A Re-Evaluation of the Law of Contempt by Advocates in Light of Recent Cypriot Jurisprudence

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Introduction

Contempt of court is defined as an act or omission, which interferes with the due administration of justice.[2] As such, contempt is a criminal offence; even more so, it is a *sui generis* criminal offence. Not only is the power of contempt, one of uncertain scope, unlike any other criminal offence, but it is also exercised according to an, otherwise unknown, summary procedure. The power of contempt has always been regarded as an inherent power of the courts, a power, which is founded upon immemorial usage. It could thus be accepted, that the offence of contempt and all the peculiarities associated with it, are '*as ancient as any part of common law'*,[3] since it has probably existed in English law since the twelfth century.[4]

Despite this fact, the law of contempt is no longer as untouchable as it once was; the influence of the case - law of the European Court of Human Rights has led to a re - evaluation of the general principles, which govern the law of contempt. Any interference with the right to freedom of expression must be necessary in a democratic society, according to article 10 of the European Convention of Human Rights. Consequently, there must be a reasonable relationship of proportionality between the legitimate aim pursued, and the means which are deployed in order to achieve that aim; the contempt of court must be necessary in a democratic society for maintain the authority of the judiciary and the due administration of justice.[5]

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[2] For a general introduction to the problem of contempt of court see *Arlidge, Eady and Smith on Contempt*, 3rd Ed, London: Sweet & Maxwell, 2000, *Borrie and Lowe's Law of Contempt*, 4th Ed, London: LexisNexis, 2010, C. J. Miller, *Contempt of Court*, 2nd Ed, Oxford: Clarendon Press, 2000.
[3] *R* v. *Almon* (1765) Wilm 243, at 254.
[4] J. Fox, *The History of Contempt of Court*, Oxford: Clarendon Press, 1927,
[5] *Sunday Times* v. *United Kingdom*, Judgment of 26 April 1979; (1979) 2 EHRR 245, *Goodwin* v. *United Kingdom*, Judgment of 27 March 1996; (1996) 22 EHRR 123.

Two fairly recent Cypriot-related judgments, namely the judgment of the Grand Chamber of the European Court of Human Rights in *Kyprianou* v. *Cyprus*[6] and the judgment of the Supreme Court of Cyprus in the case of *Loukis Loucaides*,[7] give rise to a re-evaluation of the principles governing the most straightforward and notorious cases of contempt; those where the offence is committed in the face of the court and in particular by advocates. The aim of this paper is to examine the implications of the *Kyprianou* and *Loucaides* judgments, in so far as the right to a fair trial and freedom of expression is concerned. The first Part of the paper shall provide an introduction to the problem of contempt in the face of the court, while the subsequent Parts shall analyse in depth the judgments of *Kyprianou* and *Loucaides* and their implications.

1. Contempt in the Face of the Court

1.1. Defining Contempt in the Face of the Court

The law of contempt has always been considered as a direct outcome of the need to safeguard the orderly administration of justice from improper interference,[8] and to safeguard the public's trust in a fair and unimpeded trial.[9] According to such approach it is not the dignity of the judge, which is offended by the contempt, nor is the dignity of the court; rather it is the fundamental supremacy of the law which is challenged.[10] Criminal contempt is usually divided in two categories; those which are committed in the face of the court, and those which are committed outside the court. In common law such distinction maintained its importance due to the different extent of the inherent jurisdiction of superior and inferior courts, in the sense that superior courts of record could normally punish both forms of contempt, while inferior courts of record could only punish contempt if it was committed in their face.

[6] App. 73797/01, *Kyprianou* v. *Cyprus*, Judgment of 15/12/2005.
[7] *Re Loukis Loucaides Advocate*, Application 45/2011, Judgment of 16/5/2011.
[8] See Phillimore Committee, *Report of the Committee on Contempt of Court*, Cmnd. 5794, 1974 (cited in this paper as Phillimore Committee), para. 1.
[9] *A – G* v. *Times Newspaper Ltd* [1974] AC 273, HL, at 315.
[10] *A – G* v. *Leveller Magazine Ltd* [1979] AC 440, HL, at 459.

The exact meaning of contempt in the face of the court was analyzed in the leading English judgment of *Balogh* v. *St Albans*.[11] Lord Denning specified that such an expression was never confined to conduct, which a judge saw with his own eyes. It is therefore, not necessary that all the circumstances of the offence are in the personal knowledge of the court.[12] On the contrary; a judge could always act on his own motion and punish summarily, even if the contempt was reported to him by officers of the court, or by others. Contempt in the face of the court should be considered to be the same thing as contempt which the court can punish of its own motion As a result, Lord Denning distinguished between three forms of contempt in the face of the court: contempt which is committed in the sight of the court, contempt which is committed within the court room but which is not seen by the judge, and contempt which is committed at some distance from the court.

It could be argued that such an interpretation of contempt in the face of the court is wider than it ought to be. Why should the court's power to punish contempt of its own motion, necessarily be equated to contempt in the face of the court? The phrase 'contempt in the face of the court' implies that the location of the offence is essential; an offence committed at some distance from the court should thus, not be considered to be an offence, which is committed in the face of the court. Furthermore, it could be argued that if the contempt is committed within the court room, but not seen by the judge, it should not be considered as contempt in the face of the court. While it is true that under such circumstances, the necessary element of location would be satisfied, it is still questionable whether there such an offence could be considered to be committed in the face of the court; despite the fact that it was committed within the court room, the judge was not a witness to it. Consequently, there would be no actual difference from an offence, which was committed outside the court room.

It is suggested that a narrower interpretation of the phrase 'contempt in the face of the court' would be preferable, not only so far as technicalities are concerned, but mostly

[11] *Balogh* v. *St Albans Crown Court* [1975] QB 73, CA.
[12] This was the position of Laskin J in his dissenting judgment in *McKeown* v. *R* (1971) 16 DLR (3rd) 390, at 408.

because the power of contempt is a great power, and is to be exercised '*with scrupulous care and only when the case is clear and beyond reasonable doubt*', as Lord Denning himself has admitted[13] In summary proceedings, the judge appears to assume the role of prosecutor and judge in his own cause, especially where the insult is directed against him personally. Furthermore, the contemnor usually has little or no opportunity to defend himself or make a plea in mitigation. A narrower interpretation of contempt in the face of the court would restrict the power of the lower courts to punish summarily to those cases where it was imperative for the judge to act immediately; in all other cases, it should be left to the Attorney - General, or the party aggrieved to make a motion in accordance with the rules.

There are many examples of what could constitute contempt in the case of the court. An exhaustive list would be beyond the scope of this article. It would be sufficient to observe that the offence could cover any type of conduct which may seriously disrupt court proceedings; the most common cases of contempt in the face of the court deal with circumstances under which persons were assaulted or threatened in court during proceedings,[14] or where the court, or jury, or solicitors were insulted[15].

1.2. Comparative Views on Contempt

a. England

The Phillimore Committee, which was appointed to consider whether any changes were required in the law relating to contempt of court, recommended that the practice, whereby the judge deals with contempt in the face of the court himself, should continue. The Committee observed that the judge would be in the best position to deal with the matter, since he had witnessed what had taken place; furthermore, he would be more inclined to take a lenient view after a period of reflection, than another judge who would simply read the transcript and would be anxious to protect his brother judge. The Committee

[13] *Balogh* v. *St Albans Crown Court* [1975] QB 73, CA, at 85.
[14] *Morris* v. *Crown Office* [1970] 2 QB 114.
[15] See e.g. *R* v. *Davison* (1821) 4 B & Ald 329.

recommended, however, that the judge should always ensure that the contemnor is in no doubt about the nature of the conduct, which constitutes an offence. The judge should always let the contemnor explain, or deny his conduct, and allow him to call witnesses; in addition, the contemnor should be entitled to make a plea in mitigation of his sentence. In order to defend himself, the contemnor should be entitled to legal representation, and the court should have the power to grant legal aid immediately for the purpose, where appropriate. In those cases where the contempt also amounts to a criminal offence, the judge should consider referring it to the prosecuting authorities, unless reasons of urgency or convenience require that it be dealt with summarily.[16]

Recent developments concerning contempt in the face of the court were influenced by the recommendations of the Phillimore Committee; recent cases have emphasized that the courts follow a more restrictive approach,[17] which balances the need for urgency during summary contempt proceedings, with the application of natural justice principles. In *R* v. *Moran*,[18] it was held that the judge had acted too precipitately, had not given the contemnor the opportunity to apologize, and had not invited any counsel in court to offer advice. The Court of Appeal quashed the order for committal and noted that a judge should always reflect carefully, whether or not to imprison a man for contempt; giving a contemnor the opportunity to apologize should be one of the most important aspects of contempt proceedings.[19]

In other recent cases, the Court of Appeal quashed the conviction, because there was no urgency to justify use of the summary procedure. In *R* v. *Stafforce Personnel*[20], the Court of Appeal held that a summary procedure was unnecessary, especially since it was based only on hearsay evidence; the matter ought to have been referred to the Attorney – General, in order to ensure that the case was determined on a proper evidential basis. In *R*

[16] Phillimore Committee, para. 95.
[17] See the brief, albeit correct comment of T. Rees and D. C. Ormerod, 'Trial: Contempt of Court' [2001] CrimLR, at 589.
[18] *R* v. *Moran* (1985) 81 Cr App R 51, CA.
[19] For a rather different approach, see e.g. *R* v. *Newbury Justices ex p Pont and Others* (1984) 78 Cr App R 255.
[20] *R* v. *Stafforce Personnel Ltd*, 24 November 2000, CA.

v. *Griffith*,[21] the appellant was convicted for contempt on court for threatening witnesses outside the court. The Court of Appeal held that the court had jurisdiction to employ the summary process, since the process of intimidation had continued up to the door of the court. However, the judge should not have chosen the summary procedure, due to the fact that the actions of the appellant had not prevented any witness from testifying, and there was no danger of any future intimidation, since the appellant was taken into custody; consequently, the actual risk of postponing the summary process until after the trial was insignificant.

The Court of Appeal has also held that when a witness refuses to testify, it is advisable that the matter is dealt with at the conclusion of the trial, or at the very soonest at the end of the prosecution case.[22] The most prominent example of the new approach of the Court of Appeal, however, is evidenced in *R* v *MacLeod*.[23] The Court of Appeal stated that article 6 of the European Convention does not add to, or alter the normal requirement of English law that proceedings should be conducted fairly before an independent and impartial tribunal. The Court thus, held that the trial judge was entitled to deal himself with the intimidation of witness, which had occurred in a corridor outside the court room. It was held that there was no reason why the judge should not be regarded as an independent and impartial tribunal for the purposes of contempt proceedings, since he had not '*himself observed what had taken place in the corridor*'[24]. The new approach of the Court of Appeal, as stated in *MacLeod*, would seem to suggest that a judge should not try summarily a case of contempt, to which he was a witness, and was therefore, committed in the face of the court in the narrow sense.

The practice, whereby the judge deals with contempt in the face of the court himself, was eventually partially abandoned. The Lord Chief Justice issued the *Practice Direction* of 5

[21] *R* v. *Griffith* (1989) 88 Cr App R 63, CA.
[22] Thus, in *R* v. *Phillips* (1983) 78 Cr App R 82, CA, the judge should not have tried the offence at an earlier stage, especially since the evidence provided by the witness would have added little, or nothing by way of weight, support, or confirmation of other witnesses. See also *R* v. *Montgomery* [1995] 2 Cr App R 23, CA, where the Court of Appeal set out sentencing guidelines in respect to witnesses who refuse to testify.
[23] *R* v. *Calum Iain MacLeod*, 29 November 2000, CA.
[24] Ibid.

June 2001,[25] outlining the powers of the Magistrates' Courts to deal with contempt in the face of the court. Where the contempt is not admitted by the alleged offender, the justices should not make any findings against the offender; their powers are limited to making arrangements for a trial to take place, before a bench of magistrates other than those before whom the alleged contempt occurred. The offender is entitled to call and examine witnesses where evidence is relevant, and should be allowed an opportunity to apologize for his contempt, or to make representations. If the justices choose to exercise their powers to commit to custody, they must take into account any time spent on remand and the nature and gravity of the contempt; any period of committal should be for the shortest period needed in order to satisfy the interests of preserving good order in the administration of justice.

When the contempt is admitted, the justices should ask the offender whether he has any problem with them dealing with the matter. If there is an objection, then a differently constituted panel should hear the proceedings. If there is no objection, then the bench may deal with the matter, so long as the offender's conduct was not directed to the magistrates; if, however, the offender's conduct was directed towards the magistrates, it would not be appropriate for the same bench to deal with the matter. In all circumstances, legal aid should generally be granted to cover representation, and the offender must be afforded adequate time and facilities in order to prepare his case.

The *Practice Direction* marks a turning point of the law of contempt for Magistrates' Courts. Judges should no longer try those cases which were dealt in the face of court, if the conduct was directed towards them. Even in those cases, where the conduct was not directed towards the bench, the judge should only try the case, if the offender admits the contempt, and has no objection to the judge dealing with the matter. However, the *Practice Direction* expressly provides for the possibility of derogating from the Direction in a minority of exceptional cases, where the application of the Direction will not be, under the circumstances, consistent with the aim of achieving justice.

[25] [2001] 2 Cr App R 17.

The developments described above, show that there is a continuous effort to reform the summary procedure, which is followed in cases of contempt in the face of the court, in a manner that will effectively safeguard the protection of human rights. Despite this fact, the practice whereby the judge deals with contempt in the face of the court himself, was not completely abandoned yet. In *Wilkinson*[26] the Court of Appeal observed that in many cases it would be preferable for a judge, who had witnessed contempt in the face of the court, to refer the summary trial of the matter to a colleague; despite this fact, the choice of the trial judge to hear the case herself, was not wrong since there was no dispute as to the essential facts of what had taken place and given the fact that a fair minded observer could not have concluded that there was a real possibility of bias.

b. United States

The scope of the summary power to punish contempt in US Federal Courts was severely limited by the 1831 Act,[27] mostly to cases where the misbehaviour occurred in the presence of the court, or so near thereto so as to obstruct justice. The Supreme Court held that the phrase 'so near thereto' should be construed in a narrow and geographical sense,[28] thus restricting the application of summary procedure even further. It was eventually established that in cases of contempt in the face of the court, a public hearing before another judge is required. In *Mayberry* v. *Pennsylvania*,[29] it was held that the trial judge should have disqualified himself from dealing with the contempt, since he had been subjected to personal vilification and abuse. It was observed, however, that it is not every attack on a judge that disqualifies him from dealing with the contempt.

In the leading case of *Bloom* v. *State of Illinois*,[30] the Supreme Court re – examined the issue of summary punishment in cases of contempt. It was held that the independence of the judiciary and the effective functioning of the courts do not depend upon the power to

[26] *Wilkinson* v. *Lord Chancellor's Department* [2003] 2 All ER 184, CA. See also *HT Advocate* v. *Tarbett* [2003] SLT 1288.
[27] Following the *Lawless – Peck* case. See F. Frankfurter, J.M. Landis, 'Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts' (1924) 37 Harvard Law Review 1010, at 1024 - 1029.
[28] *Nye* v. *United States* 313 US 33 (1941)
[29] *Mayberry* v. *Pennsylvania* 400 US 455 (1967).
[30] *Bloom* v. *State of Illinois* 391 US 94 (1968).

punish contempts summarily; therefore, summary proceedings in any contempt trial subjected to severe punishment, were held to be unacceptable. Summary proceedings in contempt cases are permissible only insofar as they concern petty offences, which is a general exception to jury trial under United States' law.

c. European Court of Human Rights

Prior to the *Kyprianou* case, the European Court of Human Rights did not have the opportunity to examine in depth the relationship between the right to a fair trial and the summary procedure in cases of contempt in the face of the court. In *Ravnsborg*,[31] the applicant had been ordered by the relevant courts on three different occasions, to pay fines for improper statements, which were made in his written observations. The orders were made in the form of decisions. The applicant claimed that the absence of an oral hearing in any of the proceedings relating to the fines, violated article 6 of the Convention.

The Court initially examined whether the proceedings related to a 'criminal charge' against the applicant within the meaning of article 6. The Court observed that the formal classification under Swedish law was open to differing interpretations; however, after examining the nature of the offence, the Court concluded that the conduct for which the applicant was fined fell outside the scope of article 6, since the measures ordered by the Swedish courts were more akin to disciplinary powers, than to the imposition of a punishment for commission of a criminal offence. Furthermore, the nature and degree of the severity of the penalty was not sufficiently important to warrant classifying the offences as criminal. Consequently, the Court held that article 6 did not apply to those proceedings, and was therefore, not violated. It should be stressed that the European Court did not decide on the matter whether a summary procedure in a criminal case, concerning contempt of court, would violate article 6; it was simply held that in the specific case, the proceedings relating to the fines were not criminal, and therefore, article 6 did not apply.

[31] *Ravnsborg* v. *Sweden*, Judgment of 23 March 1994, Series A, No. 283 – B; (1994) 18 EHRR 38.

II. The *Kyprianou* case

A. The Procedure before the Cypriot Courts

Michalakis Kyprianou is an advocate; he has been in practice for more than forty years and he is a former member of the House of Representatives. On 14 February 2001, Kyprianou was defending two accused for murder before the Assize Court of Limassol.[32] Kyprianou was conducting the cross - examination of a prosecution witness, when the Court interrupted his questioning, holding that his cross - examination went beyond the extent it could go at that particular stage of the main trial. In response, Kyprianou declared that he stops his cross - examination, and he asked for leave to withdraw from the case on the basis that the Court seemed to consider that he was doing his job properly in defending the accused; his request was denied. At that point, Kyprianou protested that the Court prevented him from conducting his cross - examination in an efficient manner; Kyprianou alleged that while he was cross - examining the witness, the three members of the Court were talking to each other and sending 'ravasakia' to each other.[33]

The Assize Court considered that the words spoken by Kyprianou, and particularly the manner in which it was spoken, constituted contempt in the face of the court, and suggested that the advocate should decide whether he wanted to insist on what he said; Kyprianou replied that they could try him and argued that watching the small pieces of paper going from one judge to another while he was cross – examining, deprived him from any stamina to defend the accused. The Assize Court had a short break in order to consider the matter, and upon returning announced that Kyprianou's was unanimously held guilty of contempt. The Court asked Kyprianou whether he had anything to add before passing sentence on him, to which he responded that he was defending a very serious case in a very tense atmosphere and felt that he was interrupted in his cross –

[32] Criminal Case 7119/00 (in Greek).
[33] Ravasakia is a Greek word, which can define either a short and secret letter, or a love letter, or even a short written message with unpleasant results.

examination. After a short break, the Assize Court, by majority, sentenced the applicant to five days imprisonment.

Kyprianou filed an appeal with the Supreme Court.[34] Kyprianou challenged the constitutionality of Section 44 § 2 of the Courts of Justice Law 14/1960, as amended by Law 166/1987, which provided that when an offence of contempt is committed in full view of the court, the court may take cognizance of the offence and sentence the offender to a fine of seventy - five Cypriot pounds, or to imprisonment of up to one month, or to both imprisonment and a fine.[35] He argued that such provision was contrary to article 30 § 2 of the Constitution of Cyprus, which safeguards the right to a fair trial; article 30 § 2 corresponds to article 6 of the European Convention of Human Rights. It was contended that the Assize Court acted as both prosecutor and judge, as both witness and judge; therefore, the court was not independent, nor impartial. Furthermore, the appellant complained that he was presumed guilty as soon as he objected to the Assize Court's conduct, and that he was not informed in detail of the accusations against him.

The Supreme Court rejected all grounds of the appeal. The Court observed that the appellant had created a tense atmosphere, and showed disrespect to the Assize Court, both by words and conduct. By referring to English law of contempt, on which Cyprus law is based, the Supreme Court held that the power of courts to punish contempt is connected with the normal function of the courts, and its aim is the protection of judicial institutions, which is essential in order to safeguard a fair trial. Section 44 § 2 of the Courts of Justice Law was lawfully authorized by article 162 of the Constitution, and was therefore, not unconstitutional. The appellant's approach betrayed a fundamental misunderstanding of the nature of proceedings for contempt in the face of the court, since the judges are not parties to such proceedings; their objective is to safeguard the integrity of the judicial system and not their persons.

[34] Criminal Appeal n. 7065, Regarding the Issue of the Conviction of Michalakis Kyprianou for Contempt of Court, 14 February 2001 (in Greek).
[35] With respect to the Cypriot law of contempt prior to the *Kyprianou* judgment see S. Stavrinides, 'Contempt of Court in Cyprus' [1991] 2 Cyprus Law Tribune 167 (in Greek).

It should be noted that the Supreme Court referred in some length to the judgment of the European Court in *Ravnsobrg* v. *Sweden*,[36] and to the English Court of Appeal's decision in *R* v. *MacLeod*;[37] the Supreme Court seems to have accepted that both of these cases supported the view that article 6 of the European Convention did not contravene the right of the judge to deal with cases of contempt in the face of the court. This point of view, however, is not correct. *MacLeod*, as explained above, would seem to suggest that a judge should not try summarily a case of contempt to which he was a witness, while in *Ravnsborg* it was held that article 6 of the Convention did not apply, due to the fact that the proceedings relating to the fines were not criminal. None of these authorities could actually support the view adopted by the Supreme Court.

B. The Judgment of the European Court

Kyprianou eventually lodged an application with the European Court of Human Rights against the Republic of Cyprus, alleging violations of article 6 and article 10 of the Convention in relation to his conviction and imprisonment for contempt in the face of the court.[38] The applicant contended that he had not been heard by an impartial and independent tribunal, in violation of article 6 §1, that he had been presumed guilty as soon as he had objected to the Assize Court's conduct, in violation of article 6 § 2, and that the Assize Court failed to inform him in detail of the accusations against him, in violation of article 6 § 3.

The Government submitted that there was no violation of article 6 of the Convention. They argued that the proceedings for contempt in the face of the court in common law jurisdictions are not adversarial, in the sense that one person is opposed to another; rather, they concerned with the integrity of the judicial system, and as such they were an indispensable element of a fair trial. Thus, the judges of the Assize Court were not acting in their personal capacity in trying the applicant. Moreover, if contempt proceedings were to be tried before a different bench, undesirable consequences would occur; the judges

[36] *Ravnsborg* v. *Sweden*, Judgment of 23 March 1994, Series A, No. 283 – B; (1994) 18 EHRR 38.
[37] *R* v. *Calum Iain MacLeod*, 29 November 2000, CA.
[38] The complaints were declared admissible with the Admissibility Decision of 8 April 2003.

would have to testify and their credibility would have to be scrutinized by their peers. Consequently, the very integrity of justice was at stake. Furthermore, the Government submitted that the presumption of innocence of the applicant had been upheld, and that it was sufficient that the applicant was informed of the offences with which he was charged.

The European Court did not accept the submissions of the Cyprus Government.[39] To begin with, it was held that article 6 was fully applicable in the case, due to the criminal nature of the offence, a fact which the Government had not disputed. As a result, the Court ought to examine whether the Assize Court was an impartial tribunal, under article 6 § 1 of the Convention. According to the established case - law of the European Court, there are two aspects to the requirement of impartiality; the tribunal must be impartial, both from an objective and a subjective point of view. Thus, the tribunal must offer objective sufficient guarantees to exclude any legitimate doubts;[40] it must also be subjectively free of personal prejudice or bias.[41]

In the *Kyprianou* case, the court which convicted the applicant was constituted by the same judges, before whom the contempt was allegedly committed; this was enough to raise legitimate doubts, which were objectively justified as to the impartiality of the court. Moreover, the European Court did not accept the submissions of the Cyprus Government that the judges were not acting in their personal capacity; it held that judges are also human, and their personal feelings, as well as their perception and evaluation of the facts, may interpret a certain type of behaviour as contempt in the face of the court. The Court observed that there was an increasing trend in a number of common law jurisdictions acknowledging the need to use a summary procedure in respect of contempt of court sparingly, after a period of careful reflection and with appropriate safeguards. Consequently, there was a violation of article 6 § 1 of the Convention; the European

[39] App. 73797/01, *Kyprianou* v. *Cyprus*, Judgment of 15/12/2005 (first instance *Kyprianou* v. *Cyprus*, Judgment of 27 January 2004).
[40] See e.g. *Sander* v. *United Kingdom*, Judgment of 9 May 2000; (2001) 31 EHRR 1003, *Hauschildt* v. *Denmark*, Judgment of 24 May 1989, Series A, No 154; (1990) 12 EHRR 266.
[41] A tribunal is presumed to be free of personal prejudice or partiality. See *Le Compte, Van Leuven and De Meyere* v. *Belgium*, Judgment of 23 June 1981, Series A, No 43; (1982) 4 EHRR 1.

Court considered that the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.

Furthermore, the European Court held there was a breach of the principles of impartiality on the basis of the subjective test; the Court considered as proof of such lack of impartiality, the eagerness of the judges to try the applicant summarily for the criminal offence of contempt in the face of the court without availing themselves to other less drastic measures, the severity of the punishment, and the observations of the judges that their persons were insulted gravely. The Court was also not convinced that any defect in the proceedings of the Assize Court was rectified on the subsequent appeal to the Supreme Court, since the Supreme Court had declined to quash the decision, although it had the power to do so. Consequently, there was a breach of article 6 § 1 of the Convention, on the basis of both the objective and subjective tests.

At first instance, the European Court also found that there was a violation of article 6 § 2 of the Convention; it was held that the Assize Court had formed and expressed an opinion during its discussion with the applicant, which amounted to a conclusion that it considered him guilty of contempt in the face of the court. Therefore, the Assize Court violated the principle of the presumption of innocence. The European Court also held that there was a violation of article 6 § 3 of the Convention; the applicant was informed about the nature and cause of the accusations against him, only after the Assize Court had already formed its opinion that the applicant was guilty. In addition, the applicant was not informed of the material facts which influenced the court's decision, namely the interpretation that the court chose for the word 'ravasakia', the court's objections regarding the applicants voice and his gestures to the court, and the fact that according to the court's view, the applicant had accused the court of restricting him, and of '*making secret justice*'.[42]

[42] Under the circumstances, the Court did not consider that it was necessary to examine separately whether article 10 of the Convention had been also violated.

However, the Grand Chamber held that no separate issue arose under Article 6 § 2 or § 3 of the Convention. On the contrary, the Grand Chamber considered that a separate examination of the Applicant's complaint under Article 10 was called for, despite the fact that such had not been examined at first instance. It was held that, albeit discourteous, the Applicant's comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder. Accordingly, the Court considered that the penalty imposed was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel. The Court's finding of procedural unfairness in the summary proceedings for contempt served to compound that lack of proportionality. Thus, it was held that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression. The fact that the applicant only served part of the prison sentence did not alter that conclusion.

The *Kyprianou* judgment is of extreme importance for the law of contempt.[43] Prior to *Kyprianou*, the European Court had only dealt with the law of contempt in relation to the right to freedom of expression; following *Kyprianou*, the law of contempt must be also examined in relation to the right to a fair trial, under article 6 of the Convention, as well as the right of freedom of expression of an advocate under Article 10 of the Convention. The practice, whereby the judge deals with contempt in the face of the court - in the narrow sense of the term - himself, must be completely abandoned, since it violates article 6 § 1 of the European Convention. Such a violation will be found, even if the trial judge is held to be subjectively unbiased; the fact that the judge who convicts the contemnor is the same, before whom the offence was allegedly committed, is enough to raise objective legitimate doubts as to the impartiality of the court.

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[43] A. Emilianides, 'Contempt in the Face of the Court and the Right to a Fair Trial' (2005) 13 European Journal of Crime, Criminal Law and Criminal Justice 401-412.

II. The *Loucaides* Case

Section 44 of the Courts of Justice Law 14/60 was amended by Law 36(I)/2009 following the *Kyprianou* judgment.[44] The amended provision 44 stipulates that while Cypriot courts still have the power to punish for contempt committed in the face of the court, if the act constituting the contempt is committed against the person of the judge, they cannot adjudicate the matter personally, but they have to refer the matter, including the minutes of the Court, to the President of the Supreme Court who may appoint another judge to adjudicate the matter. The Court referring the matter to the President of the Supreme Court should inform the alleged perpetrator of the act or words which constitute contempt and of the penalties provided in the law (currently imprisonment for up to six months or a fine not exceeding €768.87, or both imprisonment and a fine); if the alleged perpetrator has apologized in a satisfactory manner, the Court may refrain from referring the matter.

If the judge appointed by the President of the Supreme Court in order to adjudicate the offence, holds that an offence has been committed, before imposing penalty, he/she shall balance between the need to safeguard the integrity of the judiciary on the one hand and the right of freedom of expression on the other. Especially with regard to advocates, Section 44 § 9 provides that words or behaviour by an advocate who appears before the Court and examines or cross-examines witnesses, or expresses statements or arguments on behalf of the party he/she represents, do not constitute a criminal offence, but could only constitute a disciplinary offence; such provision aims at safeguarding both the freedom of expression of the advocate, as well as the right to a fair trial of his/her client.

Supposedly this was the end of the matter, since the Cypriot legislator complied with the ratio of the European Court of Human Rights' judgment in *Kyprianou*, that no person should be a judge of his own cause in contempt proceedings and further specifically provided for the rights of advocates. However, a recent case gives rise to further

[44] See also K. Ebeku, 'Revisiting the Acquittal of 10 Policemen: Issues of Judicial Independence, Trial by Media and Fair Trial in Cyprus' (2010) 18 European Journal of Crime, Criminal Law and Criminal Justice 1-42.

reconsideration of the law of contempt when applied against advocates. The former Cypriot Judge of the European Court of Human Rights and currently advocate, Loukis Loucaides, was considered by a Superior District Court Judge to have behaved and expressed words in a manner giving rise to contempt in the fact of the court. The aggrieved Judge referred the case to the President of the Supreme Court who appointed the President of the District Court to adjudicate the case. Loucaides argued that the President of the District Court had no jurisdiction to adjudicate contempt proceedings against him; however, his objections were dismissed. Loucaides then filed an application for a writ of certiorari before the Supreme Court of Cyprus.

The Judge of the Supreme Court Photiou granted a certiorari and quashed the contempt proceedings.[45] It was held that since Loucaides was representing a client in the proceedings before the District Court, Section 44 § 9 of Law 14/60 precluded the application of criminal proceedings of contempt; the matter should be examined by the Disciplinary Board of the Cyprus Bar Association and accordingly the District Court lacked jurisdiction on the matter. It was further considered that Section 44 § 8 of Law 14/60 explicitly provides that the President of the Supreme Court may appoint a judge to adjudicate the alleged contempt in accordance with the procedure provided for in a procedural regulation issued by the Supreme Court; since the Supreme Court had never issued such procedural regulation, it was held that the appointment of the President of the District Court by the President of the Supreme Court was not legally permitted, and that accordingly, the President of the District Court lacked jurisdiction to adjudicate the matter.

Conclusion

It is submitted that while the *Kyprianou* judgment had finally put to sleep the practice that a judge can deal with contempt in the face of the court himself, the *Loucaides* judgment has ensured that advocates are not to be subject to criminal contempt proceedings for any acts or words expressed during representation of their clients; in such

[45] Application 45/2011, *Loukis Loucaides*, Judgment of 16/5/2011 (in Greek).

cases advocates are subject only to disciplinary proceedings by the appropriate disciplinary body. In addition, in his decision to grant leave for an application of certiorari, Judge Photiou had also considered additional parameters of the case, which, in view of his conclusions, he did not consider necessary to finally pronounce upon.[46] It was noted that there is no prosecutor in contempt proceedings, and that the judge essentially acts as both prosecutor and judge contrary to the fundamental principles governing a criminal trial. In addition the trial was to be held in accordance with the minutes prepared by the aggrieved judge which had been disputed by the accused; furthermore, the accused did not have the right to cross-examine witnesses with respect to the facts supporting the case against him. It is considered that these are serious issues which might influence the manner in which the law of contempt is exercised by the courts, also in cases which do not concern advocates.

In the past, the need to protect the judicial authority from any acts which interfere with the due administration of justice would be considered as the primary focus of the law of contempt; in a modern legal system, however, the protection of individual fundamental rights is considered to be equally important. The law of contempt must take into consideration the right of the accused to have a fair trial; in that manner

'*genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries*'.[47]

[46] Application 37/2011, *Loukis Loucaides*, Judgment of 23/3/2011 (in Greek).
[47] *Bloom* v. *State of Illinois* 391 US 94 (1968).