THE LAW COMMISSION

SCANDALISING THE COURT: SUMMARY OF CONCLUSIONS

INTRODUCTION

1. Scandalising the court is a form of contempt of court. It consists of the publication of statements attacking the judiciary (for example accusing a court or judge of being corrupt) and likely to undermine the administration of justice or public confidence therein. The statements need not have been published for that purpose; but criticism in good faith, as part of a discussion of a question of public interest, does not fall within the offence. Prosecutions for this form of contempt are uncommon: the last successful one was in 1931.

2. On 10 August 2012 we published Consultation Paper No 207, Contempt of Court: Scandalising the Court, asking whether the offence should be retained, abolished, replaced or modified. We received 46 responses, of which 32 agreed with the proposal that the offence of scandalising the court be abolished without replacement and 9 considered that there was a need for an offence of this kind, whether in the form of scandalising or of a statutory replacement. At a seminar for Court of Appeal and High Court judges held on 15 October 2012, those present supported abolition. However, some substantial arguments have been advanced against abolition, in particular by Sir Sydney Kentridge QC.

3. An amendment to the Crime and Courts Bill has now been proposed,[1] to abolish the offence.

THE ARGUMENTS

Freedom of expression; human rights

4. The main argument for abolition of the offence is based on freedom of expression. Sir Sydney Kentridge QC emphasises that the importance of freedom of expression lies in promoting the personal fulfilment of those who express themselves, the testing of ideas through open debate and the flow of useful information about government. These valuable purposes, he argues, may be served by most forms of criticism, but not by vulgar abuse or false accusations of misconduct. Hence he argues there is still a need for an offence of scandalising to address those forms of publication.

5. We do not believe that an offence criminalising such statements is the answer. The law does not generally regard vulgar abuse as important enough to punish, and offers other means of dealing with false accusations, such as actions for libel. Restraints even on wholly unjustified criticisms can have a chilling effect, discouraging justified criticisms.

[1] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0049/amend/su049-ic.htm (last visited 3 Dec 2012).

6. There is a great deal of abusive material attacking judges. The general view of the judges who responded to our consultation was that this does little harm, as most of it is too extreme to be believed, and that an offence such as scandalising which seeks to suppress it may do greater harm than the material itself.

7. Sir Sydney Kentridge QC further argues that our proposals for abolition are unduly influenced by the North American approach to freedom of expression, which is significantly different from that in the European Convention on Human Rights.

8. We acknowledge the difference: in the United States and Canada the offence has been held to be unconstitutional. The consultation paper argues that the European Court of Human Rights is unlikely to hold that the offence is inconsistent with the Convention but might disapprove of particular prosecutions. A domestic court would adopt the same approach, as it is bound to interpret the offence consistently with the Convention.

9. The elements of the offence lack certainty in definition but it is unlikely that a court would hold that the offence is incompatible with article 7 of the Convention or fails to meet the standard of being "prescribed by law" in article 10. A court would probably disapprove of prosecutions in marginal cases rather than of the existence of the offence.

10. Another argument advanced for abolition is that, if an offence has not been used for 80 years, it may not be regarded as truly "necessary". Since the offence restricts freedom of expression, in order to be compliant with article 10 it must be "necessary" in a democratic society for maintaining the authority and impartiality of the judiciary and protecting the reputation or rights of others. However, the argument based on lack of prosecutions is not conclusive of whether the offence is necessary in that sense. Sir Sydney Kentridge QC points out that the reason for the absence of prosecutions could be that the deterrent is effective, and that the offence could have symbolic value, as marking out the boundaries of acceptable behaviour.

11. The offence is clearly not an effective deterrent, as shown by the volume of abusive online material. Nor is it well known enough to have symbolic value. We do not believe that it significantly influences journalistic practice: rather, current journalistic practice influences what criticisms are regarded as acceptable discussions of matters of public interest.

Other considerations

12. We do not believe that the existence of this offence or prosecutions for it would increase public respect for judges.

    (1) The very fact that an offence of insulting judges was created and is now enforced by judges promotes a perception that it is a self-serving exercise in which the judges protect their own.

    (2) Silence enforced by an offence is likely to create more ill-feeling than the original publication, not least the suspicion that judges are engaged in a cover-up and unfairly suppressing freedom of expression.

(3) A prosecution publicises the offending allegations to a wider audience by bringing them back to public attention after memory of them has begun to fade.

(4) Web posts frequently accuse judges of conspiracies or illegitimate social engineering. Prosecuting the authors, if they go to trial, would give them a platform on which to vent these allegations further.

(5) Where the contemnor was an unsuccessful litigant, the contempt proceedings would be used to re-litigate the issues in the original proceedings.

(6) In cases where an issue is raised as to whether the allegations are true, the proceedings could turn into a trial of the judge. They might also result in the public revelation of personal matters which the judge would prefer to keep private.

13. The offence of scandalising the court arose in a climate of deference to authority figures which has since declined. This change is unlikely to be reversed by coercive measures, which, almost by definition, would not be backed by public opinion.

REPLACING SCANDALISING

14. In the consultation we raised the question whether possible replacements for scandalising ought to be adopted. Two such replacements are:

(1) a civil procedure, where a judge could order a post to be taken down or prohibit further publication of the same material;

(2) an offence of publishing false allegations of judicial corruption.

We consider that these would be subject to some of the same objections as the current offence, such as the perception that judges are protecting their own and the appearance of censorship.

EXISTING OFFENCES OFFERING PROTECTION AGAINST ABUSIVE PUBLICATION

15. Many publications and communications which might currently amount to the offence of scandalising also constitute offences against one or more of the following:

(1) Public Order Act 1986 sections 4A and 5 (threatening, abusive or insulting words or behaviour);

(2) Communications Act 2003 section 127 (sending offensive electronic communications);

(3) Malicious Communications Act 1988 section 1 (sending offensive or false communications);

(4) Protection from Harassment Act 1997;

(5) In extreme cases assisting and encouraging an offence under the Offences Against the Person Act 1861.

In addition to these criminal offences there is the possibility of a civil action for defamation.

CONCLUSION

16. In conclusion, we do not argue that abolition of the offence is required in order to comply with the European Convention on Human Rights. We do however believe that the existence of the offence is unnecessary given that the more serious cases will generally be covered by other offences. On considering the responses we received on consultation from the public and in particular from the judges, we also believe that any attempt to enforce it would be counter-productive. Accordingly we consider that its retention serves no practical purpose, and support the amendment to the Crime and Courts Bill abolishing scandalising the court.

17. The amendment does not affect other forms of contempt, such as contempt in the face of the court or statements that may prejudice proceedings. It only extends to England and Wales.