritius. In agreement with the Supreme Court (Forget and Yeung Sik Yuen JJ.) their Lordships conclude that (subject to arguments based on specific constitutional guarantees to be considered later in this judgment) the Supreme Court of Mauritius has an inherent power to punish for contempt.

Having set out the major ground of their decision on the principal issue, their Lordships can briefly deal with the remaining points which were debated on the principal issue. Their Lordships reject the submission that "law" in the Constitution means statute law alone. There is a single legal order in Mauritius but its sources are French law, English law, and Mauritian statute law and case law. There is no sensible reason why the ordinary meaning of "law" in the Constitution should be cut down to exclude the common law and to confine it to statute law. Indeed the prescribed judicial oath requires a judge to do right to all manner of people "after the laws <u>and usages</u> of Mauritius without fear or favour ...": Third Schedule of the Constitution. This essential part of the main argument of counsel for the appellants is therefore wrong. Moreover, between 1968 and 1981 section 15 of the Courts Act (which was preserved by section 5 of the Mauritius Independence Order 1968) was in operation in its original form. It provided that the Supreme Court of Mauritius had the same powers as the High Court of England. Plainly that included a power to punish for contempt. In its original form section 15 was therefore an additional and sufficient basis for the power to punish for contempt. In 1981 a major revision of the Constitution was undertaken. Professor A. H. Angelo of the Victoria University of Wellington, New Zealand, was responsible for the detailed work. The original section 15 with its reference to English High Court procedure was considered out of date. Drawing on his New Zealand experience Professor Angelo adopted the technique of drafting section 15 to provide that the Supreme Court "shall have all the powers and judicial jurisdiction necessary to administer the laws of Mauritius": see Hunt v. B.P. Exploration Co. (Libya) Ltd. [1980] 1 N.Z.L.R. 104; and Riley McKay Pty. Ltd. v. McKay [1982] 1 N.S.W.L.R. 264. The New Zealand jurisprudence makes clear that such a provision covers all the inherent powers of a superior court. And the power to punish for contempt is the paradigm of inherent powers. Section 15 as amended in 1981 was therefore an additional sufficient basis for the power to punish for contempt.

<u>ISSUE (2): The impact of the Constitution on the Power to Punish for Contempt</u>

It is now necessary to consider the impact of certain constitutional guarantees on the inherent power of the Court to punish for contempt. Concentrating on the arguments addressed to the Board in the present case, their Lordships' views are as follows:-

(a) <u>Freedom of expression: section 12.</u>
Counsel submitted that the offence of scandalising the court is inconsistent with the protection of freedom of expression which is guaranteed by section 12 of the Constitution. Given that freedom of expression is the lifeblood of democracy, this is an important issue. And there is no doubt that there is a tension between freedom of expression and the offence of scandalising the court. But the guarantee of freedom of expression is subject to qualification in respect of provision under any law (1) "for the purpose of ... maintaining the authority and independence of the courts" and (2) shown to be "reasonably justifiable in a democratic society". Their Lordships have already concluded the offence of scandalising the court exists in principle to protect the administration of justice. That leaves the question whether the offence is reasonably justifiable in a democratic society. In England such proceedings are rare and none have been

successfully brought for more than sixty years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman, Civil Liberties and Human Rights, in England and Wales, 1993, 746-747; Barendt, Freedom of Speech, 1985, 218-219. Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of criticising, in good faith, in private or public, the public act done in the seat of justice": see Reg. v. Gray [1900] 2 Q.B. 36, at 40; Ambard v. Attorney-General for Trinidad and Tobago [1936] A.C. 322 at 335; and Badry v. Director of Public Prosecutions [1983] 2 A.C. 297. The classic illustration of such an offence is the imputation of improper motives to a judge. But, so far as Ambard may suggest that such conduct must invariably be an offence their Lordships consider that such an absolute statement is not nowadays acceptable. For example, if a judge descends into the arena and embarks on extensive and plainly biased questioning of a defendant in a criminal trial, a criticism of bias may not be an offence. The exposure and criticism of such judicial misconduct would be in the public interest. On this point their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence: Rex. v. Nicholls (1911) 12 C.L.R. 280. Given the narrow scope of the offence of scandalising the court, their Lordships are satisfied that the constitutional criterion that it must be necessary in a democratic society is in principle made out. The contrary argument is rejected.

(b) <u>No definition of contempt:</u>
Section 10(4) contains an express guarantee against retrospectivity in criminal matters. Counsel for the respondent rightly conceded that there is to be implied in section 10(4) a further requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct: Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245. Counsel for the respondent submitted, however, that it is inappropriate to call the offence of scandalising the court a crime. Their Lordships accept that the offence of this form of contempt is an offence sui generis and that it is not part of the ordinary criminal law. On this basis counsel for the respondent argued that section 10(4) is inapplicable. This restrictive interpretation would mean that in the field of contempt retrospective legislation and hopelessly vague legislation would not be unconstitutional. That cannot be right. The implied guarantee of certainty is applicable to the power to punish for contempt. But the meaning of scandalising the court is explained in the case law: Sunday Times v. United Kingdom, supra. There is therefore no breach of the implied constitutional guarantee of certainty.

(c) <u>No defined penalty:</u>
It is true that there was originally no prescribed maximum penalty for the offence of contempt: see new section 18C of the Courts Act, which imposes a maximum penalty of a term of imprisonment for a year or a fine of 300,000 Rupees. But there is no substance in this objection since the range of appropriate penalties was at all material times apparent from the decisions of the Supreme Court.

(d) <u>No appeal:</u>
There is no appeal as of right against a finding of contempt of court. On the other hand there is a right of appeal on a matter of interpretation of the Constitution. Moreover, with the special leave of the Board there is a right of appeal on the merits of the decision to the Privy Council. This is the context in which counsel for the appellants submitted that there has been a breach of the right to a fair hearing under section 10(1) of the Constitution. Given the available remedies, and the special nature of the jurisdiction, their Lordships are not persuaded that there has been any breach of the right to a fair hearing under section 10(1) of the Constitution.

ISSUE 3: mens rea

Counsel for the appellants submitted that the Supreme Court was wrong to hold that mens rea was not an ingredient of the offence of scandalising the court. The publication was intentional. If the article was calculated to undermine the authority of the court, and if the defence of fair criticism in good faith was inapplicable, the offence was established. There is no additional element of mens rea. The decision of the Supreme Court on this point of law was sound."

(2) Review of the Cases as to what constitutes the Offence of Scandalizing the Court

34. In *Procureur General v Hitié* (1908) MR 43, the editor of a newspaper was fined for publishing scandalous matter respecting the Court attributing extraordinary leniency to the Judges due to their partiality.

35. In *DPP v Masson & anor* (1971) MR 292, the Court observed that contempt of court by scandalising the Court is an offence of a criminal character, which must be proved with such strictness as is consistent with the gravity of the offence charged. The Court held that the case against the respondents, namely that a newspaper article printed and published by the respondents contained scandalous matters respecting the Magistrates of the Intermediate Court, had not been made out beyond reasonable doubt.

36. In *DPP v Mootoocarpen* (1989) MR 160, a newspaper while reporting a judgment of the Supreme Court made inter alia the following remarks: "The Supreme Court quashes yet another undemocratic conviction passed by a lower court". The Supreme Court held that what was subtly insinuated was that this Court was thereby taking sides in a long quarrel between the proponents of the repeal of certain laws (the Industrial Relations Act and the Public Order Act) and their opponents. It was considered that to do so is likely to prejudice the administration of justice and affect the Court's credibility and impartiality. They went on to say that the Supreme Court does not intervene in political quarrels and must ensure that no one is allowed even to adumbrate that it might do so. In a democratic society, a Court should be able to protect itself from attacks addressed against its credibility or impartiality, the more so as it cannot reply to such attacks. The very premise of a democratic society is that society should have faith in its judiciary.

37. In *DPP v Ahnee & ors* (1994) MR 24, the respondents were responsible for publishing, in relation to Court proceedings, a pre-written article which, it was averred, had the effect of scandalizing the Court and bringing the administration of justice into contempt. The Court held it was no defence to claim that what had been written was the result of a mistake of fact. Further, the question was not what impact the writer intended the publication to have but what impact the article itself was calculated to have. In order to expect lenient treatment, the author should express regret for harm done to those who have been attacked, and not simply regret for his own mistake.

    It was argued before the Judicial Committee of the Privy Council [*Ahnee & ors v DPP* (1999) (Privy Council Appeal No. 28 of 1998)] that in its contextual setting the article did

not amount to a contempt. Their Lordships were satisfied that there is no ground upon which the decision of the Supreme Court, on the materials before it, can be challenged.

38. More recently in *DPP v Dhooharika* (2011) SCJ 356, the Court held that articles and interview that were baseless, gratuitous, malicious and highly defamatory of the Chief Justice and were calculated to undermine the authority, independence, impartiality and integrity of the Judiciary and in particular of the Chief Justice, thus causing public confidence in the administration of justice to be undermined, were contemptuous.

(3) Possible Defences to the Offence of Scandalizing the Court

39. The fact that an impugned statement could be a fair comment made in good faith is no defence.

    In *R v Colsey* (1931), the Court rejected this line of defence. Colsey had written an article, which contained an assertion that the judge who tried a labour dispute could not altogether be unbiased as he himself had been involved at an earlier stage with one of the laws relating to the matter. The court found the editor guilty of contempt and observed that it was irrelevant whether the statement was a fair comment made in good faith.

    Before *Colsey*, the Australian judiciary recognised that plea. In *R v Nicholls* (1911) CLR 280, it was accepted that not every accusation of impartiality on a judge would amount to contempt as such comment may even be for the public interest.[43]

40. The law of contempt also does not accept the defence of justification, though such a defence is available in cases of defamation.[44]

41. It is to be noted that there is a marked difference in approach between British and American Judges as to what constitutes the offence of scandalizing the Court. In *Bridges v California* (1941) 314 US 252, at 270-1, Justice Black observed obiter that loss of respect for the judiciary was not a serious enough evil to justify abridgment by the States of free speech. In *Pennekamp v Florida* (1946) 328 US 331, at 365-9, Justice Frankfurter held unconstitutional proceedings initiated in Florida when a newspaper published articles criticizing a judge for undue sensitivity to defendants accused of rape; only comment affecting a pending decision could properly be proscribed without violating the First Amendment.

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[43] This was confirmed in *Attorney General v Mundey* (1972) 2 NSWLR.

[44] Vide Report of the Phillimore Committee on Contempt of Court (1974), Cmnd 5794, at paras. 165-166.
But it is to be noted that the Law Commission of England in its Report on "Offences relating to Interference with the Course of Justice" (1979) Law Com No. 96, at para. 3.68 was of the opinion that a true allegation of judicial corruption should never be penalized.

As pointed out by E. Barendt, *Freedom of Speech* (1985, Oxford, Clarendon Press) at p. 222:

> "*American Judges just do not accept the argument that public confidence in their authority and in the fair administration of justice will necessarily be shaken by hostile comment. It is the truth of the comment, not the mere fact that it is made, which may undermine such confidence; and if the remarks are true, the public should certainly be allowed to digest them*."