CHAPTER
7

Contempt of Court - Judicial Proceedings and Media Freedom

The right to a fair trial and the right to freedom of expression often seem to be in conflict. In different jurisdictions around the world there have been many cases in which media freedoms have been limited in order to facilitate the impartial administration of justice. Some instruments, such as the European Convention, even make "maintaining the authority and impartiality of the judiciary" a legitimate ground for limiting the right to freedom of expression.

The right to a fair trial – or to a fair hearing on any matter, such as a violation of rights – is a central and fundamental human right. It is guaranteed in Article 14 of the ICCPR, in Article 7 of the African Charter, and in most national constitutions. However, a *fair* hearing is understood to mean a *public* hearing, encompassed in the old adage that justice must not only be done, but be seen to be done. In the modern age, a public hearing does not only mean that the doors of the courtroom are open to the family and friends of the participants but also that media reporting is generally understood to be a crucial part of making a trial public.

The United States Supreme Court, in *Sheppard v Maxwell*,[247] discussed why publicity is good for the administration of justice:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, particularly in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism."[248]

In some jurisdictions courts have introduced live broadcasts of trials – such as the OJ Simpson trial in the United States and the Oscar Pistorius trial in South Africa. In the case brought to determine whether the Pistorius case could be broadcast, the High Court in Pretoria explained the value of broadcasting a criminal trial:

[247] United States Supreme Court: *Sheppard v Maxwell* 384 US 333, 350 (1966).
[248] *Id.*

> "My view is that it is in the public interest that, within allowable limits, the goings on during the trial be covered as I have come to decide to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings due to geographical constrains to name just one, are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon. ... Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, so to speak, will go a long way into dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings."[249]

The presumption is that the right to freedom of expression will prevail unless it is necessary to limit it for the purpose of ensuring the right to a fair hearing. This will be determined, as ever, by the three-part test: legitimate aim, prescribed by law, necessary in a democratic society.

Various Courts have made pronouncements on when they will limit public accessibility to watch legal proceedings.

- In Canada, in *Attorney General of Nova Scotia v MacIntyre*,[250] the Canadian Supreme Court said that "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance ... One of these is the protection of the innocent."[251]
- In New Zealand, the Supreme Court said that the primary position is that there should be public access, and then reasons should be given for why that is diverted from:

  > "There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness."[252]

- In the United States, courts have interpreted the common law to mean that there is a presumption of access to court documents (including those gathered in the investigation and not necessarily presented in evidence), and have held that "[t]he presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice.[253]

[249] South Africa High Court: *MultiChoice (Pty) Ltd v The National Prosecuting Authority* 2014 (1) SACR 589 (GP) at para 27.

[250] Canada Supreme Court: *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

[251] *Id* at para 187.

[252] New Zealand Supreme Court: *Rogers v Television New Zealand Limited* [2007] NZSC 91 at para 74.

[253] United States Court of Appeals: *United States v Amodeo* 71 F 3d 1044 (1995).

- In South Africa, the Constitutional Court has held that "[f]rom the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial."[254]

From these cases we can see that courts often accept that although "the default position" should be "one of openness", a balancing exercise is required to ensure that the interests of justice were served.[255]

Reporting Ongoing Criminal Investigations

There is an obvious potential danger in reporting on investigations that are current and continuing. Aside from the risk that media comment and revelations may prejudice future court proceedings there may be a risk that reporting will interfere with the investigation. Media coverage may tip off those being investigated, or it may reveal the techniques that the police are using.

Yet courts have become increasingly reluctant to apply blanket restrictions to reporting of investigations.

The ECtHR reached this conclusion in the case of *Weber v Switzerland*.[256] Franz Weber, a journalist and ecologist, had held a press conference criticising (and thereby revealing) details of a continuing investigation. The Swiss law prohibited making public "any documents or information about a judicial investigation" until the investigation had been completed. The Court found that because the proceedings under investigation had already been made public, there was no interest in maintaining their confidentiality. Hence it was not "necessary in a democratic society" to impose a penalty on Weber. In addition, the statements could not be seen as an attempt to pressure the investigating judge and therefore prejudicial to the proper conduct of the investigation, because the investigation was already practically complete.[257]

Reporting Court Proceedings – The Sub Judice Rule

The general rule is that court proceedings are open to the public – which includes the media. Fundamentally the argument in favour of public trials is that opening the proceedings to scrutiny will guarantee fairness. Hence "a fair and public hearing" is a phrase that cannot be taken apart – the fairness is dependent (in part) on the publicity. Although often the public is interested in the proceedings for cheap sensationalist reasons, having a public trial plays an important role in informing and educating the public about the workings of the justice system. It is for this reason that parties cannot decided unilaterally to exclude

[254] South Africa Constitutional Court: *Independent Newspapers v Minister for Intelligence Services* 2008 (5) 31 (CC) at para 41.

[255] *Id* at para 43.

[256] ECtHR: *Weber v Switzerland*, Application No 11034/84 (1990).

[257] *Id*.

the public, and courts may only do so if it "would not run counter to any public interest."[258]

Nevertheless, Article 14(1) of the ICCPR does provide:

> "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

This means that a court should retain some discretion in deciding whether to restrict public access. The Human Rights Committee has said that the grounds for excluding the public listed in Article 14(1) constitute an exhaustive list – there may be no other grounds for not allowing the public access to a trial. This applies equally to media access.[259] The burden of proof for showing that the public should be excluded lies with the state.[260]

The Human Rights Committee has observed that making trials public is "a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public."[261] This means that the courts must make publicly available information about the location and time of hearings and make adequate provision to accommodate the public (and the media).

There are, of course, intermediate steps that can be taken to fulfil the same interests, such as excluding the public for limited parts of a trial or imposing restrictions so that the media do not report certain names or facts.

The Canadian Supreme Court has emphasised that access to legal proceedings will only be prohibited in strict circumstances:

> "Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. … Public access will be barred only when the appropriate court … concludes that disclosure would subvert the ends of justice or unduly impair its proper administration."[262]

[258] ECtHR: *Håkansson and Sturesson v Sweden*, Application No 11855/85 (1990) at para 66.

[259] Human Rights Committee: General Comment 13 at para 6.

[260] Human Rights Committee: *Miguel Angel Estrella v Uruguay*, Communication No 74/1980 (1980) at para 10.

[261] Human Rights Committee: *Van Meurs v The Netherlands*, Communication No 215/1986 (1990) at paras 6.1-6.2.

[262] Canada Supreme Court: *Toronto Star Newspapers Ltd. v Ontario* [2005] 2 SCR 188 at paras 3-4.

"Trial by media"

One of the greatest concerns about media coverage of court proceedings is the danger of "trial by media" – in other words, that biased or ill-informed coverage will affect the outcome of a court case. This concern is particularly acute in criminal cases where an essential element of a fair trial is the presumption of innocence – the principle that no one is to be regarded as guilty of a crime until the prosecution has proved its case.

This places a considerable ethical burden on journalists to report accurately and responsibly. It also places a burden on the courts to ensure that media coverage does not prejudice the fairness of proceedings. Ultimately, of course, the courts may feel it necessary to intervene to restrain irresponsible reporting.

However, this does not mean that all reporting and media comment is prohibited, beyond a stenographic reproduction of what happens in court. As the ECtHR has observed:

> "Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large. Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement … that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them."[263]

The ECtHR also recognises that the possibility of the media influencing a court decision will vary depending on whether that decision is made by a jury (or lay judges) or professional judges. In the former situation, it may be more legitimate to require neutrality in the reporting of a case.[264]

If the case concerns a matter of particular public interest, however – for example if the defendant is a politician as in *Worm v Austria*[265] – the public have a particular right to receive different views on the matter:

> "Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large. Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual (references omitted)."[266]

In other words, the general principle about greater scrutiny of the actions of politicians applies in legal cases, just as it does in relation to privacy. But politicians are still entitled to a fair trial and media are not entitled to make "statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial."[267]

The public interest applies more broadly than just to politicians. One of the first such

[263] ECtHR: *Worm v Austria*, Application No 22714/93 (1997) at para 50.

[264] *Id* at para 54; ECtHR: *Tourancheau and July v France* Application No 53886/00 (2005) at para 75.

[265] ECtHR: Worm v Austria *supra* note 263 at para 50.

[266] *Id*.

[267] *Id* at para 50.

cases considered by the ECtHR was that of *The Sunday Times v United Kingdom*.[268] In that case, the newspaper was challenging a court injunction restraining it from commenting on the responsibility of the company responsible for the drug Thalidomide, which had caused birth deformations, because there were continuing settlement negotiations. The Court applied its three-part test and explicitly ruled out the state's contention that it was "balancing" the right to freedom of expression and the right to a fair trial:

> "The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."[269]

In this case, the Court concluded that reporting was clearly in the public interest:

> "In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared that its diffusion would have presented a threat to the 'authority of the judiciary'."

Another factor to consider is the degree of prejudice that would result with publication. In South Africa, the Supreme Court of Appeal held that this degree of prejudice is central to this issue:

> "In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place."[270]

Nevertheless, courts have been generally disinclined to interfere with media reporting. In an American case, the Supreme Court refused to uphold a ban on reporting confessions said to have been made by a defendant in a murder case. It reasoned that the protection such a ban might offer would not justify prior censorship. Word of the confessions would probably spread anyway – and who is to say what influence this would have on jurors.[271] The point holds even more strongly in the age of the Internet.

Interestingly, the former South African Deputy Chief Justice, Dikgang Moseneke has said that the *sub judice* rule in South Africa is virtually extinct:

> "But how, you might ask, can a statement outside of court affect the outcome of a case in South Africa, where we have no jury system? The answer must surely be that it rarely could, and that the sub judice rule, and its relevance in South Africa, is, at the very least, on the verge of extinction.
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> There is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want

[268] EECtHR: *Sunday Times v United Kingdom supra* note 84.

[269] *Id* at para 65.

[270] South Africa Supreme Court of Appeal: *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA) at para 19.

[271] United States Supreme Court: *Nebraska Press Association v Stuart* 27 US J39 567-67 (1976).

> a system in which the judicial system is 'shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone'. We want a system in which the public trusts that the judiciary is acting according to the 'time-honoured standards of independence, integrity, impartiality and fairness.' For that to happen, we must, as far as reasonably practicable, create means for the media to access, observe and report on the administration of justice."[272]

Protection of Participants' Privacy

There are a number of other grounds on which courts may limit reporting of proceedings. Most obviously – and uncontroversially – courts may limit the naming of children or the victims of certain types of crime (notably those of a sexual nature).

However, although the media will generally accept the validity of such restrictions and comply with them, there may nevertheless be exceptional cases. One such arose in New Zealand, where a court ordered the suppression of the name of a witness in a trial, as well as the substance of the evidence, on the basis that the evidence was hearsay. There was considerable media speculation on the nature and content of the suppressed evidence. The Court of Appeal took as its starting point that "in the absence of compelling reasons to the contrary, criminal justice is to be public justice[273]." However, when the privacy of the victims of crime was concerned – as in this case – they can be protected against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The original court order had become counter-productive in that it had promoted speculation on the content of what had been suppressed:

> "The suppression might itself 'promote distrust and discontent'. That speculation is not in the interests of the administration of justice and is itself a reason supporting the revoking of the prohibition order."[274]

So, although the Court of Appeal concluded that the ban was mistaken, this was only because it had potentially discredited the justice process, not because freedom of expression took precedence.

What about the privacy of an accused person?

Bear in mind that a person who is accused of a crime is still regarded as innocent. Bear in mind also the danger of prejudicing a fair trial. However, in a case regarding an alleged breach of a defendant's privacy, the ECtHR ruled for the newspaper that had been fined by a domestic court for publishing a photograph of the accused.

B was a right-wing extremist, publicly known before his prosecution for a series of letter-

[272] The speech can be found here: http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf.

[273] New Zealand Court of Appeal: Television New Zealand v R (1997) LRC 391.

[274] *Id*, 396.

bombings. *News* magazine published several photographs of B, under the headline "The Mad World of Perpetrators" – which seemed to imply B's guilt. The magazine was fined.

The ECtHR found that there were reasons justifying the publication of the photographs. The case was a matter of major public interest, while B was already a public figure before the bombings case. Only one of the published pictures, of B's wedding, arguably disclosed details of his private life.[275]

It is important to underline that restrictions on reporting, when justified, are *exceptions* to the fundamental principle of openness in court proceedings. The South African Supreme Court of Appeal has ruled:

> "[C]ourt records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified."[276]

In the United Kingdom, the guardian of a child applied for an injunction to prohibit the publication of the child's mother's surname in her murder trial as well of other information that would enable the child to be identified and so cause harm. The Court highlighted that "the importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms",[277] and ruled that the injunction would not be permissible:

> "[I]t is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."[278]

Criticism of Judges

The narrow interpretation of protecting the dignity of the court has often been understood to mean that it is contempt of court to criticise the judge. However, as early as 1877 in South African courts have recognised that legitimate criticism of the judiciary should be allowed:

> "Although no scandalous or improper reflection on the administration of justice can be allowed, everyone is undoubtedly at liberty to criticise the conduct of Judges on the Bench in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded, that the Court has power to interfere."[279]

[275] ECtHR: *News Verlags GmbH & CoKG v Austria*, Application No 31457/96 (2000).

[276] South Africa Supreme Court of Appeal: *City of Cape Town v South African National Roads Authority Limited* 2015 (3) SA 386 (SCA) at para 47.

[277] United Kingdom House of Lords: *In re S* [2004] UKHL 47 at para 29.

[278] *Id* at para 34.

[279] South Africa High Court: *In re Phelan 1877, 9*.

In one Australian case, a newspaper attacked the integrity and independence of the Australian Industrial Relations Commission, describing its members as "corrupt labour judges." The newspaper's publisher was charged with "bring[ing] a member of the Commission into disrepute."

The Federal Court of Australia found that truthful and fair criticism of a court or judge is not contempt, even if it impairs public confidence:

> "[I]t is no contempt of court to criticize court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. It is not necessary, even if it be possible, to chart the limits of contempt scandalizing the court. It is sufficient to say that the revelation of truth - at all events when its revelation is for the public benefit - and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence."[280]

Although many jurisdictions have recognised the need for the criticism to be fair, this does not automatically require that the manner in which the criticism is expression must be moderate. In Zimbabwe, in *In Re Chinamasa*,[281] the Supreme Court stated that:

> "The use of colourful, forceful and even disrespectful language may be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence. People should not have to worry about the manner in which they impart their ideas and information."[282]

A Kenyan example involves criticism of a judge in a particular case – albeit not by the media but a lawyer outside court. Pheroze Nowrojee, an advocate, wrote to the registrar of the High Court protesting at the delay of the judge in deciding a motion in an important case amounting, he argued, to a refusal to adjudicate. The Attorney-General applied to the High Court for an order against Nowrojee for contempt.

The Court found in the advocate's favour. The judge should only be protected against "scurrilous abuse," whereas there was substance to the concern expressed in Nowrojee's letter:

> "Such abuse must be distinguished from healthy comment and criticism, and the court must scrupulously balance the need to maintain its authority with the right to freedom of speech. The offence must be proved beyond reasonable doubt and it is a jurisdiction to be exercised only in the clearest cases of necessity in the interests of the administration of justice and the protection of the public from the result of undermining the authority of the court."[283]

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[280] Australia Federal Court: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at para 5.

[281] Zimbabwe Supreme Court: *In Re Chinamasa* 2000 (2) ZLR 322 (S).

[282] *Id*. This case was cited recently by the Swazi Supreme Court *in Swaziland Independent Publishers (Pty) Ltd and Editor of the Nation v the King* (73/13) [2014] SZSC 25.

[283] Kenya High Court: *Republic v Nowrojee* Miscellaneous Criminal Application No 461 of 1990 at para 6.

Scandalising the Court

In the Indian case of *EMS Namboodivipad* v *TN Nambiar*,[284] the Chief Minister of Kerala made a general statement accusing judges of class bias, unconnected to any specific case. The Supreme Court of India upheld his conviction on the basis that "the likely effects of his words must be seen and they have clearly the effect of lowering the prestige of Judges and Courts in the eyes of the people."[285] The Indian Supreme Court reached a similar conclusion in the case of *Sanjiv Datta*, who filed an affidavit critical of the court in a broadcasting case: "there is a danger of the erosion of the deference to and confidence in the judicial system…and an invitation to anarchy."[286]

However, the South African Constitutional Court has evaluated the offence of scandalising the court against the provisions of that country's Bill of Rights. In *S v Mamabolo*,[287] the Court concluded that there was a very narrow scope for a conviction for scandalising the court, weighed against the Constitutional values of accountability and openness.

In the same case, the Constitutional Court held that the threshold for conviction is extremely high:

> "The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury, not a private delict; and its sole aim is to preserve the capacity of the judiciary to fulfil its role under the Constitution. Scandalising the court is not concerned with the self-esteem, or even the reputation, of judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice."[288]

In an important decision on a case from Mauritius, the Privy Council quashed the conviction and sentence of a newspaper editor who had criticised the Chief Justice. In doing so it narrowed the scope of the offence of scandalising the court. If judges were unfairly criticised "they have to shrug their shoulders and get on with it." Although the Privy Council said that there was a strong case for abolishing the offence it was a matter for the Mauritian legislature. However, it would no longer be necessary for the journalist to demonstrate that he or she had acted in good faith. Rather, the prosecution will be required to prove beyond a reasonable doubt the bad faith behind the publication.[289]

As might be expected, the United States offers particularly strong protections of freedom of expression in criticism of judges. The Supreme Court has enunciated a "clear and present

[284] India Supreme Court: *EMS Namboodivipad v TN Nambiar* (1970) 2 SCC 325.

[285] *Id*, 2024.

[286] India Supreme Court: *In Re: Sanjiv Datta and Others* [1995] 3 SCR at para 460.

[287] South Africa Constitutional Court: *State v Mamabolo* 2001 (3) SA 409 (CC).

[288] *Id* at para 45.

[289] United Kingdom/Mauritius Privy Council: *Dhooharika v The Director of Public Prosecutions* (Mauritius), Privy Council Appeal No 0058 of 2012 (2014).

danger" test (echoed in recent Canadian jurisprudence), which requires that "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[290] In *Pennekamp et al v Florida*,[291] the Court considered a series of articles criticising Florida judges. Although the articles contained factual errors and "did not objectively state the attitude of the judges," they did not constitute a clear and present danger to the administration of justice. The State of Florida had hence not been justified in finding the journalists in contempt of court.[292]

The ECtHR has dealt with several cases, not entirely consistently, and with generally less liberal conclusions as regards freedom of expression. In its first such case, *Barfod v Denmark,*[293] the Court considered the application of a journalist convicted of defamation for questioning the ability of two lay judges to reach an impartial decision in a case against their employer, the local government. The Court found no violation of freedom of expression, concluding that the article:

> "[W]as not a criticism of the reasoning in the judgment…but rather…defamatory accusations against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence."[294]

In *Prager and Oberschlick v Austria*,[295] the Court reached a similar decision in relation to an article of general criticism against judges of the Vienna Regional Criminal Court, some of whom were descried as "arrogant" and "bullying". The ECtHR again declined to find a violation of Article 10, because of "the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial."[296]

In *De Haes and Gijsels v Belgium*,[297] by contrast, the Court found in favour of the applicants, who had been convicted of contempt of court, following a series of articles criticising a court decision in a children's custody case. It tried to differentiate this case from *Prager and Oberschlick:*[298]

> "Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance; in that respect the present case differs from the *Prager and Oberschlick* case."[299]

De Haes and Gijsels were "proportionate" in their criticisms and had offered to demonstrate the truth of their allegations. Even while finding in their favour, however,

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[290] United States Supreme Court: *Bridges v California*, 314 US 252 (1941).

[291] United States Supreme Court: *Pennekamp et al v Florida*, 328 US 331 (1946).

[292] *Id*.

[293] ECtHR: *Barfod v Denmark*, Application No 11508/85 (1989).

[294] *Id* at paras 34-25.

[295] ECtHR: *Prager and Oberschlick v Austria* Application No 15974/90 (1995).

[296] *Id* at para 37.

[297] ECtHR: *De Haes & Gijsels* Application No 19983/92 (1997).

[298] ECtHR: *Prager and Oberschlick v Austria supra* note 295.

[299] *De Haes & Gijsels supra* note 297.

the Court underlined the priority in protecting public confidence in the judicial system:

> "The courts — the guarantors of justice, whose role is fundamental in a State based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded".[300]

More recently, the ECtHR overturned the conviction of a lawyer for defamation of two investigative judges in an article the lawyer had written in *Le Monde* on the grounds that it unjustifiably infringed freedom of expression. The Court took into account that the applicant was a lawyer, that he was making a contribution to a debate on a matter of public interest, the nature of the remarks and the circumstances, as well as the sanction that had been imposed.[301]

[300] *Id* at para 37.

[301] ECtHR: *Morice v France* Application No 29369/10 (2015).