of honesty" is a "paradigm example of a general norm which underlies almost all contractual relationships" (*Yam Seng Pte Ltd.*, at para. [135]) and hence could easily be implied in virtually all contracts by reference to the parties' objective intentions. In my view, the more significant impact of *Bhasin* concerns the precise meaning and future development of "good faith" as a "general organizing principle" of contractual performance. Unfortunately, Justice Cromwell declined to elucidate the scope of this principle, noting simply that it "may be invoked in widely varying contexts" and that future development necessarily calls for a "highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties" (at para. [69]). This principle has the potential to generate an unforeseen host of discrete obligations, and, with respect, seems inescapably to pose a significant threat to freedom of contract. In both of these respects, *Bhasin* engages with the long-standing policy concerns that Professor McKendrick has identified as underpinning the "traditional English hostility" towards a doctrine of good faith, namely the inherent subjectivity and uncertainty of the concept itself, and the doctrine's ostensible discordance with the ethos of individualism in which parties are free to pursue their own self-interest (McKendrick, *Contract Law*, 9th ed. (London 2011), 221–22).

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FREE SPEECH AND SCANDALISING THE COURT IN MAURITIUS

AT the behest of the Law Commission, *Contempt of Court: Scandalising the Court* (18 December 2012), Parliament recently abolished the common law offence of scandalising the court (s. 33 of the Crime and Courts Act 2013). But the offence is still frequently found in many parts of the common law world and the decision of the Judicial Committee of the Privy Council in *Dhooharika v DPP of Mauritius* [2014] UKPC 11; [2014] 3 W.L.R. 1081 may indicate its future in common law jurisdictions. The Privy Council was asked to decide, inter alia, whether the common law offence was compatible with s. 12 of the Constitution of Mauritius. Section 12 protects a person's freedom of expression but also makes saving for any law, or any act done pursuant to law, which aims to maintain the authority and independence of the courts and which is reasonably justifiable to that end.

Those who see judging the laws of other jurisdictions as exercises in diplomacy as well as justice will likely applaud the decision: the Privy Council found itself able to avoid the controversial result of declaring the offence to

be unconstitutional whilst yet allowing the appeal and quashing the conviction. Others will regret that the free speech exception for maintaining the authority of the judiciary is neither confined nor made clearer by the Privy Council's decision. The necessity of the offence remains, as ever, questionable.

Mr. Dhooharika was the editor-in-chief of *Samedi Plus*, a newspaper published in Mauritius. In August 2011, his newspaper ran a series of allegations by a high-profile individual in Mauritius, Mr. Dev Hurman, about the Chief Justice of Mauritius. Editorials in *Samedi Plus* suggested that Mr. Hurman's allegations warranted investigation and that the President of the Republic should appoint a tribunal to decide whether he had acted in abuse of his position or shown bias. No such investigation occurred and instead Dhooharika and Hurman were charged separately for scandalising the court, which is (or was, in England in Wales) part of the law of contempt. Only Dhooharika's case concerns us. He was convicted and sentenced to three months' imprisonment and a large fine, though execution of the sentence was suspended pending appeal to the Privy Council.

Lord Clarke delivered the judgment for the Privy Council. First, on the necessity of the offence, the Privy Council noted that the continental variant of scandalising the court had survived examination under Article 10 ECHR provided that the restrictions on free speech were proportionate (*De Haes and Gijsels v Belgium* (1997) 25 E.H.R.R. 1). With a passing reference to "local conditions" in Mauritius, the Privy Council held that the offence was compatible with s. 12 of the Constitution. The implicit message is that the perceived "vulnerability" of the judiciary in some countries may justify the continued existence of the offence there.

The Privy Council nonetheless showed its own mind by finding "considerable force" in the arguments in support for abolition of the offence, citing Lord Pannick's article "'We Do Not Fear Criticism, nor Do We Resent It': Abolition of the Offence of Scandalising the Judiciary" [2014] P.L. 5. In particular, it is not obvious that any respect for the judiciary will typically be enhanced by allowing judges to preside over the trial of their critics. The existence of the offence also deters journalists and others from speaking out on perceived judicial errors or injustice. Further, there are other ways to address attacks on the judiciary for a perceived lack of independence, for example with a statement from the Lord Chief Justice. One might add that, unsurprisingly, on consultation, the Law Commission found little empirical or anecdotal evidence in favour of the effects of criminalisation. The Privy Council is presumably hoping that the Mauritius National Assembly might take the hint.

If the offence is to be justified at all, it is submitted that it is better done in terms of the rest of the substantive law in a particular country. The Law Commission rightly noted that the offence looked "somewhat isolated" in England where seditious libel and criminal libel had already been

abolished. But countries which maintain a range of such offences, and which apply them to protect other public office-holders besides the judiciary, might legitimately be in a different position. It is regrettable that the Privy Council did not consider whether this was of relevance to the case of Mauritius. Instead their passing reference to "local conditions" in Mauritius simply invites more questions.

Second, for those jurisdictions where the offence is there to stay, *Dhooharika* decides that there is a *mens rea* element. The Privy Council held that the conduct of the accused must be objectively likely to bring a judge or court into contempt, or to undermine their authority, thereby interfering with the administration of justice; and the accused must have acted in bad faith. The Privy Council thus approved the judgment delivered by Lord Steyn in *Ahnee v DPP of Mauritius* [1999] 2 A.C. 294 that "bad faith" is a necessary element to be proved, rather than the defendant needing a "defence" of "good faith". This meant that Dhooharika should not have been convicted since no strong evidence of Mr. Dhooharika's bad faith had been led by the Mauritius Director of Public Prosecutions.

It seems optimistic to think that this goes far in restricting the ambit of the offence. This is because (at paras [48]–[49]), the Privy Council seems to define "bad faith" in traditional *mens rea* terms, by reference to intention or recklessness. The bad faith is established, the Privy Council says, if the prosecution can prove an intention to create "a real risk" of undermining public confidence in the administration of justice or that the individual personally foresaw such a risk. But in countries where confidence in the judiciary is genuinely quite low, sparking a critical debate on the impartiality of those who administer justice will too readily constitute a "real risk" of undermining public confidence in the judiciary. A higher threshold for prosecution is required, such as the one suggested by Sachs J. in *South Africa v Mamabolo* (2001) 10 B.H.R.C. 493 at [75], that there should be "a real and compelling threat which, viewed contextually, is likely to cause a sufficiently serious and substantial prejudice upon the administration of justice".

This brings to mind, third, the concerns of the Law Commission, that the common law offence was obscure not only in respect of the mental element but also in several other respects. In particular it is not clear whether there is, at common law, a defence of truth or a public interest defence when improper motives are publicly imputed to a judge. Such defences would seem especially important in cases concerning journalists. In cases of criminal libel and defamation, defences of fair comment, public interest, and truth have variously been established at common law. The failure of the Privy Council to engage with these matters in the context of scandalising the court is most regrettable. Their insistence on a *mens rea* element is a small consolation.

Furthermore, one might wonder whether those critics who face prosecution can expect a fair trial. There were several problems with Mr.

Dhooharika's trial before the Supreme Court in Mauritius, which in themselves sufficed to allow his appeal. The trial was fast-tracked by the Director of Public Prosecutions and took place just two months after the first editorial appeared, apparently because of public concern. Despite the defendant wishing to rely upon his good faith as a defence, he was not permitted to give evidence in person and the Supreme Court had reference only to his affidavit. The Supreme Court was further criticised for hastening to sentence without hearing any evidence by way of mitigation, especially when the sentence might be imprisonment. In any event, the offending passages in the newspaper, as cited by the Privy Council, make it tolerably clear that Mr. Dhooharika was not saying that he believed Mr. Hurman's allegations, rather that they should be openly investigated and decided upon by a tribunal. The Mauritius Supreme Court decision that this amounted to an attack on the Chief Justice seems close to incomprehensible and, notwithstanding it being a question of fact, the Privy Council seemed prepared to reverse it. If this is the kind of trial that awaits critics of the judiciary in Mauritius, then not even the recognition of a public interest defence should be enough to save the offence from the prospect of abolition.

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LAND REGISTRATION: RECTIFICATION AND PURCHASERS

A claims an interest in B's property; C is a purchaser who is unaware of A's claim. This is a typical land law dispute involving two innocent parties (A and C). Registration systems generally set out to protect C – it is thought compelling that purchasers should be able to rely on the register to buy land quickly and risk-free. However, there are some limits to this protection.

Leaving aside forgery, registration disputes between A and C have arisen in two principal contexts. Overriding interests (especially where A claims actual occupation) have provided a large proportion of the litigation. However, there has been much discussion over the past few years regarding rectification of the register. Where there has been a mistake, the register may be rectified so as to correct the mistake. Where this has been especially controversial is where there is a mistake in the registration of B (who may or may not be the person primarily responsible for the mistake), but B has executed a registrable disposition in favour of C and C has been registered. Assuming that C is *bona fide*, there is a strong argument that C has been misled by the register's identification of B as being the proprietor with powers to deal with the land. This is strengthened by Land Registration Act 2002 ("L.R.A."), s. 23.