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CONTEMPT OF COURT — FREEDOM OF EXPRESSION AND THE RIGHTS OF THE ACCUSED[1]

by

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Any democratic society must have effective systems of checks and balances. Apart from the separation of powers and the rule of law, a proper legal system must be maintained and promoted. The peace and harmony in society depends on the existence of such mechanisms and the confidence members of society have in the system of adjudicating disputes and obtaining justice. It is the very foundation of our society.

In the words of Lord Diplock:

> ... in any civilized society it is the function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by the courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another.[2]

As Tun Salleh Abas LP said in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad*:[3]

> The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role, they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislations or excesses in administrative action. If that role of the judiciary is appreciated, then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.

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1 **Paper presented at the 11th Malaysian Law Conference held in Kuala Lumpur on 8th–10th November 2001.**

2 *Attorney-General v Times Newspaper Ltd* [1973] 3 All ER 54 at 71, cited with approval by the Federal Court in *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604 at p 608.

3 [1987] 1 MLJ 383 at p 387.

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Lord Denning in *Morris v The Crown Office*said:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society.[4]

The law of contempt of court is a necessary evil. It is required to ensure that the mechanism of adjudicating disputes and everything connected with it is not deflected or interfered with.

Rules must be enforced to protect the status, authority, reliability and integrity of the adjudication process and everything connected to it. It is in the public interest that these mechanisms should exist and therefore there must exist offences for any breach of the rules to support the adjudication of disputes, the right to a fair trial and the right to privacy. The sanctions by way of imprisonment or fines, serve as a deterrent.

There is another public interest that is of paramount importance to any democratic society -- the freedom of speech and expression. It is only by allowing the freedom of expression of views, ideas and opinions, however much the state or individuals may disapprove, will there be growth and development in every area of life. It is so fundamental that Voltaire said:[5]

> I disapprove of what you say but I will defend to the death your right to say it.

In fact that is what the 'adversarial system' is all about. It is hoped that in the collision of evidence, views and opinions, that is, in the contest between the parties, the truth will emerge.[6] It is the best system we have. That is why in the forum for arriving at the truth and dispensing justice, no fetter or restriction must be permitted on the freedom of expression except for the protection of that process itself.

Malaysia has provided for the protection of this right in Article 10 of its Constitution.[7]

As stated by Abdul Hamid LP in the Supreme Court:

> A balance must be struck between the right to freedom of speech as provided for in Article 10 of the Federal Constitution and the need to protect the interest ...of maintaining public confidence in the judiciary.[8]

The law of contempt seeks to do this.

In this paper, I propose to give a brief outline of the law of contempt and how it has been applied in circumstances in which it infringes on the freedom of expression, with particular emphasis on criminal contempt, where there is much inconsistency in the application of the law. In order to appreciate the tension between the need to have the law of contempt and the need to protect the freedom of expression, the rationale for both will be alluded to. The final part of my paper will deal with the rights of the accused person.

DEFINITION AND PURPOSE OF CONTEMPT

Contempt of court is that broad offence that incorporates all breaches of the rules that must be followed to ensure that these mechanisms, properly called the administration of justice, are not in any way interfered with or jeopardized.[9]

As clearly stated by Salmon LJ:

> The sole purpose of proceeding for contempt is to give our courts power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented. This power to commit for what is inappropriately called 'contempt of court' is sui generis and has from time immemorial reposed in a judge for the protection of the public.[10]

And as Brown J said:[11]

> ...the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of the court itself, but to prevent an undue interference with the administration of justice in the public interest.

THE DISTINCTION BETWEEN CRIMINAL AND CIVIL CONTEMPT

The offence of criminal contempt is committed when the interference with the administration of justice is in the nature of a public wrong, like preventing a judge from giving judgment, threatening a process server or destroying evidence in a case.

The offence of civil contempt is basically to compel obedience of the courts' orders and decrees, which are given pursuant to a dispute between litigants.

The basis of the distinction is similar to that between crimes and torts generally -- between public and private wrong, that is, in its character and purpose. For civil contempt, also known as 'contempt in procedure', the punishment is remedial and for the benefit of the complainant, whereas for criminal contempt, the act is one which so threatens the administration of justice that it requires punishment from a public point of view, which is punitive in nature.

Civil contempt is fairly straightforward and the court exercises the power of contempt when a litigant initiates it, similar to an action in tort with the differences only in procedure, standard of proof and sanctions.

Criminal contempt, however has taken the form of many types of offences which can be broadly [12] categorized into four main areas:

(i) contempt in the face of the court;
(ii) scandalizing the court;
(iii) prejudicing or impeding court proceedings;
(iv) interfering with the course of justice.

i Contempt in the face of the court

'In the face of court' means that the contemnor does an act which immediately disrupts or interferes with the proceedings and leaves the judge no option but to bring the contemnor before the court and to fine or sentence him to immediate imprisonment to ensure that the administration of justice/proceedings continues without further interruption.

In the case of *Re Kumaraendran, An Advocate & Solicitor*,[13] Eusoffe Abdoolcader J adopted the definition of Laskin J in *McKeown v The King*:[14]

> Contempt in the face of the court is in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.

Or as more succinctly described by Lord Denning MR in *Balogh v St Albans Crown Court*:[15]

> It really means 'contempt in the cognizance of the court'.[16]

An example of this can be found in the case of *Morris v The Crown Office*,[17] where a group of students interrupted proceedings by marching into court, singing, shouting and distributing leaflets to promote equality of the Welsh language with English. At the court of first instance, they were sentenced to three months' imprisonment for contempt in the face of the court. However on appeal, the court bound them over to keep the peace after having served seven days. Though this case restricts the right to freedom of expression in court in circumstances where proceedings are ongoing, it does so for the protection of a greater public interest and that is, the due administration of justice.[18]

There are specific statutory provisions in Malaysia, which can be resorted to[19] if the contempt is in the nature of an offence that can be dealt with at a later date.

ii Scandalizing the court

This offence, broadly speaking, seeks to prevent scurrilous abuse or attacks upon the authority and impartiality of the judiciary as a whole or of a judge as a judge or of a court,[20] to protect the public confidence in the administration of justice.

In the case of *Murray Hiebert v Chandra Sri Ram*,[21] the Court of Appeal quoted Lord Diplock who said in *Chokolingo v A-G of Trinidad & Tobago*:[22]

> 'Scandalizing the court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.[23]

There is a greater public interest in the preservation of public confidence in those who dispense justice.[24]

As the court stated in *R v Editor of the New Statesman ex p DPP*,[25] the charge of contempt [for scandalizing the court] is not to spare the feelings of a particular judge. It is for the public interest of maintaining the respect, independence, confidence and impartiality of the judiciary by not belittling their reputation and authority as such remarks may have a detrimental effect on the carrying out of their judicial responsibilities.[26]

The Phillimore Committee,[27] after a thorough study of the law of contempt, also concluded that the law in fact exists to protect the administration of justice and the fundamental supremacy of the law and not the dignity of the judges.

iii Prejudicing/impeding court proceedings

The main area here involves the publication or public discussions of ongoing court proceedings [28] or matters related to it.

In the words of Watkins LJ in *Peacock v London Weekend Television*:[29]

> In our land we do not allow trial by television or newspaper. Until the well recognized institution of this country for doing justice, namely the courts, have worked their course, then the hand of the writer and the voice of the broadcaster must be still.

The much celebrated case on this point is *Attorney-General v Times Newspaper Publishing* [30] ('the Thalidomide case'), where the papers were about to publish an article, the contents of which the Attorney-General felt were contemptuous, in that the contents of the article would bring pressure on one of the parties so as to dissuade that party from continuing the claim, or would pressure that party into making a settlement which he might not otherwise have made, or would influence him in some way over his conduct in the action. The Attorney-General obtained an injunction from the High Court which was discharged by the Court of Appeal. The Attorney-General then appealed to the House of Lords.

In allowing the appeal, Lord Reid said that:

> There has been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.[31]

There is another area where the law of contempt is applied in restricting reports or comments on actual or potential legal proceedings on the basis of privacy or confidentiality of the parties. This argument applies in situations where it is necessary to keep all or some aspects of the proceedings secret in order to protect personal rights of someone involved.

Examples of such instances are those cases involving sexual offences or children, or areas of intellectual property like trade secrets as well as government secrets.

iv Interfering with the course of justice

This catch-all category covers every other form of criminal contempt which in any way obstructs or interferes with or deflects the administration of justice. This will include intimidation of witnesses, destroying of evidence, changing notes of evidence, obstructing court officials from performing their duties etc.

THE POSITION IN MALAYSIA

Article 126 of our Federal Constitution declares that:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish contempt of itself.

This provision is repeated in s 13 of the Courts of Judicature Act 1964.[32] The subordinate courts are governed by s 99A of the Subordinate Courts Act 1948[33] which empowers the subordinate courts to punish for contempt and s 9 of the Third Schedule gives some instances of the same.

Apart from these provisions many areas are still unclear as there is no one specific statute encompassing the definition of contempt, the offences of contempt, the procedure to be followed, the defences available, or the sentences for the various offences of contempt.

At present, we follow the common law in trying to ascertain the ambit of the law on contempt and the procedure to be applied. In *Attorney-General, Malaysia v Manjeet Singh Dhillon*,[34] recently applied by the Court of Appeal in *Murray Hiebert v Chandra Sri Ram*,[35] the Supreme Court held that it had:

> ... this far consistently applied the common law principle of contempt of court as seen in the judgments in some of these cases, viz: *A-G & Ors v Arthur Lee Meng Kuang, Lim Kit Siang v Dato Seri Dr Mahathir Mohamed*,[36] and as recently as this year in *Trustees*

> *of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor & anor application* [37] ...I see no reason now to depart from these principles.

The procedure on civil contempt is laid down in the Rules of the High Court 1980 and the Subordinate Court Rules 1980.[38] It is the area of criminal contempt that is uncertain. The Bar Council has forwarded a memorandum to the Prime Minister on the need to legislate in this area and the proposed Contempt of Court Act is currently under consideration by the Attorney-General's chambers.

However, recently a new procedure has been introduced for the offence of contempt in the face of court, which is a part of criminal contempt.[39] A further amendment was made to O 52 of the Rules of the High Court 1980 by inserting a reference to all other forms of contempt under the new r 1B which states:

> In all other cases of contempt of court, formal notice to show cause why he should not be committed to prison or fined shall be served personally.

It is the writer's view that this is an insufficient safeguard and does not give much certainty to this area of the law and procedure, which is highlighted in the final part of this paper.

The Phillimore Committee [40] in the United Kingdom and the Sanyal Committee [41] in India both concluded that in the area of criminal contempt, the law falls short of certainty and requires legislation. Both these jurisdictions have now codified the law of contempt.[42]

The need for the continued existence of the law of contempt in certain areas has been challenged, as there are arguments for allowing some of the activities that the law of contempt seeks to prevent. In *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad*,[43] Harun J said:

> It is important that the courts should be the subject of free criticism. It is equally important that the dignity and authority of the court should be maintained. It is the reconciliation of these two principles that involves the difficulty in deciding cases of contempt of court.

One cannot persuasively argue that there is a fundamental right for a citizen to threaten a judge or intimidate a witness but the right to freedom of expression and speech and the right to information are a different matter.

FREEDOM OF EXPRESSION

The Federal Constitution of Malaysia enshrines the right to freedom of expression in Article 10:

> Freedom of speech, assembly and association
>
> (1) Subject to clauses (2), (3) and (4),
> (a) every citizen has the right to freedom of speech and expression
> (b) all citizens have the right to assemble peaceably and without arms
> (c) all citizens have the right to form associations

> (2) Parliament may by law impose
>
> (a) on the rights conferred by para (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence;

Freedom of expression in the traditional sense covers obvious forms of expression such as making speeches, writing books, articles or broadcasting.

The European Convention on Human Rights ('ECHR') chose 'expression' in preference to 'speech'[44] to include other forms of expression like artistic work, painting, photography, sculpture and music. Such work may at times carry an overt or explicit political message.[45] It would also include peaceful assemblies or demonstration.

Halsbury's Laws of England states that the freedom of expression incorporates both the right to receive and to express ideas and information and the secrecy of private communications.[46]

Article 19 of the Universal Declaration of Human Rights ('the UDHR') states that:

> Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

By virtue of its membership in the United Nations, Malaysia subscribes to the UDHR. In addition to this, Parliament has given the UDHR legal status in Malaysia by importing it into the Human Rights Commission Act of Malaysia 1999, where it states in s 4(4):

> For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights to the extent that it is not inconsistent with the Federal Constitution.

The International Covenant on Civil and Political Rights ('the ICCPR')[47] and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') guarantee this as well.[48]

Many constitutions give the protection of freedom of expression and speech a very high status. In the United States it appears in the first amendment. In the Canadian Charter of Rights and Freedoms it is found in s 2.

In Malaysia, as stated earlier, each freedom has been specifically spelt out in its constitution, leaving no doubt as to its importance. However, although all these declarations, conventions and constitutions give paramount importance to the freedom of speech and expression, that right is not an absolute right and is subject to certain restrictions, one of which is for the protection of the administration of justice.[49]

THE IMPORTANCE OF THE RIGHT

There are many arguments advanced for the protection of this right and the special status accorded to it, but the three most compelling ones I have found are as follows:

i The argument of truth

John Stuart Mill in his essay 'On Liberty' propounded the argument that suppression of opinion is wrong, because it is only by the 'collision of adverse opinions' that the truth is discovered or known.[50] Nobody has a monopoly on truth and the majority in society has no right to suppress the views of the minority, however much they dislike them.[51]

This rationale asserts that all truths are relative and that it can only be judged in the 'competition of the market'. The truth or 'market place for ideas' rationale for freedom of expression extends not only to political speeches but also to ideas, history, social sciences, natural sciences, other branches of knowledge and commercial speech.[52]

It is in the collision of these adverse opinions, views and ideas, no matter how distasteful or how much the state or individual may disagree, can we find the truth. It applies to every area of life. This argument of course involves some degree of scepticism of the state, accepted beliefs or acknowledged truths but it is essential to progress and growth.[53]

ii Democratic self-governance

The rationale in this argument for freedom of expression is to enable citizens to understand and participate meaningfully in the democratic process. Mahatma Gandhi said:

> The evolution of democracy is not possible if one is not prepared to hear the other side.[54]

The Constituent Assembly of India hailed the guarantee of free speech as the most important right of fundamental liberties in a democratic society.[55]

Alexander Meiklejohn said:

> The principle of freedom of speech springs from the necessities of the program of self government. It is not a law of nature or reason in the abstract. It is a deduction from basic American agreement that public issues shall be decided by universal suffrage.[56]

In fact, the Law Reform Commission of Canada, after an exhaustive study on the law of contempt stated:

> The administration of justice and the judicial system should not be set apart, or be an exception. It is normal and important for all citizens to feel involved in their system of justice. It is healthy for them to be able to express their views on its imperfections and defects freely, without fear of reprisals, and to propose means of remedying them. Justice must be accessible to the people. It would be contrary to the very democratic process to deny them the right to criticize.[57]

It is only through the freedom of speech and expression can there be democratic self-governance. It is the hallmark of a democratic society.[58]

iii Self-fulfilment

Both arguments above are arguments of a means to an end but the argument of self-fulfilment is an end in itself. This right is protected not only to discover the truth and to ensure better governance but also to allow 'personal growth and self realization'.

In *Procunier v Martinez,*[59] Thurgood J of the US Supreme Court said:

> [Freedom of expression] serves not only the needs of polity but also those of the human spirit -- a spirit that demands self-expression.

These three arguments were all adopted by Lord Steyn in the *House of Lords in R v Secretary of State for Home Department ex p Simms*,[60] where he stated:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognized that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill) 'the best test of truth is the power of the thought to get itself accepted in the competition of the market': *Abrams v US* (1919) 50 US 616 at 630 per Holmes J dissenting. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice in the country...[61]

The law of contempt, which restricts this special right in certain circumstances, can only be justified on the basis of protecting a greater public interest.

THE TENSION BETWEEN THE TWO FUNDAMENTAL PRINCIPLES OF PUBLIC INTEREST

This tension is explained by Lord Templeman in *Attorney-General v Guardian Newspapers Ltd*:[62]

> This appeal involved a conflict between the right of the public to be protected by the security services and the right of the public to be supplied with full information by the press...The question is therefore whether the interference with the freedom of expression [by the injunctions] ...was necessary in a democratic society in the interest of national security for protecting the reputation or rights of others, for preventing disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary...The continuance of the ... injunctions appears to me to be necessary for all these purposes.

The greater public interest here was national security.

In the celebrated case of *Attorney-General v Times Newspaper Publishing* [63] ('the Thalidomide case'), the papers were about to publish an article, the contents of which the Attorney-General felt were contemptuous, in that the contents of the article would bring pressure on one of the parties so as to dissuade that party from continuing the claim, or would pressure that party into making a settlement which he might not otherwise have made, or would influence him in some way over his conduct in the action. The Attorney-General obtained an injunction from the High Court, which was discharged by the Court of Appeal. The Attorney-General then appealed to the House of Lords.

In allowing the appeal, Lord Reid said that:

> The whole issue in the case concerned public policy and in particular a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.[64]

The public interest protected here at the expense of freedom of expression, was the protection of the parties to the adjudicating process from interference.[65]

However, the European Court of Human Rights reversed the decision of the House of Lords by 11 votes to nine and held that there was a breach of Article 10 of the Convention.[66] It said that in this context, the court's role was to balance the public interest in freedom of expression against the need to maintain the authority of the judiciary, which was in contrast to the view of some of the members of the House of Lords that it could not get involved in trying to balance competing interests and that the prejudgment rule was absolute.

The European Court however specifically recognized the protection of the administration of justice in general as a legitimate aim of restriction but said that in this particular case, the public debate on the thalidomide tragedy was a matter of undisputed public concern and there was no pressing social need sufficient to outweigh the public interest in freedom of expression.[67]

OTHER JURISDICTIONS

In New Zealand, the right to freedom of expression, guaranteed in the Bill of Rights Act 1990, is balanced against all other affirmed freedoms and rights.[68]

The New Zealand Court of Appeal in *Gisborne Herald Co Ltd v Solicitor-General* [69] stated that:

> The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the courts invokes both these values.

In *Canadian Newspaper Company v Canada (Attorney-General)*,[70] Lamer CJ said:

> Freedom of the press is, indeed, an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

Generally there seems to be a consensus that there should be restrictions of the freedom of expression for the protection of the parties to the adjudicating process or to ensure that this process is not in anyway interfered with.

The law of contempt should not however be used to restrict criticism of the justice system, decisions of the court or its officials because it is only by responding to these criticisms can there be improvement in the administration of justice. No person should be cited for contempt for constructively criticizing the law or the administration of justice. Freedom of speech should be protected at all costs. Judges who are the protectors of fundamental liberties should be less sensitive. This was the position taken by Lord Morris in *McLeod v St Aubyn*:

> Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.[71]

THE OBJECTIVE AND THE TEST

It is clear that the restriction on freedom of expression will only be permitted in very exceptional circumstances. From a reading of the cases, there is much uncertainty in the way in which judges have decided what is and what is not contemptuous but there is at least some certainty in the objective sought to be achieved when applying the law of contempt. It is to prevent any interference and to protect the confidence that the public must have in the administration of justice.

Once the objective has been identified, the law of contempt should only be applied when that publication of expression defeats or interferes with the objective.

The test to determine this, however, is uncertain. The English position is the real risk as opposed to a remote possibility test. In Malaysia however, the test of what amounts to contempt is 'if it is likely or it tends in any way to interfere with the proper administration of justice'.

In the case of *Murray Hiebert v Chandra Sri Ram*,[72] the Court of Appeal agreed with the High Court judge that the publication was contemptuous because it was written in respect of proceedings in the suit, it was sub judice and it scandalized the High Court. The court considered the statement of Lord Parker CJ in the case of *R v Duffy*:[73]

> The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists -- namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned...The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?

It is worthy of note that though the court recognized the 'real risk' test, they took the view that the test that should be applied is the test as applied in:

> ' *Straits Times Press Ltd, Palaniappan* and *Sin Poh Amalgamated*,...[which was ...'To constitute contempt of court, it is not necessary to prove affirmatively that there had been an actual interference with the administration of justice by reason of offending statements. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice.']
>
> The Court of Appeal held that 'that is the test for the High Court to apply until overruled by the Federal Court. In my view, therefore, the High Court had applied the correct test.'[74]

LOCAL CONDITIONS

The courts have repeatedly justified taking a different approach from their counterparts in other jurisdictions on the basis of 'local conditions'.

In *Attorney-General v Arthur Lee Meng Kwang*,[75] Mohamed Azmi SCJ had this to say:

> Whether a criticism is within the limits of reasonable courtesy and good faith must in our view, depend on the facts of each particular case. In determining the limit of reasonable courtesy the courts should not however lose sight of local conditions, a proposition laid down in *PP v Straits Times Press Ltd* [76] and *PP v SRN Palaniappan & Ors* [77] where Spenser Wilkinson J

> hesitated, quite correctly, to follow too closely the decisions of English courts on the subject of contempt without first considering whether the relevant conditions in England and this country are similar.[78]

I can do no better than to quote the words of Dr Abdul Aziz Bari [79] as to the stifling effect this has on the freedom of expression locally, not only among members of the public and lawyers but also on academics:

> It must be pointed out, however, that Malaysian courts do not follow their English counterparts in areas where positive developments have taken place. This is evident on the issue of contempt of court, whose impact on the scope of freedom of speech is very significant. The reasons given were that 'our social conditions...are very different from those in England'[80] ...and that the sensitivity of the local courts 'need not be the same as courts of similar jurisdiction in England....[81]
>
> The impact of these trends in the teaching of constitutional law is quite far-reaching because case law stands as one of the sources of constitutional law. And most law lecturers rely heavily on them in their teaching. They are quite reluctant to take a different view. It is hoped that in the future they will follow the footsteps of their counterparts in the civil law world where jurists take an active part in developing the law. Law academics should realize their role because as has been alluded to by Lord Denning,[82] they have a part to play; something which could not be undertaken by either lawyers or judges. Be that as it may, existing laws may stand in their way. In the words of a prominent academic:
>
> 'It is not a satisfactory situation, because the restrictions are considerable enough...to make any...academic...think twice before placing any controversial views in the public domain.[83]

It is interesting to note that judges have repeatedly pointed out that this power to punish for contempt will not be used to protect the judges' personal dignity or character.

As per Lord Denning MR in *R v Commissioner of Police of the Metropolis ex p Blackburn No 2*,[84] cited and applied in the case of *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed*:[85]

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.[86]

In *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed*,[87] the Prime Minister of Malaysia in an interview had made the following comments, which was reported in an article in the Time magazine under the heading, 'I Know How The People Feel':

> *On the Courts*. The judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation. We know exactly what we want to do, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.

In delivering judgment, Harun J said:[88]

> It is important that the courts should be the subject of free criticism...The right of every individual (including the Prime Minister) to freedom of speech in this country has been consistently upheld by the courts subject only to any restrictions that are prescribed by the Constitution itself. There is no reason to deny the right to the respondent in the instant case. The court should not be over sensitive to criticism.

On appeal, the Supreme Court upheld the decision of the High Court judge and the right to freedom of speech and expression.

RECENT CASES

However, in some recent cases in Malaysia, for example *Re Tai Choi Yu* [89] and *Re Lee Chan Leong; Eddie Lee Kim Tak v Jurutera Konsultant (SEA) Sdn Bhd (No 3)*,[90] even letters to the court became the subject matter of contempt proceedings.

In *Re Tai Choi Yu*,[91] counsel had written a letter to court seeking to reschedule the case and for it to be fixed before another judge on the ground that there was a strong likelihood of bias and partiality on the part of the presiding judge. He was found in contempt and sentenced to one month's imprisonment by the same judge.

In *Re Lee Chan Leong; Eddie Lee Kim Tak v Jurutera Konsultant (SEA) Sdn Bhd (No 3)*,[92] the lawyer first wrote to the Chief Justice seeking the disqualification of the High Court judge and later wrote stating that he was withdrawing that letter as the matter had been resolved by the High Court judge ('telahpun diselesaikan dengan sewajarnya oleh Yang Arif Mahkamah Tinggi Kuala Lumpur'). That sentence was held to be misleading and contemptuous. The lawyer expressed his regret -- in his words:

> I regret that the phrase used in the said letter dated 10 April 1999 has given rise to Your Lordship the impression that there was a discussion between Your Lordship and me. When I phrased the letter ...I honestly and sincerely believed that I need not elaborate...And when I wrote the letter, I intended it to mean that Your Lordship had appropriately dealt with the matter...However when the learned Deputy Registrar informed me that Your Lordship was displeased with the letter, in that it gives the impression as stated in the...letter to show cause, I immediately sent another letter ... to the Chief Judge to give the full picture...

The lawyer was convicted for contempt, fined RM10,000 in default three month's imprisonment and ordered that the said fine be paid by 1.30pm of the same day.

PUBLICATION

If the objective of the law of contempt in this area, as mentioned earlier, is protecting the confidence that members of the public have in the judicial process, then for it to constitute contempt, there must firstly, be a personal scurrilous attack on the judge or court or an attack on the integrity or impartiality of the judiciary. Secondly, there must be sufficient publication of the contemptuous statement to members of the public.

Tan Sri Harun Hashim SCJ, in his dissenting judgment in *Attorney General, Malaysia v Manjeet Singh Dhillon*[93] cited a case involving the contempt of 'scandalizing the court', *Brahma Prakash v State of Uttar Pradesh*,[94] where the Supreme Court of India held:

> What is material, is the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public or of the judiciary itself that thereby lead to interference with the administration of justice.

Tan Sri Harun held that:

> The extent of the publication ...is very limited and does not meet the test suggested in Brahma Prakash.

And added that,

> Mere abuse of a judge, however defamatory, is not contempt of court.

In recent years the proliferation of cases in which the power of contempt has been used is alarming, in contrast to the past decades.

A well known former Court of Appeal judge Dato' VC George had this to say, at a memorial for the late Tan Sri Ismail Khan:

> Tan Sri took the view, which I respectfully share, that if a judge has to resort to abuse or to threats of holding counsel in contempt (other than in respect of technical contempt, that is where there has been a breach of undertaking and the like) it amounted to an admission that he accepts that counsel has been contemptuous of him and Tan Sri used to say that if that happens more than once, the possibilities are that there is something fundamentally wrong with the judge!
>
> Tan Sri could not recollect even one instance in all the years that he practiced at the Bar and in all the years that he sat on the bench, of any judge threatening counsel with contempt proceedings and come to think of it, for that matter, neither could I, in all my years at the Bar of our courts and in all the years that I had sat on the bench.[95]

FINAL ARBITER

When the press is prevented from reporting a case or a member of the public is prevented from commenting adversely on a judge or the administration of justice or even discussing matters pending before the courts, the law of contempt has then been used to curb that freedom all in the name of preserving the adjudicating process and the parties to the process so that the truth will be known and the 'final arbiter' can pronounce justice. In fact the whole jurisprudence of our law encourages parties and witnesses to speak freely, granting them immunity and protection for what is said in court. That is where the issues of life and death are decided.

Should not a person's fear of bias or partiality of a particular judge hearing a case or the fact that the judge has an interest in the outcome of the suit, or that the parties of the case have indulged in concocting evidence or used illegal means to obtain evidence etc be a matter that should be canvassed in court? The court is the proper forum to raise all these issues. Freedom of speech and expression needs the greatest protection here -- parties must be able to ventilate their grievances, fears and complaints, so long as it is kept within the limits of reasonable courtesy, because the confidence of the public in the administration of justice depends on it.

In the words of Lord Denning MR:

> Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'[96]

and Lord Dankwerts LJ in the same case,[97] quoting Lord Hewarts CJ in *R v Sussex Justices, ex p McCarthy*:[98]

> Justice should both be done and manifestly seen to be done.

That is the confidence in the process, which is sought to be protected. As the right of audience to this forum is confined to lawyers, they must be given the utmost freedom to express their client's concerns. There have been many instances of lawyers being cited for contempt for making an application to disqualify the judge, or even for filing an application to disqualify a public prosecutor or simply for citing a case. When an advocate's right to express his client's interests is restricted, that very confidence is destroyed.

In the words of Abdoolcader J:

> Presidents and magistrates must accept the fact that it is the duty of counsel appearing before them to act fearlessly and with all force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the court[99]

and Lord Reid in *Rondel v Worsley*:[100]

> Every counsel has a duty to his client, fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.

In any event there is an avenue available if a lawyer abuses this freedom, which is statutorily provided for, and was used by Abdoolcader J in *Re Kumaraendran, An Advocate & Solicitor*:

> I think this is a proper case for reference to the appropriate Bar Committee for an enquiry into the conduct of the advocate by his peers in relation to the statement, and I so direct.[101]

Should the law of contempt be used to restrict personal attacks or defamatory expressions of a judge? The answer lies in the words of Lord Denning:

> ...we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations... we must rely on our conduct itself to be its own vindication.[102]

SCANDALIZING THE COURT

'Scandalizing the court' is an offence which strikes at the very heart of freedom of expression. The uncertainty in what constitutes contempt for 'scandalizing the court' has led to an undesirable situation and has curbed freedom of expression.

> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in the court of justice. They can say that we are mistaken and that our decisions are erroneous, whether they are subject to appeal or not.[103]

To minimize the restriction on freedom of expression and uncertainty in the law the Phillimore Committee recommended that 'scandalizing the court' should no longer form a contempt of court but should be redrafted as a separate criminal offence.[104]

Malaysia has already provided for a separate criminal offence in the Penal Code, specifically under:

> Section 228 --'Whoever intentionally offers an insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to six months, or with a fine which may extend to two thousand ringgit, or with both.

If the contempt is in the nature of an offence that can be dealt with at a later date, this provision can be resorted to but it is the writer's view that judges should still have residual power to control proceedings in their court under the head of 'contempt in the face of the court' to immediately address instances of interference as in *Morris v Crown Office*,[105] discussed earlier. This section, quite rightly, does not cover instances where the proceedings in the matter have concluded.

Take the case of *R v Commissioner of Police of the Metropolis ex p Blackburn No 2*,[106] where Quintin Hogg QC, wrote an article after proceedings had concluded in the case, accusing the judges of 'blindness'[107] and stating that the Gaming Act of 1960 was unrealistic, unworkable and contradictory and that the decision of the Court of Appeal was erroneous. The Court of Appeal was moved to treat such remarks as contempt of court as the writing had the effect of ridiculing or lowering the authority of the court.

The court held that Mr Hogg was entitled to make all the criticism he so wished. As per Salmon LJ:

> ...it is the inalienable right of everyone to comment fairly on any matter of public importance...providing it keeps within the limits of reasonable courtesy and good faith.[108]

The court did not find contemptuous, the fact that a QC had accused judges of being blind, in view of the importance of the right to freedom of expression. In fact, the court further held that despite inaccurate statements of fact in the article, the statement was not a contempt of court but within the limits of free speech.[109]

In the case of *Ambard v Attorney-General for Trinidad and Tobago*,[110] the Privy Council did not find contemptuous, the publication of an article which compared and criticized two different judges who gave different sentences for similar crimes. In the words of Lord Atkin:

> ... The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune[111] ...Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.[112]

Criticism of judgments must be encouraged as only then can the system of justice be improved, so long as the criticism is constructive and not a scurrilous attack on the judge or court.

A free press too is an indicator of a democratic society and a healthy society will encourage debate about all matters including politics, the judiciary, or justice in general. Justice itself should be open to scrutiny; courtrooms should be open to the public; debate should be encouraged about the operation of justice; justice should be visible.[113]

RIGHTS OF THE ACCUSED

Rights of the accused in a criminal trial

The first area that needs to be addressed is the right of the accused in a criminal trial. Due to its importance, it bears repeating that an accused person should not be restricted from bringing his complaint, grievance and fears to court by the threat of contempt. It is a fundamental principle of criminal law that a person accused of a crime must be allowed to raise the best possible defence, arguments and evidence.[114]

In the case of *PP v Dato' Seri Anwar bin Ibrahim (No 4)*,[115] Zainur Zakaria, solicitor for the accused, filed a motion before the court for an order that two members of the prosecution team be prevented, prohibited or discharged from further prosecuting the case and the matter of their conduct be referred to the Attorney General for appropriate action. The motion was supported by an affidavit based on a statutory declaration of Manjeet Singh Dhillon ('MSD') and a letter. The substance of the motion was anchored on the premise that the prosecutor had asked MSD to fabricate evidence. The High Court judge struck off the motion summarily on the basis of it being contemptuous.

The solicitor in the matter was cited and convicted for contempt and sentenced to three months' imprisonment for filing the notice of motion.

The Court of Appeal heard the appeal by the solicitor against both his conviction and sentence and dismissed same.

The solicitor then appealed to the Federal Court and after considering the merits of the application the Federal Court, as per Haidar FCJ,[116] concluded:

> Suffice for me to state that I agree with the conclusion of the learned Chief Judge -- *In my view, he was prima facie justified in filing the said application.*

Not only was the accused deprived of a right to a full hearing on the matter that he had complained about, but his solicitor could no longer continue to act for the accused, depriving him of his constitutional right to the legal practitioner of his choice.[117]

Further, Abdul Malek Ahmad FCJ, in the same case, held:

> ...There has been a blatant disregard of rules of procedure and considering the frame of mind the learned trial judge was in, he should have been the last person to deal with the contempt issue. Having held the allegations were baseless despite not calling for further evidence to support this, the learned trial judge had ruled that the motion should not have been filed. Since the procedure

> taken was wrong and the matter had certainly not been proved beyond reasonable doubt, the learned trial judge fell into error in deciding that contempt of court had taken place. Imposing a sentence of three months imprisonment was definitely the wrong icing to the cake... the conduct of the learned trial judge himself had vitiated the contempt proceedings. It is obvious that the Court of Appeal in merely agreeing with the trial judge, fell into the same error.[118]

This case clearly demonstrates the arbitrary nature of the proceedings and the dangers of leaving the law of contempt uncertain. It is surprising and alarming to note that the Court of Appeal had agreed with the High Court judge on this fundamental issue. It is certainly time for the legislature to look into this area of the law.

Having said that, I wish to add that this inconsistency is not confined to our local judges but the same inconsistency prevails in other jurisdictions where the law of contempt is left to the common law:

> There is no better illustration of the present uncertain state of the law than the variety of judicial opinion expressed in the *Sunday Times* case [Thalidomide case] itself. That case was considered by three courts: the Divisional Court of the Queen's Bench Division, the Court of Appeal and finally the House of Lords. The judgments and reasoning in each court disclose a remarkably wide variety of routes by which the judges reached their decisions. There is nothing very unusual in the reversal by a higher court of a lower court's decision but such a variety of judicial reasoning is exceptional, especially in a matter where penal sanctions are involved.[119]

RIGHTS OF THE CONTEMNOR CHARGED WITH AN OFFENCE OF CONTEMPT

The second area is the right of the contemnor charged with an offence of contempt. The UDHR clearly states the minimum standards that must be complied with:

> Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
>
> Article 11(1): Everyone charged with a penal offence has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[120]

The guarantees necessary are stated in the ICCPR and the ECHR which among others are, the right to be informed of the charge promptly and in detail, the right to a legal practitioner of his choice, the right to adequate time and facilities to prepare the defence and the right to be present and to participate in the trial.

In Malaysia, the main objection in the law of contempt is as stated by the Raja Azlan Shah LP in the Federal Court case of *Jaginder Singh & Ors v Attorney-General:*[121]

> The disturbing aspect...in this case is that no specific charges against the appellants were distinctly stated and what is worse they were not given an opportunity to answer and defend themselves. It is unthinkable that they should be sent to prison unless specific charges were framed and they have had an opportunity to answer them. This is because the summary contempt procedure more often involves a denial of many of the principles of natural justice, requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

The Federal Court went on to say:

> We have said many a time that the summary contempt procedure not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence.[122]

It is clear that the then Federal Court envisaged a position where the summary procedure will only be used in the context of 'contempt in the face of the court', that is, where all the facts are within the knowledge of the judge who can summarily deal with the matter because it is urgent and imperative to act immediately.

Further, it is also a procedure which the courts have said should only be availed as a last resort, as per Abdoolcader J in *Re Kumaraendran, An Advocate & Solicitor:*[123]

> In *Balogh v St Albans Crown Court, supra*, the Court of Appeal in England held that because the power to summarily punish a contemnor for contempt is arbitrary, contrary to natural justice, and far removed from the ordinary processes of the law, it is to be exercised with scrupulous care and only when it is imperative for the court to act immediately; and it must never be invoked unless nothing else will do to protect the ends of justice.

The Bar Council in its proposed Contempt of Court Act sought to address the uncertainties in the law, as in:

(a) the definition of contempt;
(b) the sentence for contempt (maximum or minimum or when it is to be just a fine or caution etc);
(c) the relevant procedures;
(d) the defences available;
(e) the right of legal representation;
(f) the right to call witnesses and adduce evidence;
(g) who initiates the complaint;
(h) who prosecutes the offence;
(i) the specific circumstances in which a judge can initiate contempt proceedings;
(j) the application of the rules of natural justice;
(k) the application of the safeguards in the adversarial system

Any criminal offence must have minimum safeguards. The law that a party is accused of breaching, must be certain and clear. The charge must be stipulated clearly. The rules of natural justice must be incorporated in the procedure. The right to legal representation as provided for under the Constitution must be adhered to. Time and facilities to prepare his defence must be accorded. The right to adduce evidence and cross-examine witnesses must also be given. Only then can public confidence in the administration of justice by the courts be maintained.

CONCLUSION

The fine balance that the law of contempt seeks to achieve in balancing the freedom of expression with the protection of the administration of justice is an important one. It cannot be left to the whims and fancies of individual judges but there must be fixed objective criteria used in determining if an act is contemptuous.

As stated earlier, in the area of civil contempt, with the exception of the standard of proof and sentencing, the law is fairly certain. It is in the area of criminal contempt that there is much uncertainty.

The law of contempt should be codified. The offence of 'scandalizing the court' in particular must be clearly spelt out. It is a strict liability offence and with the law in a state of flux, this has a stifling effect on the freedom of expression. Codification would not do away with all the problems[124] but it would give us a better balance between the freedom of expression and the protection of the administration of justice.

It must be recognized that freedom of speech and expression is the most important fundamental right, all other rights are dependent on it. It also must be recognized that there must be some restriction to that freedom to maintain public order. But most importantly, the freedom of expression must be protected at all costs, in the arena of justice. The only restriction permissible is where there is a real risk of prejudice to the administration of justice.

The proper safeguards in criminal law and the rules of natural justice must apply, with one exception, that is, in the area of 'contempt in the face of the court'. The rule of natural justice would prevent the judge who witnesses the contempt from hearing the matter. But there is a greater public interest here and that is to protect the adjudication process. When the contempt is within the cognizance of the judge, he should have the power to immediately deal with it after according the contemnor all the safeguards provided for in law.

Only then, would we have struck a fair balance between the freedom of expression, the protection of the administration of justice and the rights of the accused.

1 **Paper presented at the 11th Malaysian Law Conference held in Kuala Lumpur on 8th-10th November 2001**.

2 *Attorney-General v Times Newspaper Ltd* [1973] 3 All ER 54 at 71, cited with approval by the Federal Court in *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604 at p 608.

3 [1987] 1 MLJ 383 at p 387.

4 [1970] 1 All ER 1079 at 1087, Court of Appeal.

5 Attributed to Voltaire, but actually SG Tallentyre's summary of Voltaire's attitude towards Helvetius following the burning of the latter's *De l'esprit* in 1759 in *The Friends of Voltaire* (1907), at p 199, Partington, A (Edn) 1994, *The Concise Oxford Dictionary of Quotations*, 3rd ed, Oxford, New York at p 341.

6 See also Gomez, J, 'The right to silence in the United Kingdom and Malaysia', (1995) The Journal of the Commonwealth Lawyer, p 71 at p 79.

7 Article 10 of the Federal Constitution.

8 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273 at p 275.

9 For a brief history on the development of the law of contempt and the different types of contempt, see Gomez, J, 'Contempt of Court', (2001) xxx No 2, *INSAF, The Journal of the Malaysian Bar,* at p 1.

10 Ibid.

11 In *Re HE Kingdon v SC Goho* [1948] MLJ 17, at p 18, cited by Abdul Hamid J in *Public Prosecutor v Straits Times (M) Bhd* [1971] 1 MLJ 69, at p 70.

12 The categories are not exhaustive. Anything that a judge feels is interfering in the administration of justice may constitute contempt.

13 [1975] 2 MLJ 45 at p 47.

14 (1971) 16 DLR (3rd) 390, at p 408.

15 [1974] 3 WLR 314, at p 319.

16 See also Abdul Haseeb Ansari, 'Judicial Delineation of the Supreme Court on its Jurisdiction under art 129 read with art 142 of the Constitution of India', 3 September 1999, [1999] 3 MLJ lxv, lxxi -- where he cites Moffitt P's observation in *Registrar Court of Appeal v Collins*[1982] 1 NSWLR 682, that this power extends to conduct which takes place outside the actual court room, which is sufficiently proximate to the court in time and space; as well as the view appearing in another Australian case, *European Asian Bank AG v Wentworth* [1986] 5 NSWLR 445, that the expression will mean 'conduct coming to the notice of the court directly by one of its senses' and concludes that Lord Denning's dictum as the preferred view.

17 [1970] 2 QB 114.

18 Other examples are *PP v Seeralan* [1985] 2 MLJ 30, where the issue before the Supreme Court was whether there was contempt in the face of the court. The court held that the lawyer's conduct in accusing the magistrate of being unfair, biased and prejudiced in regard to a particular witness did constitute contempt in the face of the court.

19 See Gomez, J, 'Contempt of Court', (2001) xxx No 2, *INSAF, The Journal of the Malaysian Bar*, p 1 at p 6. For example, s 228 of the Penal Code (FMS Cap 45).

20 The Report of the Phillimore Committee, para 159 at p 68.

21 [1999] 4 MLJ 321.

22 [1981] 1 All ER 244, at p 248.

23 Also see the statement of Lord Parker CJ in the case of *R v Duffy, ex p Nash* [1960] 2 QB 188, 'The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists -- namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned...The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?'

24 The law of contempt under this head provides an effective remedy against any 'personal, scurrilous abuse of a judge as a judge' *R v Gray* [1900] 2 QB 36, at p 40, as per Lord Russell CJ.

25 [1928] 44 TLR 301.

26 Shorts E & de Than, C, *Civil Liberties Legal Principles of Individual Freedom*, (1998) London, Sweet & Maxwell, at p 321. See also Lord Salmon in *Morris v The Crown Office* [1970] 1 ALL ER 1079, at p 1087, '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 insults. Nothing is further from the truth. No such protection is needed.'

27 Appointed by the Lord Chancellor on 8 June 1971 and chaired by Phillimore LJ -- they presented their comprehensive Report on Contempt of Court to Parliament in December 1974.

28 In the UK, the position even covers press reporting of imminent proceedings -- Eady, D & Smith ATH, *Arlidge, Eady & Smith on Contempt*, (1999) London, Sweet & Maxwell at p 304: 'this obligation can hinder press reporting even prior to the commencement of proceedings, at least where such proceedings are 'virtually certain' to take place, and even possibly before that stage is reached' -- p 64.

29 (1985) 150 JP 71, 80. See also Eady D & Smith ATH, 1999, Arlidge, Eady & Smith on Contempt, London, Sweet & Maxwell at p 64.

30 [1974] AC 23.

31 Ibid, at p 300.

32 Courts of Judicature Act 1964 (Revised in 1972) (Act 91).

33 Subordinate Courts Act 1948 (Revised in 1972) (Act 92).

34 [1991] 1 MLJ 167 at pp 177-178.

35 [1999] 4 MLJ 321 at p 334.

36 [1987] 1 MLJ 383.

37 [1990] 1 MLJ 273.

38 Orders 52 and 34 respectively.

39 Rules of the High Court 1980, O 52 r 1A.

40 See fn 26.

41 The Ministry of Law in India by its order No F 49/61-Adm I dated July 1961 set up a special Committee chaired by the Additional Solicitor-General of India, Shri H N Sanyal to examine the entire law relating to contempt of court.

42 The Contempt of Court Act 1981 in the UK and the Contempt of Court Act 1971 in India (passed to improve the 1952 Act).

43 [1987] 1 MLJ 383, at p 385.

44 Stone, R, *Civil Liberties and Human Rights* (2000) 3rd Edn, London, Blackstone Press at p 167.

45 Stone, R, *Civil Liberties and Human Rights* (2000) 3rd Edn, London, Blackstone Press at p 168.

46 Lord Hailsham, *Halsbury's Laws of England*, (1974) 4th Edn, London, Butterworths, Vol 8 para 834.

47 In art 19 -- '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in para 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or public order or of public health or morals.'

48 Date of entry into force -- 1 November 1998 Protocol No 11 -- Article 10 -- Para 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. Para 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities ...as are prescribed by law and are necessary in a democratic society ...for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.'

49 ECHR restrictions can be imposed for maintaining the authority and impartiality of the judiciary. The ICCPR states that restrictions are permissible for the protection of public order, which includes protection of the administration of justice.

50 Nicol A, Millar G & Sharland A, *Media Law and Human Rights* London, (2001) Blackstone Press, at p 2. This argument was also advanced by Milton two centuries earlier in his essay 'Areopagitica: A speech for liberty of Unlicensed Printing (1644)' in 1958, *Prose Writings*, London, Everyman edition.

51 Stone, R, *Civil Liberties and Human Rights*, (2001) 3rd Edn, London, Blackstone Press at p 168.

52 Nicol A, Millar G & Sharland A, *Media Law and Human Rights*, (2001) London, Blackstone Press, at p 2.

53 Jawaharlal Nehru supported this view -- 'I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press'-- Nehru's speech on 20 June 1916 in protest against the Press Act 1910 quoted by Soli Sorabjee in his essay 'Freedom of Expression and the Indian Constitution' Iyer V (Edn) *Constitutional Perspectives -- Essays in Honour and Memory of HM Seervai*, (2001) Delhi, Universal Law Publishing at p 121.

54 Quoted by Soli Sorabjee in his essay 'Freedom of Expression and the Indian Constitution' in Iyer V (Edn), *Constitutional Perspectives -- Essays in Honour and Memory of HM Seervai*, (2001) Delhi, Universal Law Publishing at p 121.

55 Shiva Rao (Edn), *The Framing of India's Constitution: A Study*, (1966) New Delhi, Indian Institute of Public Administration at p 222 as quoted.

56 Meiklejohn, A, *Political Freedom: Constitutional Powers of the People*, (1965) Oxford, OUP at p 27.

57 The Canadian Law Reform Commission Report on Contempt of Court -- Report No 17, dated March 1982, at p 9.

58 Mark Carlisle MP [1969] Criminal Law Review 109-164 at p 124, which was adopted by Abdul Hamid J in the case of *Public Prosecutor*

v Straits Times (Malaya) Bhd [1971] 1 MLJ 69 at p 70.

59 416 US 396 at p 427 (1974).

60 [2000] AC 115 at p 126.

61 Nicol A, Millar G & Sharland A, *Media Law and Human Rights*, (2001) London, Blackstone Press, at p 4.

62 [1987] 1 WLR 1248.

63 [1974] AC 23.

64 Ibid, at p 294.

65 In the words of Watkins LJ in *Peacock v London Weekend Television* (1985) 150 JP 71, at p 80: 'In our land we do not allow trial by television or newspaper. Until the well recognized institution of this country for doing justice, namely the courts, have worked their course, then the hand of the writer and the voice of the broadcaster must be still.' See also Eady D & Smith ATH, *Arlidge, Eady & Smith on Contempt*, (1999) London, Sweet & Maxwell, at p 64: 'There has been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.' -- *Attorney-General v Times Newspaper Publishing* [1974] AC 23 at p 30.

66 *Sunday Times v United Kingdom* [1979] 2 HERR 245.

67 Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at p 283 opined that there was no difference in principle between English law on freedom of expression and Article 10 of the European Convention of Human Rights.

68 Eady D & Smith ATH, *Arlidge, Eady & Smith on Contempt*, (1999) London, Sweet & Maxwell at p 62.

69 [1995] 3 NZLR 563, at p 571.

70 (1988) 43 CCC (3D) 24, 29, 52 DLR 4th Edn 690, 695 [1988] SCR 122.

71 [1899] AC 549 at p 561.

72 [1999] 4 MLJ 321.

73 *R v Duffy & Ors ex p Nash* [1960] 2 QB 188.

74 [1999] 4 MLJ 321, at p 359.

75 [1987] 1 MLJ 206, at p 208.

76 [1949] MLJ 81.

77 [1949] MLJ 246.

78 Followed in *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167, at p 174.

79 Abdul Aziz Bari, 'Teaching Constitutional Law in Malaysia: An Appraisal', [1999] 1 MLJ clxvii.

80 Per Gunn Chit Tuan SCJ in *Attorney General, Malaysia v Manjeet Singh Dhillon* .

81 *Attorney-General & Ors v Arthur Lee Meng Kuang*[1987] 1 MLJ 207, at p 209

82 See his remarks in *R v Local Commissioner for the Administration for the North* and East area of England, *ex p Bradford Metropolitan City Council v Lord Commissioner* [1979] 2 WLR 1.

83 Harding AJ, *Law, Government and the Constitution in Malaysia*, (1996) Kuala Lumpur, MLJ Sdn Bhd at p 199.

84 [1968] 2 QB 150, at p 154.

85 [1987] 1 MLJ 383, at pp 385-386.

86 Lord Salmon in the same case said that 'No criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith'.

87 [1987] 1 MLJ 383.

88 At pp 385-386.

89 [1999] 1 MLJ 416.

90 [2000] 1 MLJ 371.

91 [1999] 1 MLJ 416.

92 [2000] 1 MLJ 371.

93 [1991] 1 MLJ 167, at p 176

94 AIR 1954 SC 10, at p 15

95 14 July 2000, [2000] 3 MLJ i, at p vi.

96 *Metropolitan Properties Ltd v Lannon*[1968] 3 All ER 304, at pp 310-311.

97 Ibid, at p 311.

98 [1923] All ER 233, at p 234.

99 *Re Kumaraendran, An Advocate &Solicitor* [1975] 2 MLJ 45.

100 [1967] 3 WLR 1666; [1969] 1 AC 191.

101 *Re Kumaraendran, An Advocate &Solicitor* [1975] 2 MLJ 45.

102 *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150, at p 154.

103 *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150, at p 154, as applied in the case of *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383, at p 386.

104 Ibid, Report of the Phillimore Committee.

105 [1970] 1 All ER 1079.

106 [1968] 2 QB 150.

107 'The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges.'

108 Ibid, at p 155.

109 *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383 at p 386.

110 [1936] AC 322.

111 *Ambard v AG for Trinidad &Tobago* [1936] AC 322 at p 335, as per Lord Atkin.

112 Ibid, at p 335.

113 Shorts E & de Than C, *Civil Liberties Legal Principles of Individual Freedom*, (1998) London, Sweet & Maxwell at p 313.

114 [1967] 3 WLR 1666; [1969] 1 AC 191, as Lord Reid held in *Rondel v Worsley*: 'Every counsel has a duty to his client, fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.'

115 [1999] 5 MLJ 545.

116 [2001] 3 MLJ 604 at p 640.

117 Article 5 (3) of the Federal Constitution.

118 [2001] 3 MLJ 604, at pp 636-637.

119 Report of the Phillimore Committee, at p 4 para 7.

120 Article 6 ECHR and Art 14 ICCPR.

121 [1983] 1 MLJ 71 at p 74.

122 Ibid, at pp 72-73.

123 [1975] 2 MLJ 45, at p 46.

124 See Eady D & Smith ATH, Arlidge, Eady & Smith on Contempt, (1999) London, Sweet & Maxwell Chapter 5, which discusses the questions still unresolved by the codification of the law on contempt.