OFFICE OF THE CLERK OF TYNWALD

The sub judice principle and the doctrine of exclusive cognisance

PROCEDURAL NOTE

14 June 2022

SUMMARY

I. Judicial independence is essential to the rule of law and to the reputation of the Island.

II. A central function of the judiciary is to operate a fair legal process. Public comment on live cases can damage fairness (or, in legal terminology, can "prejudice" one party or the other). Public comment at any time prior to the final determination of legal proceedings is therefore frowned on by the courts and in some circumstances can be a criminal offence.

III. The impact of a comment on a court case depends on the type of case, on when and where the comment is made, and on what exactly is said. Higher standards are expected of journalists than of private individuals.

IV. Freedom of speech in parliament is an important democratic principle. A central function of the legislature is to debate the affairs of the day; and the legislature must be able to legislate on any matter. Any external limitation on what Members can say within parliamentary proceedings would interfere with those democratic functions. The law does not therefore allow any such limitation to be imposed by the courts.

V. There arises a clash of principle. On the one hand the rule of law requires that commentary on live cases outside the court process be limited. On the other hand the democratic process requires that the legislature be allowed to comment on anything. The remedy which has evolved in the Island, as in the UK and in other jurisdictions, is that the legislature has chosen to *limit its own* ability to comment on live court proceedings. It has done this by adopting its own sub judice rules.

VI. The impact of a comment on a live court case, made in parliamentary proceedings, depends on the type of case, on when the comment is made, and on what exactly is said. In respect of the "when" question, Tynwald applies higher standards to itself than are applied even to journalists.

VII. In terms of the "what" question, Tynwald and the Branches rely on their presiding officers to exercise discretion as to what exactly may be said. In doing this, the presiding officers have a difficult tightrope to walk.

VIII. Just as the legislature does not interfere with the business of the courts, the courts do not interfere with the business of the legislature. The principle that the legislature is in charge of its own internal procedures is known as the doctrine of exclusive cognisance. A certificate mechanism has recently been introduced to enable Tynwald and the Branches, through their presiding officers, to assert exclusive cognisance.

DETAIL

I. Judicial independence is essential to the rule of law and to the reputation of the Island.

1. There are three distinct functions within the system of government in the Island, as in any jurisdiction. These are the legislature, the executive and the judiciary. They are sometimes known as the three "branches of government". Broadly speaking the functions can be summarised as:

    - legislature – makes the law in general terms which apply to everyone
    - executive – proposes new laws to the legislature; also "executes" many aspects of public law by, for example, collecting taxes and operating public services, many of whose functions are set down in law.
    - judiciary – settles disputes on the application of the law in individual cases, thereby developing and refining the law in the light of its practical application.

2. The degree of separation which exists in any jurisdiction between the three "branches of government" is much discussed by political scientists, constitutional theorists and lawyers. The precise arrangements vary from one jurisdiction to another and change over time.[1]

3. In the Isle of Man, as in the Channel Islands, the UK, the devolved jurisdictions within the UK, and the Republic of Ireland, there is a degree of fusion between the executive and the legislature. So for example in the Island the Chief Minister and Council of Ministers head the executive branch of government; but in order to be appointed to one of these executive positions a person must first be a member of the legislature.[2] However, the separation between the judiciary and the other two branches is much clearer. This separation is regarded as particularly important to the rule of law.[3] The Council of Ministers has a statutory responsibility to uphold and support the constitutional principle of the rule of law as well as the independence of the judiciary, with "judiciary" including both courts and tribunals.[4]

4. The international community keeps a close eye on judicial independence in large and small jurisdictions. For example, in its December 2016 Mutual Evaluation Report on the Isle of Man, Moneyval commented:

> *The key structural elements for effective AML/CFT controls are present in the IoM. The IoM is generally considered to be a very stable democracy. Political and*

[1] For a readily accessible survey of a couple of dozen jurisdictions and a brief reading list see this Wikipedia article https://en.wikipedia.org/wiki/Separation_of_powers . For a more detailed analysis of how the separation works in the UK see this House of Commons research paper on the subject from August 2011: https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf

[2] Council of Ministers Act 1990, sections 2(1) and 3(1).

[3] See David Doyle "Is your Latimer House in order?", paper delivered in September 2013 to the Commonwealth Magistrates' and Judges' Association, and especially pages 16 to 19 https://www.courts.im/media/1437/cmjaconferencejerseyseptember201.pdf

[4] Council of Ministers Act 1990, sections 6A and 6B.

> *institutional stability, accountability, the rule of law and an independent judiciary are all well established…*
>
> *The IoM has a sound legal system with robust AML/CFT legislation mirroring UK legislation. It enjoys an independent judiciary committed to the rule of law.*[5]

5. In contrast, here is a quotation from an April 2022 report concerning intellectual property protection and enforcement around the world by the Office of the United States Trade Representative:

> *… concerns include interventions in judicial proceedings by local government officials, party officials, and powerful local interests that undermine the authority of China's judiciary and rule of law. A truly independent judiciary is critical to promote rule of law in China and to protect and enforce IP rights.*[6]

II. A central function of the judiciary is to operate a fair legal process. Public comment on live cases can damage fairness (or, in legal terminology, can "prejudice" one party or the other). Public comment at any time prior to the final determination of legal proceedings is therefore frowned on by the courts and in some circumstances can be a criminal offence.

6. As a matter of principle, everyone is entitled to a fair hearing in front of an impartial decision-maker. This principle is expressed in Article 6 of the European Convention on Human Rights which was enshrined in Manx law by the Human Rights Act 2001. The principle itself predates ECHR by centuries.[7] Public comment on live cases can interfere with the fairness of a court process.

7. Contempt of court is a feature of Manx common law which has grown up in parallel with English common law. The expression "contempt of court" has a technical meaning which may not be readily apparent. As Salmon LJ observed in a case reported in 1970:

> *The archaic description of these proceedings as "contempt of court" is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.*[8]

8. In a case decided in 1992 the Manx Court of Appeal explained that a person would be in contempt of court –

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[5] https://rm.coe.int/anti-money-laundering-and-counter-terrorist-financing-measures-isle-of/168071610e pages 19 and 36

[6] https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf

[7] Abundant commentary will be found on the principle of a fair hearing. This Wikipedia article is as good a place to start as any. https://en.wikipedia.org/wiki/Natural_justice

[8] *Morris v Crown Office* [1970] 2 QB 114, 129

> *if their words or actions had been likely to interfere with the due administration of justice or to prejudge the issues, and had created a real or substantial risk of prejudice to [one party or the other];*

and went on to comment that contempt of this sort was a criminal act.[9]

9. In both the Island and in the UK there is a "strict liability rule" which states that

> *conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.*[10]

10. A contempt against public justice is also a misdemeanour under the Island's Criminal Code 1872, which provides as follows:

> *347 Other offences not specified*
>
> *Whosoever shall do any other act or thing (not hereinbefore or in any other unrepealed Act of Tynwald or bye-law made by authority of any Act of Tynwald, specified or referred to, or otherwise provided for by law), in contempt of God or religion, or in contempt of the Queen's Government, or against public justice, or against public trade, or against the public health, or to the disturbance of the public peace, or injurious to public morals, or outraging decency, shall be guilty of a misdemeanour.*
>
> *348 Punishment under ten preceding sections*
>
> *Whosoever shall be convicted of any of the misdemeanours hereinbefore in the last ten sections specified shall be liable to imprisonment for a term not exceeding two years and to a fine.*

III. The impact of a comment on a court case depends on the type of case, on when and where the comment is made, and on what exactly is said. Higher standards are expected of journalists than of private individuals.

11. In terms of the *type of case*, the "risk of prejudice" created by a comment is particularly severe when it comes to jury trials. Juries are directed to decide cases only on the basis of the facts presented to them in court. If a case is being commented on in public outside the court, this could unfairly influence what a juror thinks about the case. Where a decision falls to be made by a professional judge, the risk of prejudice from public comment is considered to be less. For example, the Manx case of *Barr* concerned public commentary about a decision which was to be taken by the Deputy High Bailiff. The Court of Appeal ruled that "it

[9] *In re Barr* 1990–92 MLR, page 400

[10] Wording taken from Contempt of Court Act 1981 of the UK Parliament, section 1. For the Island, the court confirmed in *Barr* that the Manx law of contempt was the same as English common law which had been "preserved by Parliament when it instituted statutory rules in England": see page 400 and also the discussion at pages 409–410.

was not likely that [the Deputy High Bailiff], a professional judge hearing the case alone, would be unduly influenced by discussion in the media".[11]

12. In terms of the "when" question, a public comment cannot be a contempt of court "tending to interfere with the course of justice in particular legal proceedings" if those proceedings have not begun yet, or have been concluded. In the UK there is statutory provision setting out when proceedings are to be regarded as "active".[12] Equivalent provision does not exist in Manx statute law.[13]

13. In terms of the "where" question, UK statute law makes special provision for publications that are "addressed to the public at large or any section of the public". In these type of publications a higher standard of behaviour is expected. Specifically, such a publication can be in contempt of court regardless of the intent of the publisher.[14]

14. There is no equivalent provision in Manx statute law. However, in applying the common law test whether the comment "had created a real or substantial risk of prejudice" the Manx courts would be able to take into account where the comment was made and how widely it was disseminated.

15. In terms of the "what" question, the UK's Contempt of Court Act 1981 provides at section 5:

> *A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.*

16. There is no equivalent provision in Manx statute law. However, in the case of *Barr* the Manx Court of Appeal commented:

> *the issues themselves – the validity of a restrictive system of work permits, or of immigration restrictions – were subjects of general interest that the electorate should be encouraged to debate… there could not be a continuing embargo on temporate public discussion of the points of law underlying the issues.*[15]

IV. Freedom of speech in parliament is an important democratic principle. A central function of the legislature is to debate the affairs of the day; and the legislature must be able to legislate on any matter. Any *external* limitation on what Members can say within

[11] *In re Barr* 1990–92 MLR, page 400. See also the court's discussion of the English authorities on this point at pages 411–414.
[12] Contempt of Court Act 1981, Schedule 1.
[13] Provision on when a case is to be regarded as active does exist in Standing Orders for Manx parliamentary purposes, as discussed further below.
[14] Contempt of Court Act 1981, section 2.
[15] 1990–92 MLR, page 401

parliamentary proceedings would interfere with those democratic functions. The law does not therefore allow any such limitation to be imposed *by the courts*.

17. In England, freedom of speech in parliament is guaranteed by Article 9 of the Bill of Rights 1688, which provides:

> *That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.*

18. In the Isle of Man, section 1 of the Privileges of Tynwald (Publications) Act 1973 provides:

> *It is hereby declared that no civil or criminal proceedings may be instituted against any member of Tynwald in respect of anything said or otherwise communicated by him in any debate or proceedings in Tynwald or either Branch or a committee thereof.*

19. Tynwald Proceedings Act 1876, as amended in 2020, provides at section 6B:

> *Article 9 of the Bill of Rights 1688 (an Act of Parliament [c. 2]) (which guarantees the freedom of speech and debate or proceedings in Parliament, and provides that those freedoms ought not to be impeached or questioned in any place outside Parliament) applies to Tynwald Court and to the Branches as it applies to the Commons House of Parliament.*

V. There arises a clash of principle. On the one hand the rule of law requires that commentary on live cases outside the court process be limited. On the other hand the democratic process requires that the legislature be allowed to comment on anything. The remedy which has evolved in the Island, as in the UK and in other jurisdictions, is that the legislature has chosen *to limit its own* ability to comment on live court proceedings. It has done this by adopting its own sub judice rules.

20. The Standing Orders of Tynwald provide as follows; and similar rules exist in the Standing Orders of the House of Keys and the Legislative Council –

> *3.4(10) A Question shall not refer to any matter which is sub judice, subject to the discretion of the President.*
>
> *3.11(4) A motion shall not refer to any matter which is sub judice, subject to the discretion of the President.*
>
> *3.20B (8) The subject matter of a General Debate shall not refer to any matter which is sub judice, subject to the discretion of the President. In the course of a General Debate no reference shall be made to a matter which is sub judice, subject to the discretion of the President.*
>
> *11.4 "sub judice" includes any civil case in which papers for the commencement of proceedings have been filed in the office of any court or tribunal, whether or not they have been served on or communicated to the other party or any criminal case where a person has been charged or summoned to appear at court. A case will remain sub judice until it is discontinued, or judgment has been or verdict and*

sentence have been delivered and until the time for appealing has expired; it will continue to be sub judice after papers for the commencement of any appeal have been lodged until judgment or discontinuance.

21. These rules were updated in 2009 to ensure that all three Chambers had the same definition of sub judice and to make express provision for the presiding officer to exercise discretion in the application of the rule. This followed the experience of the 2008 financial crisis. The Standing Orders Committee of Tynwald explained:

> *Your Committee noted that the sub judice rule had not been invoked in relation to the Kaupthing, Singer and Friedlander case, although technically it could have been. It would, of course, have been unthinkable for this immensely important matter not to have been able to be debated in Tynwald or the House of Keys.*[16]

22. The approach in Tynwald is similar to that at Westminster.[17]

VI. The impact of a comment on a live court case, made in parliamentary proceedings, depends on the type of case, on when the comment is made, and on what exactly is said. In respect of the "when" question, Tynwald applies higher standards to itself than are applied even to journalists.

23. As expressed in the Standing Orders, the starting point is that there should be no Questions, motions or General Debates about any live court proceedings. However, this is always subject to the discretion of the presiding officer.

24. In terms of the type of case, the presiding officers will acknowledge particular sensitivity in the case of a jury trial.

25. In terms of the "when" question, Tynwald's *sub judice* rule is expressed in simpler terms than the provisions of the UK Contempt of Court Act. Broadly speaking the Tynwald rule is engaged earlier, and continues longer, than the legal rules. In this respect Tynwald applies to itself higher standards than are applied to the general public, even including journalists.

VII. In terms of the "what" question, Tynwald and the Branches rely on their presiding officers to exercise discretion as to what exactly may be said. In doing this, the presiding officers have a difficult tightrope to walk.

26. On the one hand the presiding officers have to uphold the rights of Members to speak freely on matters of public concern. On the other hand the presiding officers have to uphold the rule of law, and to respect the principle of judicial independence. Broadly speaking it is the practice of the presiding officers to err on the side of caution, taking into account the special public prominence of comments made during parliamentary proceedings.

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[16] PP 2009/0122, paragraph 34

[17] For a summary of the Westminster approach see pages 6-7 of this House of Commons Standard Note of August 2011: https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf

27. In the *sub judice* rule as applied in the House of Commons there is an express proviso that:

> *where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.*[18]

While this proviso has not been formally adopted in the Island, it may provide presiding officers here with a useful frame of reference when exercising their discretion under the Standing Orders.

VIII. Just as the legislature does not interfere with the business of the courts, the courts do not interfere with the business of the legislature. The principle that the legislature is in charge of its own internal procedures is known as the doctrine of exclusive cognisance. A certificate mechanism has recently been introduced to enable Tynwald and the Branches, through their presiding officers, to assert exclusive cognisance.

28. Section 6A(3) of the Tynwald Proceedings Act 1876 provides a mechanism by which the presiding officers can assert exclusive cognisance in respect of particular matters before the courts. The mechanism involves the President or the Speaker making a certificate on the advice of the Clerk of Tynwald, the Secretary of the House of Keys or the Clerk of the Legislative Council as the case may be. A certificate issued in this way is conclusive evidence that the giving of evidence, producing of a document or supplying of information, in respect of a matter, would infringe the exclusive cognisance of Tynwald Court, the House of Keys or the Legislative Council.

29. Section 6A was inserted by the Tynwald Proceedings (Amendment) Act 2020 which was debated in both Branches on 17th December 2019. In seeking leave to introduce the Bill as a private Member's Bill in the Keys, the then Deputy Speaker (Mr Robertshaw) said:

> *The background to this Bill is that there are live proceedings which make it necessary to settle in statute the privileges of Tynwald on the same basis as enjoyed by parliaments throughout the Commonwealth.*
>
> *Parliamentary privilege is the area of the law that allows parliaments to function. This means: freedom of speech and debate; and 'exclusive cognisance', i.e. the right for internal affairs not to be interfered with by outside agencies, such as governments or the courts or tribunals.*
>
> *Without this protection, parliamentary committees would not be able to guarantee confidentiality to witnesses and others who bring matters to their attention; nor to keep confidential all minutes, correspondence and other internal information and retain control over it. Inquiries on sensitive topics would not be able to proceed successfully, without being able to give such guarantees. Work in areas such as*

[18] Erskine May online, paragraph 21.19
https://erskinemay.parliament.uk/section/4868/matters-awaiting-judicial-decision-and-matters-under-investigation/

these might have to cease without such protection, and that effectively encapsulates the urgency that now faces this Hon. House.

Although the law on privilege applies to Tynwald, the case law in this area is limited and it is appropriate to ensure that Tynwald's privileges are better understood.[19]

30. Since section 6A came into force on 21 January 2020, certificates have been issued by the President of Tynwald in relation to two separate and unrelated matters.[20]

Clerk of Tynwald
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[19] https://www.tynwald.org.im//business/OPHansardIndex1821/4543.pdf
[20] See Written Answer W202201-0218 given by the President of Tynwald on 7 June 2022. https://www.tynwald.org.im/business/BusinessHansardIndex2126/W202201-0218.pdf