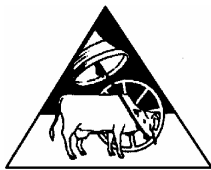


DRAFT

CONTEMPT OF COURT ACT



Law & Society Trust
03, Kynsey Terrace, Colombo 8
Sri Lanka
Tel: 2691228, 2684845 Tele/Fax: 2686843
e-mail: lst@eureka.lk
Website: <http://www.lawandsocietytrust.org>

A DRAFT CONTEMPT OF COURT ACT FOR SRI LANKA – A PRELIMINARY NOTE

Freedoms of conscience, expression, assembly, association and political participation are inherent elements of the type of society ideally contemplated by the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, as reflected in the particular constitutional provisions relating to the same. These freedoms are specifically promoted in international instruments on human rights to which Sri Lanka is a signatory, including the International Covenant on Civil and Political Rights (ICCPR).

The above freedoms underlie the importance of public scrutiny of the processes of governance, which in present day thinking, encompasses the administration of justice. The primary justification for public scrutiny of the judiciary is that it constitutes a democratic check on judges who are not elected but who exercise public power. Importantly, this is a method of scrutiny that is appropriate where impeachment and removal from office of a judge under the Constitution is a remedy resorted to only in extreme situations in most countries, normally amounting to incapacity, gross incompetence or gross misconduct on the part of the judge.

International human rights law has maintained that when balancing rights of free speech with the principle of the authority of the judiciary, the question should be whether the prohibition is strictly necessary in a democratic society. The freedom to debate the conduct of public affairs by the judiciary does not however mean that unwarranted attacks on the judiciary as an institution, can be condoned. At all times, comment should be fair and without personal bias.

The following comment is pertinent in this regard;

“(This) is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.

Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism nor do we resent it. For there is something far more important at stake. It is no less than the freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment on matters of public interest.

Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken and our decisions erroneous, whether they are subject to appeal or not. All we ask is that those who criticise us will remember that, from the nature or our office, we cannot reply to those criticisms. We cannot enter into public controversy, still less political controversy. We must rely on our conduct itself to be its vindication.”

(Vide Lord Denning in *Regina vs Commissioner of Police of the Metropolis* (1968 2 QB, 150 at154)

Unlike in the United Kingdom and India (and quite apart from the jurisprudence of the United States on these issues which concedes an even greater latitude to freedom of speech), the Sri Lankan law on contempt of court has hitherto effectively resulted in a 'chilling' of the freedoms of speech, expression and information on matters of public interest.

In the first instance, what amounts to contempt has been subjected to differing interpretations by the courts, the majority of which have inclined towards conservative views. This has had an inevitable impact on public discussion of vital public interest issues due to fears that journalists or citizens voicing their opinions on particular judgements of the Court or with regard to pending adjudications, will be cited for contempt.

It is primarily for these reasons that Sri Lanka should consider the enactment of a Contempt of Court Act, which may be modelled on the UK and Indian Acts but with even greater emphasis on modern standards relating to contempt of court.

The draft Act that has been prepared* clarifies substantive issues relating to contempt and;

- a) Defines what amounts to contempt;
- b) Defines what could be legitimately prohibited with reference to the *sub judice* rule; and
- c) Clarifies the rule regarding disclosure of sources.
- d) Imposes procedural norms of fairness in contempt inquiries as well as prescribes a minimum sentence for contempt findings;

It articulates particular well recognised principles, including the following;

- A fair and accurate report of legal proceedings published in good faith does not constitute contempt of court.
- Fair criticism of judicial acts/True statements of fact on matters of public importance or public concern relating to the administration of justice does not amount to contempt.
- No sentence is imposed for contempt unless the act substantially interferes with the administration of justice.
- Defences of innocent publication/distribution are specified.
- Where *sub judice*, is concerned, the test is whether there is a substantial likelihood of prejudice to the outcome of the case. Courts in the United Kingdom have declared that there must not be gagging of *bona fide* public discussion in the press, of controversial matters of general

* The draft Act and the accompanying paper was prepared by Dr J de Almeida Guneratne, P.C. and Kishali Pinto-Jayawardena, attorney-at-law, for the Law and Society Trust. The documents incorporate previous research undertaken as senior consultants for the National Human Rights Commission in 2004-2005 as well as for the Bar Association in 2005. The involvement of former Chief Justice GPS de Silva and former Supreme Court judge MDH Fernando in finalising clauses of the Contempt of Court draft act is noted with gratitude.

public interest, merely because there are in existence contemporaneous legal proceedings in which some particular instance of these controversial matters may be in issue.

- Where refusal to disclose sources of information is concerned, courts are prohibited from ordering media personnel to disclose confidential sources except when “disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.” The greater the legitimate public interest in the information which the source has given to the journalist, the greater would be the importance of protecting the source

The draft Act addresses the parallel – but no less urgent – need to stipulate fair procedures for contempt inquiries in a manner akin to the Indian Act on Contempt of Court, where rudimentary norms of natural justice is followed during sentencing. A minimum sentence is prescribed when contempt is, in fact, found.

The view may be reasonably taken that there is no fetter on the legislative powers of Parliament, taking the initiative as it might, in laying down “by law”, procedure to be followed by the S.C. and the C.A. in regard to contempt proceedings that, the said Courts may take cognisance of. This, Parliament, could do by law (meaning, ordinary legislation).

However, for some reason or rationale, if some argument was to be put forward that, Parliament cannot do so, then the prescribing of procedures for the exercise of contempt powers could be done in any event through a constitutional amendment, which process (given the direct importance of the issue to the people in this country), should be engaged in as a matter of priority by the country’s legislature.

THE CONTEMPT OF COURTS ACT, ...

AN ACT TO DEFINE AND CODIFY THE POWERS OF COURTS IN PUNISHING CONTEMPT OF COURTS

Be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka in ... , as follows;

- Short title and extent** 1. This Act may be called the Contempt of Courts Act, ...
- Definitions** 2. In this Act, unless the context otherwise requires-
- a) ‘contempt of court’ means civil contempt or criminal contempt;
 - b) ‘civil contempt’ means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
 - c) ‘criminal contempt’ means the publication (whether by words spoken or written or by signs or by visible representations or otherwise) of any matter which;
 - (i) gravely lowers or tends to lower the authority of any court;
 - (ii) substantially prejudices or interferes with the due course of any judicial proceeding;
 - (iii) substantially interferes or obstructs the administration of justice in any other manner;
- Contempt to apply as Narrow Exception to Freedom of Expression/ Information/ Publication** 3. The legitimate exercise of freedom of expression, information and publication shall operate as the overriding principle to which the contempt rule is a narrowly interpreted exception;
4. In particular, the application of the contempt rule, in all cases, shall be;
- a) For a legitimate aim;
 - b) Prescribed by law and;
 - c) Strictly necessary in a democratic society;
- Contempt in respect of Pending** 5. A person shall be guilty of contempt on the ground that, that person has published (whether by words spoken or written or by signs or by visible representations or otherwise) of

Judicial Proceedings

any matter which lowers or tends to lower the authority of any court, prejudices or interferes with the due course of any judicial proceeding, interferes or obstructs the administration of justice in any other manner only if;

- (1) the contempt is in respect of pending proceedings and;
- (2) is contained in a publication addressed to the public at large or any section of the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced;

Innocent Publication or Distribution

6. (1) A person is not guilty of contempt of court if at the time of publication of matter amounting to contempt of court under this Act, (having taken all reasonable care), that person does not know and has no reason to suspect that relevant proceedings are pending;

(2) A person is not guilty of contempt of court as the distributor of such publication containing matter if at the time of publication of matter amounting to contempt of court under this Act (having taken all reasonable care) if that person does not know that it contains such matter and has no reason to suspect that it is likely to do so;

(3) The burden of proof of any fact tending to establish a defence afforded by this section lies upon that person

Contemporary reports of proceedings

7. (1) A person is not guilty of contempt of court in respect of a fair and accurate report of legal proceedings held in public and published in good faith;

(2) A person is not guilty of contempt of court in respect of an abridged or condensed report or an extract of legal proceedings held in public and published in good faith, provided it gives a correct and just impression of the proceedings.

Discussion of Public Affairs

8. A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest does not amount to contempt of court under this Act if:

(1) the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion, or;

(2) if the legitimate exercise of freedom of expression, information and publication including the interest of the public in receiving information about matters of public concern relating to the administration of justice

outweighs all other competing considerations.

Sources of Information

9. No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose, nor may any adverse inferences be drawn against that person consequent to such refusal to disclose the source of information contained in a publication for which that person is responsible.

Provided that a court may order a person to disclose a source of information if it is established to the satisfaction of the court that disclosure is strictly necessary in a democratic society in the interests of national security or for the immediate prevention of disorder or crime.

**Fair Comment and Criticism/
True Statements of Fact not amounting to Contempt**

10. A person is not guilty of contempt of court for expressing, publishing or making any;
- (1) Fair comment or criticism in relation to the merits of a case which has been heard and decided;
 - 1) True statements of fact on matters of public importance or public concern relating to the administration of justice;

Other defence not affected

11. Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt has ceased to be available merely by reason of the provisions of this Act

Act not to imply enlargement of scope of contempt Procedure

12. Nothing contained in this Act shall be construed as implying that any disobedience, breach, publication or other act is punishable as contempt of court, which would not be so punishable apart from this Act.
13. (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, where it is alleged or appears to the Supreme Court, the Court of Appeal or a Provincial High Court that a person has been guilty of contempt committed in its presence or hearing, such Court may cause such person to be detained in custody and at any time before the rising of that Court. On the same day or as early as possible thereafter, such Court shall cause that person to be informed in writing of the contempt with which that person is charged and nominate a date for the hearing of the charge.
- (2) On the date so nominated, such Court shall afford such person an opportunity to make his defence to the charge; and;

- a) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed either forthwith or after adjournment, to determine the matter of the charge; and
- b) make such order for the punishment or discharge of such person as may be just.

(3) Notwithstanding anything contained in sub-section (1), where a person charged with contempt under that sub-section applies, in writing, to have the charge against him tried by some judge other than the judge or judges in whose presence or hearing, the offence is alleged to have been committed, such application shall be placed before the Chief Justice, (or a bench of the three most senior judges of the Supreme Court where the said application concerns a charge issued by the Chief Justice himself), together with a statement of the facts of the case, for such directions as the Chief Justice (or the Bench assigned as aforesaid), may think fit to issue as respects the trial thereof.

(4) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1), which is held in pursuance of directions issued under sub-section (3) by a Court other than the Court in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the judge or judges in whose presence or hearing the offence is alleged to have been committed, to appear as a witness or witnesses and the statement placed before the Chief Justice (or the Bench assigned) under sub-section (3) shall be treated as evidence in the case.

(5) Pending the determination of the charge, the Court may direct that a person charged with contempt under this section, be detained in such custody as it may specify;

Provided that, that person may be released on bail, if a bond for such sum of money as the Court thinks sufficient is executed with or without sureties with the condition that the person charged, shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Court

Provided further that the Court may, if it thinks fit, instead of taking bail from such person, discharge that person on execution of a bond without sureties for his attendance as aforesaid.

14. In the case of contempt committed under this Act, other than contempt *ex facie*, the Supreme Court, the Court of Appeal or a High Court of the Provinces may take action on its own motion or on a motion made by

- a) the Attorney General

- b) any other person, with the consent in writing of the Attorney General
or
- c) where power is exercised by the Court of Appeal in respect of courts of First Instance, tribunals or other institutions as Parliament may from time to time, ordain and establish, on the motion of such court.

Every motion or reference made under this section shall specify the contempt of which the person or persons charged, is alleged to have committed.

15. (1) Notice of every proceeding under Section 13 shall be served personally on the person charged;

- a) The notice shall be accompanied;
 - (i) in the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded;
and
 - (ii) in the case of proceedings commenced on a reference by a subordinate court, by a copy of the reference

(2) Any person charged with contempt under Section 13 may file an affidavit in support of his defence and the Court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary and pass such order as the justice of the case requires.

(3) An appeal shall lie to the Court of Appeal from any order, judgement, decree or sentence of a provincial High Court in the exercise of its jurisdiction to punish for contempt in respect of which such High Court may grant leave to appeal *ex mero motu* or at the instance of any aggrieved party;

Provided that special leave may be granted in its discretion by the Court of Appeal in respect of such order, judgement, decree or sentence of a provincial High Court where the said provincial High Court has refused to grant leave to appeal to the Court of Appeal;

(4) A further appeal shall lie to the Supreme Court from any order, judgement, decree or sentence of the Court of Appeal or made in the exercise of its appellate powers in respect of the same. The Court of Appeal may grant leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party.

Provided that, the Supreme Court may, in its discretion grant special leave to appeal to the Supreme Court from any order, judgement, decree or sentence of the Court of

Appeal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court.

16. Pending any appeal, the Supreme Court or the Court of Appeal or the provincial High Court may order that;
 - a) The execution of the punishment or order appealed against, be suspended;
 - b) if the appellant is in confinement, that the appellant be released on bail

**Punishment
for contempt
of court**

16 (1) Save as otherwise expressly provided for in this Act or in any other Law, a contempt of court under this Act may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to twenty thousand rupees or with both.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology made to the satisfaction of court.

Explanation; An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any Law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a sentence of imprisonment is imposed by a court under this Act, specific reasons must be given by such court, that a sentence of imprisonment alone is called for in the facts and circumstances of the case.