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# DOES POLITICAL CRITICISM OF JUDGES DAMAGE JUDICIAL INDEPENDENCE?

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A Policy Exchange Judicial Power Project Paper

## About the Author

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## About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

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## Does Political Criticism of Judges Damage Judicial Independence?

Many elements in judicial independence are remote from the present topic—for example, security of tenure, sufficiency of remuneration, and incapacity of judges to hold Cabinet or other positions in the executive or legislature. But there is another element of judicial independence. In exercising judicial duties judges are subject to no authority but the law—not their personal desires, not the pressure of their colleagues, not the demands of public or commercial or political opinion, not the wishes of any outside group. From this idea flowed the provision in medieval statutes that there should be no messages from the monarch to a judge concerning any point in controversy before that judge.<sup>1</sup> Yet it is said that criticisms of judges by politicians damages their independence. But are secret, private messages from a monarch with extensive powers of dismissal comparable with public criticism from politicians whose limited powers of dismissal are very unlikely to be exercised?<sup>2</sup> That is the issue discussed below.

There are two types of conduct which politicians might criticise—judicial behaviour out of court and judicial behaviour in court.

How far is it possible to criticise the writings, speeches or other activities of judges off the bench? There can be no restraints beyond those created by the general law (principally the law of defamation). In 1959 Sir Patrick Devlin, then a judge of the Queen’s Bench Division, delivered his Maccabaeen Lecture on “Morals and the Criminal Law”. The lecture was attacked by many people. In particular, it was attacked by HLA Hart—not offensively, but strongly and repeatedly. Despite his status as a sitting judge, Sir Patrick Devlin could not and did not protest about this. He himself said, *de haut en bas*, in a bitter-sweet way, that he had been “denounced in rather strong language by the distinguished jurist Professor Hart in a piece which has been given a place among the masterpieces of English legal prose.”<sup>3</sup>

There is a special kind of extra-curial writing—that in which judges comment on their own cases. One school of thought is that neither judges nor counsel should ever comment on their own cases. This purism is unpopular. And a total ban would truncate judicial scholarship, which in some cases might be a pity. But one extreme example of the non-purist course comes again from Lord Devlin. In 1985 he published *Easing the Passing*. It discussed the much-publicised trial over which Devlin J had presided 28 years earlier. That trial resulted in the acquittal of Dr John Bodkin Adams on a charge of murdering an elderly female patient for

an inheritance. It was true that “the event had crossed the border which divides current affairs from history”.<sup>4</sup> The book was superbly written. But it was seen as a scandal. Like many scandals, however, it is riveting. It was seen as scandalous because of the contempt it revealed for prosecuting counsel, the Attorney-General Sir Reginald Manningham-Buller, later Viscount Dilhorne. For example, he and Dr Adams were described as “two of the most self-righteous men in England”.<sup>5</sup> Now, Viscount Dilhorne was never a popular figure, though he is probably a substantially underrated one. But Lord Devlin was attacked for publishing when his deceased victim could no longer defend himself.

What of attacks on judges for their work in court? They understandably dislike these attacks. They usually resent them. Yet they dish out many attacks of their own. They can and do attack the conduct of the parties, the credibility of the witnesses, and the competence of counsel. In appeals they attack the skill of other judges hearing the appeals, or of those from whom the appeal comes. They attack the opinions of writers cited to them. They attack those responsible for the drafting of enactments and contracts. Occasionally they attack the wisdom of enactments. Now, many of these attacks are urbane or courteous. Many stay within the boundary of what is legitimately called for by the necessities of the occasion. But some do not.

Sometimes it is said that the work of judges should not be criticised because it is not open to them to defend themselves. It is often said that persons holding the office of Lord Chancellor (in its pre-2005 manifestation) or Attorney-General or Chief Justice have become increasingly reluctant to defend judges under fire. Sometimes judicial victims stand out against the spirit of the age. They can expect little support from leaders of the Bar and solicitors who think that if the spirit of the age is on the march, they are barking out the orders. But if judges are attacked, and no institutional defenders are to be found, must they submit meekly?

There are defensive techniques available to the judges.

One technique is for the judge to rely for support on academic lawyers or politicians or journalists. But to sup with these allies requires a long spoon. Their support may emerge spontaneously. It is best, though, not to solicit it.

Another technique is an anonymous response by the judge. In 1958, in the *Criminal Law Review*, the distinguished Cambridge criminal lawyer, JW Cecil Turner, attacked the decision of the Court of Criminal Appeal, sitting five judges, in *R v Vickers*.<sup>6</sup> It was a decision on the arcane topic of intent in murder. Later that year an article appeared stating that *R v Vickers* had been quite “severely

criticised” by Turner. It defended *R v Vickers* and criticised Turner. The first footnote stated: “The author of this article regrets that he is compelled to remain anonymous. Mr JWC Turner has, however, been informed of the views expressed in this article.”<sup>7</sup> According to RFV Heuston, the anonymous article was “widely believed to have been written” by Mr Justice Devlin—who happened to be a member of the Court of Criminal Appeal which decided *R v Vickers*.<sup>8</sup>

Another technique has been employed in Victoria recently. It involves recourse to the law of contempt. It arose out of a guilty plea in 2016 by Sevdet Besim to having done acts in preparation for, or planning, a terrorist attack. In Australia Anzac Day—the day of the doomed landings at Gallipoli on 25 April 1915—is a day of solemn commemorations. There are marches and religious ceremonies. In big cities like Melbourne these commemorations attract large crowds. Besim’s plan was to drive a car into a randomly selected police officer at the 2015 Anzac Day commemorations in central Melbourne. His goal was to kill or seriously injure the officer, behead the officer, seize the officer’s gun, and use it to kill or seriously injure as many people in the area as possible.

The maximum penalty is life imprisonment. The accused was sentenced to ten years’ imprisonment. A non-parole period of seven years and six months was fixed.

The Commonwealth Director of Public Prosecutions embarked on an uncommon and difficult course. She appealed to the Victorian Court of Appeal against the sentence on the ground of manifest inadequacy. The argument took place on 9 June 2017. It was heard with another appeal of the same kind. On 23 June the Court of Appeal allowed the Crown appeal and increased the sentence to 14 years’ imprisonment, with a non-parole period of ten years and six months. Whether that sentence was repressively harsh, risibly light, or probably correct is not the present concern.

During oral argument on 9 June, the Chief Justice apparently said there was an “enormous gap” between New South Wales and Victoria in sentencing for terrorism offences. She said that was because in New South Wales less weight was put on the personal circumstances of the offender and a more “tough on crime” approach was taken. Another judge called the gap “extremely worrying”.

On 13 June—that is, while judgment was still reserved—a newspaper called *The Australian* published an article about the appeal. It was headed: “Judiciary ‘Light on Terrorism’.” It referred to statements attributed to three Federal Ministers.

The Registrar of the Court of Appeal immediately sent letters to the Commonwealth Attorney-General, to the publisher and editor of the newspaper and to the responsible journalist. It “required” the attendance in court of the individuals or their legal representatives on 16 June to make submissions as to why they should not be referred to the relevant official for prosecution for contempt.

What the Ministers said, as reported, was attacked almost immediately. There is nothing sinister about this. It is characteristic of liberal democratic debate. To assert a point of view is to invite argument from those who oppose it. In fact, most of the attackers were either leading members of the party opposing the Ministers’ party, or professional organisations of lawyers, including the judges’ trade union, the Judicial Conference of Australia. This reaction tends to weaken the idea that judges are not adequately defended and hence should be immune from criticism.

Before 16 June, the Prime Minister and three other Ministers expressed support for the beleaguered Ministers. These supporters included the Attorney-General—who is shortly to come here to London as High Commissioner, and who is an eloquent advocate of free speech. The supporters spoke of the expectation that democratically elected representatives would exercise a right to raise legitimate community concerns, including criticism of the judiciary.

Shortly before 16 June, the three Ministers stated in public that they stood by their statements.

The Court of Appeal hearing on 16 June was streamed in a live broadcast online. This was the first occasion on which this had happened. What took place on 16 June is recorded in a judgment of the Court on 23 June indicating that it would not procure the institution of contempt proceedings.<sup>9</sup> It is from that that the following account is taken.

Proceedings on 16 June began with a statement being read out. It said in part:<sup>10</sup>

Given that the court’s decisions in both cases were pending, the court is concerned that the attributed statements were impermissible at law and improperly made in an attempt to influence the court in its decision or decisions. Further, the court is concerned that some of the statements purported to scandalise the court. That is by being calculated to improperly undermine public confidence in the administration of justice in this state in respect of the disposition of the appeals that the court has presently under consideration.

The court was further concerned that the attributed statements were made by three ministers of the crown. Those statements on their face:

Fail to respect the doctrine of separation of powers;

Breach the principle of sub judice; and

Reflect a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

...

Before taking appearances the publication in question makes it necessary, in the circumstances, to say the following in the strongest terms.

The parties in both cases, on both sides, namely the Director, Besim and MHK should comprehend that this court has not been and will not be affected by the statements at all, made in the Australian article or elsewhere in the media.

Those parties should be assured and confident that nothing that has been said in the article or about the article can have an effect on the decision or decisions the court will make. We particularly emphasize to the public that it should be assured and have the utmost confidence that the court will decide these matters independently, impartially and in accordance with the rule of law.

Notwithstanding that the article and associated commentary will not impact on our decision making process or any decision itself, the public should understand that that is not the end of the matter. There are important principles of law that arise when anyone speaks about a court's decision or its conduct during a hearing, before the decision is delivered.

We would add, in the strongest terms, the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.

This morning is not an occasion to debate whether the court's concerns are justified at law. That is, it is not to debate whether

contempt has been committed. That may be for another court to determine. Rather, it is an opportunity for those involved to inform the court of any relevant matters they wish before we determine whether to refer the publication for prosecution for contempt of court.

Despite that last paragraph, it will be seen that the Court of Appeal did debate whether contempt had been committed. Indeed it seemed to find repeatedly that it had been committed.

The Ministers were in a very difficult position. On the one hand, they were Victorians and Victoria has been affected recently to a considerable degree by violent crime, and to a lesser degree by terrorism. It is usually regarded as permissible, indeed as right and proper, for politicians to debate matters of public interest and communicate with their constituents about these matters. On the other hand, the Federal Government had a majority of only one in the House of Representatives and was very much in a minority in the Senate. Ordinarily there would be no election before mid-2019. For months before June 2017, the ranking of the Opposition in opinion polls suggested that it would win any election easily. If the Ministers had been charged with contempt, they would probably have stood aside, or been forced to stand aside, from Ministerial office. If they were convicted, even if they filed appeals, they would have had to leave Parliament. By-elections would have been necessary. In Australia, governments generally do badly in by-elections. The Ministers might have lost their seats. The government had support from a small number of independents, but that support might have dissolved. A general election might have ensued. It could have been disastrous from the government's point of view. Conviction would also have gravely hampered any future plans which the Ministers, or the newspaper people, had to travel to places like the United States. This may explain the series of humiliating and grovelling retreats, which, as will be seen, the Ministers, and to a much lesser extent, the newspaper, were in effect forced to execute— explanations, regrets, excuses, withdrawals and apologies.

What did the Court of Appeal actually say which provoked the Ministers' statements? And what did the Ministers actually say which provoked the reaction by the Court of Appeal? Strangely, these are very hard questions to answer. The Court quotes a few of the offending Ministerial phrases in passing. But it does not at any stage appear to have conveyed to the interested public in a full and coherent way, in context, what the Ministers said or what the newspaper reported. Was it perhaps thought that their language was too horrid to be repeated? Nor did the Court of Appeal set out the passages in the transcript on 9 June on which the Ministers' statements were based (securely or

not). Yet it seems that one or more of the Ministers said that the judges were “divorced from reality” and were “hard-left activist judges”, conducting “ideological experiments”, who had “eroded any trust that remained in our legal system”. The substantial silence of the Court of Appeal about what was actually said by it and by the Ministers is not compatible with the idea that litigation is to be conducted in public. It is not compatible with the idea that intelligible reasons must be given for decisions. It is not compatible with the idea that reasons must be capable of being read in their own right without having to go to other sources like a newspaper article that might not be easy to find or a court transcript that may or may not be available. The Court of Appeal’s reasons are partial in the sense that they are neither complete nor free-standing. Thus, they are not easy to follow or evaluate.

The Ministers can perhaps be criticised on three counts. First, they did not consult any primary source revealing what the Court of Appeal judges said on 9 June. However, as will be seen, had they tried to consult the best source—the transcript—they would have been told that it was not available. It remained unavailable at least until after the article was published. Secondly, what the Ministers said did not rise to the heights of Gladstonian gravitas. But can one say worse of it than that for the most part it was a collection of clichés—tired and demotic? For example, for judges to be described as “divorced from reality” is scarcely novel. Indeed, the phrase is so hackneyed as to carry no sting whatever. Some would wear as a badge of pride the title “hard-left activist judge”. Indeed, it is truthful to call some judges that, though people do not normally think in this way of the Victorian Court of Appeal, for more reasons than one. The proposition that among members of the public there is little trust in the legal system is to some extent true. Those who lack that trust often have, by their lights, powerful grounds for their position. To say that the Court of Appeal had eroded that trust depends on knowing precisely what they said—a fact which the Court chose not to reveal. Thirdly, it might have been better for the Ministers to have abstained from comment until the appeal was over. What judges say in judgments matters more than what they say in debates with counsel. Similar criticisms can perhaps be made of the newspaper people, though they might be thought very unfortunate so far as they were only reporting what was, if not what Talleyrand would have called an event, at least a piece of news.

The opening contribution made to the hearing by the Solicitor-General for the Commonwealth was to read a statement by the Ministers. They said they intended to make legitimate comment but not to undermine public confidence in the judiciary. They said they did not intend to suggest the Court would not apply the law or to pressure the Court. They expressed regret for their language.

This was not good enough for the Court of Appeal. Its 23 June judgment stated that in argument on 16 June it repeatedly noted that there was no apology or retraction.

The Solicitor-General then made various concessions. For example, he said that the Ministers' only source of knowledge of what happened on 9 June was an online article published by the Australian Broadcasting Corporation.

The Solicitor-General then also said that terrorism and sentencing were not among the portfolio responsibilities of the Ministers. The Court thought this important enough to record. But one asks—would the Court have tempered its criticism if terrorism and sentencing had been within the portfolio responsibilities? Can a Minister not speak about any topic of public interest, whether or not it is within portfolio responsibility, subject perhaps to the Prime Minister or Cabinet deciding otherwise? Cannot any person within the Queen's peace in Australia discuss matters of public interest like the merits of what appellate judges say in the course of public hearings? Why should Ministers be in a more constricted position than others in this respect?

Later the Solicitor-General said that he had instructions from one of the Ministers that he was content expressly to withdraw one statement attributed to him about "hard-left activist judges". The reasons for judgment conclude the sentence recording this with an exclamation mark. Does this reflect surprise at the withdrawal? Or irritation at its inadequacy? Or shock at the frightful epithet? Or displeasure at the Solicitor-General's ensuing statement that though he withdrew the statement he did not apologise for it?

Later the Solicitor-General said he now had instructions on behalf of all Ministers to withdraw the remarks about "hard-left activist judges", "ideological experiments" and "judges being divorced from reality". The Court said that this followed "the Court expressing doubt, scepticism, *even incredulity* at what was being said on behalf of the Ministers"<sup>11</sup>. This is a disturbing passage—even a damaging one. First, the office of Commonwealth Solicitor-General is one of the highest in the country. Its occupant is the principal non-parliamentary legal adviser to the Commonwealth government, and conducts all major constitutional and other civil litigation for the government. Its current occupant is of great probity, skill and reputation. Was this doubt, scepticism and incredulity directed at him? Secondly, to be incredulous is to experience an incapacity to believe a proposition. It is legitimate for a court in argument to express doubt and scepticism. But does not the time for deciding whether one is incapable of believing a proposition, and for expressing that state of mind, only come after

the process of presenting all relevant materials and hearing all argument has been concluded, not in the middle of the process?

The Court then recorded that senior counsel for the newspaper parties stated that the Ministers had given unsolicited statements over the period of one hour to the journalist. He also said that the transcript of the 9 June hearing had not been obtained or sought prior to publication. Research by the Court after 16 June, while not contradicting what senior counsel said, revealed that the newspaper had in fact inquired as to the availability of the transcript on 13 June, the day of publication, and had been told that it was not available.

Senior counsel for the newspaper parties then apologised for and retracted the publication. To anticipate, the Ministers eventually indicated on 20 June that they would follow suit, and they did so.

Returning to 16 June, counsel for the accused—including Mr Besim, a self-confessed terrorist—expressed concern “*about the contempt that had been perpetrated* by the article and the risk and fears of their respective clients”.<sup>12</sup> That reference to “risk and fears” should be taken with a grain of salt. Those facing a significant increase in sentence are naturally ready to deflect judicial disgust onto someone other than themselves.

A key feature of the quoted words is that they seem to indicate that the Court of Appeal accepted the assertion of senior counsel for the accused that there actually had been a contempt. Thereafter the Court of Appeal confusingly wavered between asserting that there was an actual contempt and asserting that there was only a *prima facie* contempt. Is it not a serious thing for a court to assert, while protected by judicial immunity, that there actually had been a commission of the serious criminal offence of contempt of court, at a time when no charges had been formally laid, the evidence was incomplete, no sworn or affirmed testimony had been received, and the proceedings of 16 June had begun with an assertion that the Court would not on that day “debate whether contempt has been committed”?

Then, after calling the matter “grave”, the Court said in relation to the Ministers:<sup>13</sup>

The Court has formed the view that there is a *strong prima facie case* with respect to the Ministers. We have formed the view that the publication and the statements involved a *serious breach* of the sub judice rule.

Well, was it only a strong prima facie case, or was it an actual serious breach? Are not the two sentences contradictory?

Later the Court of Appeal said of the newspaper parties that the newspaper “prima facie exaggerated the contempt”.<sup>14</sup> Is this to be read as a finding of contempt, and a statement that the newspaper prima facie exaggerated it? Or does it mean: “prima facie, the newspaper exaggerated the prima facie contempt of the Ministers.” The soundness of the former reading is suggested by the Court’s statement: “The Court is satisfied that the publication by [the newspaper] was egregious and a very serious matter”.<sup>15</sup> The word “satisfied” is the language of a judicial finding, and in the field of contempt, must mean “satisfied beyond reasonable doubt”. If there was only a prima facie contempt, how could it generate a satisfaction that it was “egregious” and “very serious”? The Court then said that the full apology by the newspaper parties “is sufficient acceptance by them of their contempt of court and sufficient purging of the contempt.” Is that not another finding of actual contempt, as distinct from an allegation of contempt or the statement of a prima facie position?

The Court stated that the delay by the Ministers in apologising for and retracting the statements “is most regrettable and aggravated the contempt”.<sup>16</sup> The Court continued by saying that it “accepts that the Ministers have sufficiently acknowledged and accepted their contempt ... and sufficiently purged their contempt.”<sup>17</sup> Again, are these passages not findings of contempt, as distinct from statements of a prima facie position? The Ministers cannot have purged their contempt unless they had earlier committed it.

The Court concluded by saying that but for the apologies and retractions it would have referred the Ministers and the newspaper parties to the Prothonotary of the Supreme Court for prosecution for contempt of court. It did not say whether that official had any discretion to decline to comply with the reference. Police officers, of course, have a discretion not to make recommendations of prosecution to prosecuting authorities. And even if they do, prosecuting authorities have a discretion not to act on the recommendations.

The Court concluded thus:<sup>18</sup> “The Court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong [—another finding of actual contempt]. It would be a grave matter for the administration of justice if it were to reoccur [*sic*—and yet another finding of actual contempt]. This Court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.”

The language of the Court even as it decided that there would be no prosecution for the contempt left the impression that the Ministers and the newspaper had been guilty of contempt despite the absence of the usual safeguards which a prosecution for that crime would have afforded. Further, had the Court decided to refer the matter to the Prothonotary, what would have been the impact of the language? For some might argue that in the public perception a fair trial on criminal charges could be difficult or impossible, whether before a single judge or three judges, in view of the strong words used by three of the most senior judges of the Court. Of course, the public perception would have been wrong in point of fact. One major function of an independent judiciary is that individual judges would stand up and carry out the particular duties which (here) any application by the Prothonotary to punish for contempt before them would have created, whatever other judges thought and whatever other judges may have said in initiating, or procuring the initiation of, the application to punish for contempt. At least it must be hoped that that is so.

A critic might indeed think the Court's language would itself have been perhaps a novel kind of breach of the sub judice rule – a public discussion in very pejorative terms of pending proceedings.

What exactly was the contempt (or only prima facie contempt) which the Court found? The statement read out on 16 June made vague complaints which did not necessarily involve illegality, for example, failure to respect the doctrine of separation of powers, and failure to understand the importance of the judiciary being independent. These complaints are hard to follow. If one peers through the fog generated by the Court's failure to set out either what it said on 9 June or what the article said on 13 June, it seems that the Court raised or hinted at one view on sentencing terrorists, while the Ministers asserted another. But judges continually criticise politicians, convincingly or not—in their judgments, in submissions they make to government, in public speeches, in statements issued by the Judicial Conference of Australia. Why can't politicians criticise judges—convincingly or not? One aspect of the responsibility borne by politicians is to identify defects in all three arms of governments and seek to remedy them—not just those of the legislature and the executive.

Underlying the Court's language may be the idea that it is dangerous to criticise the judiciary because over time this tends in an incremental, perhaps subliminal, way to undermine public confidence in the ability, integrity and sense of responsibility of the judicial branch, so as to encourage governments to increase controls over the judicial branch, and thereby reduce its independence. This idea is complex. It may be right. But it is controversial. Assuming it to be right, it

might be said that the danger will increase where the criticism is not answered. It is notable that the Court did not endeavour to answer the Minister's criticisms. It considered instead whether to punish the Ministers for making them. It used the hearing of 16 June, which it initiated, to deter anyone contemplating criticisms in future when it said: "it is expected that there will be no repetition of this type of appalling behaviour".<sup>19</sup> But it did not in any way directly refute the truth of what the Ministers said. Is this because it thought that the truth was irrelevant?

The hearing before the Court was not in fact dedicated to abstract questions about the separation of powers and the independence of the judiciary from other branches. It was directed to whether proceedings should be instituted against the Ministers for contempt of court which, if successful, could have led to their imprisonment, to heavy fines, and certainly to the destruction of their political careers. What sort of contempt of court did the Court have in mind?

On one reading, the primary concern of the Court seems to have been the sub judice rule. So far as the Westminster Parliament is concerned and doubtless other parliaments modelled on it, the sub judice rule prohibits parliamentary discussion of matters before the courts so as to avoid prejudicing judicial proceedings. But parliamentary discussion did not arise here. So far as contempt is concerned, the sub judice rule means that contempt is committed by comments on pending proceedings which carry a real risk of being likely to prejudice the trial of an action. Whatever the content of that rule, the vices it seeks to deal with arise most intensely where there is a trial by jury. Perhaps they also arise, one hopes very unusually, before junior or inexperienced judges. The prosecution appeal before the Court did not involve trial by jury. It was not a trial. It was not an appeal from a jury trial. It was an appeal from a sentencing judge to the apex Court in Victoria. It was heard by three of that Court's most senior and experienced judges. Even if the sub judice rule applies to appeals, it is safe to act on Lord Salmon's view that the judges will not be influenced by what is said in the media (and what the Ministers said was communicated by the media), and that if they were so influenced they would not be fit to be judges.

Although the 16 June statement expressed a concern that the statements were improperly made in an attempt to influence the Court's decision making process, that is not stressed in the reasons of 23 June. It is highly unlikely that any Minister would make that attempt in relation to the three judges concerned, because that Minister would know that any such attempt was virtually certain to fail. There is no doubt that the three Court of Appeal judges had more than enough stomach to adhere faithfully to their task whatever the Ministers said. And there is no doubt that the Ministers must have known this.

Taken by itself, the Court's stress on the sub judice rule suggests that its reaction might have been much milder if the offending opinions were expressed after the proceedings were over. But the court indicated that the timing of the statements was immaterial. They said that the statements "purported to scandalise the court ... by being calculated to improperly undermine public confidence in the administration of justice" in the particular appeals. This is a second type of contempt. It is called "scandalising the court". It was analysed thus by Rich J in *R v Dunbabin, ex p Williams*:<sup>20</sup>

Any matter is a contempt which has a tendency to deflect the Court from the strict and unhesitating application of the letter of the law ... such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office.

Despite criticisms of this type of contempt by Murphy J, in Australia prosecutions have succeeded in recent times. In contrast, this type of contempt was obsolescent in England and Wales and in Northern Ireland even before it was abolished by, respectively, the *Crime and Courts Act 2013* and the *Criminal Justice (Northern Ireland) Act 2013* s 12.

To prove this type of contempt, it is necessary to establish one of two things. One is a real risk as distinct from a remote possibility of undermining public confidence in the administration of justice. It is highly questionable whether that could have been established in this case beyond reasonable doubt. The material may have been discourteous. But it fell short of scurrilous personal abuse of the judges. It was rather a criticism of the thinking which leads to relatively light sentences. It was criticism which was strong in the sense that it advocated a sharply contrasting position. But strong criticism is not of itself contempt. The remarks do not allege personal partiality. They do not reveal personal dislike. They reveal only dislike of a particular approach.

The other way in which contempt through scandalising the court can be established arises where the defendant aims to lower the authority of the court or its judges. The Ministers denied that aim. The Court of Appeal did not say that it did not accept that denial. And the Court of Appeal gave no reason for concluding that the denial should not be accepted. It would have been difficult to establish that the remarks were not made *bona fide*.

Were the proceedings before, at and after the hearing on 16 June a waste of time? Were they a public embarrassment? The Court, with a degree of self-approbation, twice described the 16 June hearing as involving a “stern discussion”.<sup>21</sup> The Court’s summary of the discussion suggests that in a sense that seems to have been true. And there is nothing wrong with stern discussion. But the discussion was conducted on incomplete materials. It and its outcome smeared the reputations of the Ministers in a confusing way. The Ministers escaped from prosecution but that escape did not clear their names of the slur involved in being alleged to be, and in some degree being found to be, guilty of contempt. The Court did not articulate how the conduct could have been a contempt or why it was. Was the Court’s concluding observation ringing rhetoric of which the great 18<sup>th</sup> century judges who helped found modern civil liberties would have been proud? Or was it only fustian? Was the language and behaviour of the Court wholly virtuous? Or was it only shrill, petulant and precious? Was the tone only tinny? Could it be said that the Court’s conduct in fact tended to support the truth of one or two of the Ministers’ statements? Above all, was the performance not marked by absurdity? For, like judges the world over, members of the Victorian Court of Appeal do not agree with other judges unless they think it is right to do so. They do not feel overborne by other judges. Why, then, should anyone think that they would be affected by some clichés and slogans uttered by politicians in the course of a long running debate between those who think convicted terrorists are punished too harshly and those who think they are punished too leniently? Readers of the judgment must answer these questions for themselves.

There are many admirable Australian judges, with respect. But Australian courts have several faults. Some judges lack the capacity to have merited appointment. A few are unjustifiably rude. A few are bullies. Some are appallingly slow, through inefficiency or laziness or indecisiveness. Some are insensitive. Some are ignorant. Some are undignified. As a result, some judicial work is poor. The whole system is rotten with excessive delay, some of which, but certainly not all of which, judges are responsible for. It is in the public interest for these failings, whether they are widespread or not, to be exposed with a view to their eradication. But how can they be exposed by critical contributions from public debate if the Victorian Court of Appeal’s opinion is representative? This is not a question which that Court posed or answered. But if contempt is to be found in a statement creating a risk that confidence in the administration of justice will be lost, it is no defence that the statement happens to be true. On that approach, public criticism cannot extend to the judiciary. That outcome cannot be justified by appeals to judicial independence. For, as has been said, “there is a difference between judicial independence and stopping work at lunch time”.<sup>22</sup> Now it is

true that the Ministers did not criticise the judiciary for any of the faults recorded above. Rather they seemed to have criticised what they perceived the judiciary's attitude towards sentencing to be. It would go too far to say that the Court of Appeal would actually threaten contempt against politicians who criticised a judge for rudeness, inefficiency, insensitivity or ignorance, for example. But a question arises: did the Court, in threatening contempt proceedings, create an atmosphere inducing those with legitimate complaints to feel unable to make them without risking public embarrassment and possibly criminal sanctions?

It is one thing for courts to dislike a stream of criticisms from the media and from politicians—well-informed or not, weighty or not. It is another thing to seek to dam the stream by threatening or actually initiating contempt proceedings. Was a confusion between these things the fundamental error made in June 2017? David Cameron told the House of Commons on 18 April 2012 that there “are occasions ... where judges make critical remarks about politicians, and there are [times] when politicians make critical remarks about judges. To me, this is part of life in a modern democracy. [W]e should try to keep these things as far as possible out of the courts.”<sup>23</sup> Even if the Ministers made mistakes, did the Court compound them by its reaction?

The goal of contempt of court rules is to increase respect for the law. Respect for the law has been said to be a core condition of judicial independence.<sup>24</sup> Even if the Court's intention in doing what it did was to vindicate respect for the law, can it be said that what it did in fact actually engendered less respect for the law?

In Scotland, the Lord President once said that restraint should be employed in relation to prosecution for scandalising the court “lest a process, the purpose of which is to prevent interference with the administration of justice, should degenerate into an oppressive or vindictive use of the court's powers”.<sup>25</sup> Might that have happened, or did it happen, in the Victorian Court of Appeal in this case?

Hence the answer to the question posed in the title may be another question. Where judges seek to preserve judicial independence in response to political criticism by threatening use of the contempt power, do they actually strengthen the hands of those who oppose judicial independence?

## Endnotes

- <sup>1</sup> S Shetreet, *Judges on Trial* (North-Holland Publishing Co, 1976) p 8.
- <sup>2</sup> See S Shetreet, *Judges on Trial* (North-Holland Publishing Co, 1976) pp 85-159.
- <sup>3</sup> P Devlin, *The Enforcement of Morals* (1965) p vii.
- <sup>4</sup> RFV Heuston, "Patrick Arthur Devlin 1905-1992" (1994) 84 *Proceedings of the British Academy* 247 at 253.
- <sup>5</sup> *Easing the Passing* (1985) p 183.
- <sup>6</sup> [1957] 2 QB 664. See 'Malice Implied and Constructive' [1958] *Crim LR* 15.
- <sup>7</sup> 'With Malice Aforethought: R v Vickers Reconsidered' [1958] *Crim LR* 714.
- <sup>8</sup> RFV Heuston, 'Patrick Arthur Devlin 1905-1992' (1994) 84 *Proceedings of the British Academy* 247 at 251 n 17.
- <sup>9</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165.
- <sup>10</sup> In *Director of Public Prosecutions v Besim* [2017] VSCA 165, the court summarised or quoted parts of it at [6]-[7] and [10]. A fuller version is given in the present text.
- <sup>11</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [19] (emphasis added).
- <sup>12</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [24] (emphasis added).
- <sup>13</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [27] (emphasis added).
- <sup>14</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [28].
- <sup>15</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [29].
- <sup>16</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [30].
- <sup>17</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [32].
- <sup>18</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [33].
- <sup>19</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [33].
- <sup>20</sup> (1953) 53 CLR 434 at 442.
- <sup>21</sup> *Director of Public Prosecutions v Besim* [2017] VSCA 165 at [30].
- <sup>22</sup> G Gee, R Hazell, K Malleon and P O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) p 129.
- <sup>23</sup> Hansard, HC, roll 543, cll 317, 18 April 2012, quoted in G Gee, R Hazell, K Malleon and P O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) p 50.
- <sup>24</sup> G Gee, R Hazell, K Malleon and P O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) p 11.
- <sup>25</sup> *Re Milburn* 1946 SC 301 at 315 and 316.