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**THE CONTEMPT POWER: A SWORD OR A
SHIELD? – A STUDY OF THE LAW AND
PRACTICE OF CONTEMPT OF COURT IN
MALAYSIA.**

SHUKRIAH MOHD SHERIFF

**A DOCTORAL THESIS SUBMITTED TO DURHAM UNIVERSITY
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY
(LAW)**

2010

Dedication

To my dearest parents:

The Late Dato' Hj. Mohd Sheriff Puteh

&

Hajjah Wan Sepiah Wan Ibrahim

For giving all the love, support and encouragement throughout the duration of my studies

To my beloved husband:

Muhammad Syahmi Mohd Karim

For your love, sacrifices, support and tolerance given whilst you were also struggling with your Ph.D

To my dearest daughters:

Hanan Afiqah Muhammad Syahmi

Hanan Insyirah Muhammad Syahmi

For all the love and understanding given whilst I was completing my thesis. Indeed, they have made my life meaningful during my academic journey in Durham.

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Alhamdulillah, all praise to Allah, the most gracious and the most merciful for the guidance and blessing in realising my goal to achieve this success in my studies.

The process of accomplishing this thesis has gone through numerous challenges in which many parties have been involved directly or indirectly in giving assistance, support and encouragement. I wish to express my utmost gratitude to all of them for their willingness to assist me in the process of completing this thesis.

In researching this rather complicated area of law, I had the exceptional privilege of having Professor Michael Bohlander as my main supervisor. His wide interest and experience have been particularly helpful in tackling the problems I encountered during the course of this thesis writing. The encouragement he generously gave me at every stage of this work made the whole task extremely interesting. I am indebted to him for his source of motivation and continuous support. The amount of knowledge and experience that I gained is invaluable. Professor Ian Leigh as my second supervisor also deserves similar appreciation and gratitude for his help, guidance and encouragement. I am also indebted to him. I am also thankful to the staff of Durham Law School for their help.

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DECLARATION

I hereby declare that no portion of the work that appears in this study has been used in support of an application of another degree in qualification to this or any other university or institutions of learning

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ABSTRACT

The issue relating to contempt of court has caught the attention of people from all walks of life in Malaysia, particularly, after the controversial incidents of the removal of Tun Salleh Abbas, the then Lord President, in 1988 and the dismissal of the former Deputy Prime Minister, Dato' Seri Anwar Ibrahim, in 1998. The judiciary is attacked and its independence is questioned. The lawyers are placed under the threat of contempt proceedings when they tried to exercise their right to freedom of speech and expression and to exercise their duty to act for their clients without fear or favour. The Bar feels that the right to freedom of speech and expression is infringed. The Bar perceives that the contempt power was being misused by the judges.

The Malaysian law of contempt of court is derived from the English common law tradition and is characterised by substantial flexibility. This flexibility results in variable approaches and perceptions by judges that leave uncertainties in this area of law. Consequently, a draft of Contempt of Court Act 1999 has been proposed to the Malaysian government with the main intention of overcoming uncertainties in the law. Placing the comprehensive rules in a statute will allow easier access to and greater clarity of the law because all the rules and procedures would be found in one piece of legislation.

This thesis aims to state and explain the law and the practice of contempt of court in Malaysia. This study will examine the anomalies that derived from the substantial flexibility approaches by the judges in this area of law. Thorough examination and analysis would help identifying the problems and dilemma and the way that the draft Contempt of Court Act 1999 could provide remedies for the predicaments. To illuminate the understanding of the actual practical problem, this study incorporates in-depth interviews together with questionnaire surveys. A total of 15 in-depth interviews have been conducted among the Malaysian judicial officers, advocates and prosecutors. This is further complemented by postal questionnaires sent to these selected legal actors chosen at random in accordance with their seniority, aiming at eliciting their knowledge and opinion on the subject matter at hand. The combinations of theoretical discussion on contempt of court, together with the empirical study, have proved to yield a valuable insight into the re-evaluation of the Malaysian law and practice of contempt of court.

This research reveals that the uncertainties in the law of contempt of court in Malaysia were 'caused' by the inconsistencies in the application and approaches by the judges. The judges have unfettered discretion in determining contempt cases. The majority of the Malaysian legal actors support the idea of placing the law of contempt in a piece of legislation in order to overcome these arbitrariness and uncertainties. They hold that to have credence, the law of contempt would have to be well-defined, as in the absence of any clear guidelines it would be unmerited to imprison anyone for contempt.

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ABBREVIATIONS

Abbreviations	Meaning
CCA	Contempt of Court Act
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIL	Customary International Law
CJA	Courts of Judicature Act
CLA	Civil Law Act
CLO	Civil Law Ordinance
CPC	Criminal Procedure Code
CPR	Criminal Procedure Rules
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRA	Human Rights Act
HRCIA	Human Rights Commission Act
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
JAC	Judicial Appointment Commission
JACA	Judicial Appointment Commission Act
JCE	Judges' Code of Ethics
LPA	Legal Profession Act
NGO	Non-governmental Organisation
RHC	Rules of the High Courts
RPE	Rules of Procedure and Evidence
RSC	Rules of the Supreme Court
RM	Ringgit Malaysia – Malaysian currency
SCA	Subordinate Courts Act
SCR	Subordinate Courts Rule
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights

Chapter 1

Introduction

1.1 BACKGROUND RESEARCH AND STATEMENTS OF THE PROBLEM

The Malaysian contempt of court is primarily a common law phenomenon as over the years of evolution and development in the legal system, the Malaysian courts have had the opportunity to establish and define the ambit of the law relating to contempt of court, hence provide judicial illumination and interpretation. Being the common law courts, the Malaysian courts are vested with inherent power to punish the contempt of themselves.¹ The inherent power to punish for contempt has received its endorsement via Article 126² of the Constitution and Section 13³ of the Courts of Judicature Act 1964 (CJA). These provisions confer the superior courts with jurisdiction to punish any person who is guilty of contempt,⁴ but fail to spell out what contempt is and how to deal with it. The substance and content of the law are still in the common law as the formulation of the law of contempt is left to the courts.⁵

The jurisdiction to punish for contempt touches upon important fundamental rights of the citizen; that is, the right to freedom of speech and expression, which is of vital importance in any democratic system. In Malaysia, every citizen is guaranteed this right.⁶ But it is not an absolute right, because the Constitution provides limitations on the exercise of this freedom in considering other interests such as reputation, security and public order.⁷ As provided in Article 10 (2) of the

¹ *In Re HE Kingdon v SC Goho* [1948] MLJ 17, p. 18; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193, p.195; *MBF Holdings Bhd & Anor v Houg Hai Kong & Ors* [1993] 2 MLJ 516, p. 526.

² It states:

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

³ This provision is a mere repetition of Article 126 of the Constitution.

⁴ Paragraph 26 of the Third Schedule under Section 99A of the Subordinate Courts Act 1948 bestows the subordinate courts with contempt power.

⁵ *Arthur Lee Meng Kwang* (n. 1) p.196.

⁶ Article 10 (1) states:

Subject to clauses (2) , (3) and (4) –

(a) every citizen has the right to freedom of speech and expression;

⁷ Article 10 (2) Parliament may by law impose-

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or

Constitution, Parliament is allowed to pass law on contempt of court. Thus far Parliament has not passed any specific law governing the contempt of court, as it is left to be developed by common law. It is now the duty of the courts to create a balance between these two conflicting public interests, namely, the right to free speech and the right to protect the administration of justice. Nevertheless, in practice, the courts give higher protection to the administration of justice at the expense of freedom of speech and expression.⁸

The approaches taken by the courts to the issue of contempt of court received a lot of concerns, especially from the Malaysian Bar. The Bar is particularly concerned about the patterns of citing lawyers for contempt which have been more rampantly used by the judges. The use of power by the judges is alarmingly higher in comparison to the past decades.⁹ In some cases the order for contempt issued is justified due to the unbecoming conduct of some lawyers that prevent the court from administering justice. But in other cases the validity of such order is doubtful and questionable. The effect is quite significant as the improper issuance of the order could actually derail the integrity of the judges.

The Bar perceives the power to punish for contempt as arbitrary, unlimited and uncontrolled due to the unrestricted jurisdiction of the courts in treating contempt. Judges enjoyed unfettered discretion and to a certain extent, varied perceptions result in the uncertainties of the law. The inconsistencies can be seen through the definition of contempt. What constitutes contempt of court has to be ascertained

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;

⁸ *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167.

⁹ See Dato' Mahadev Shankar, 'Memorial Note: The Late Tan Sri Ismail Khan' (2000) 3 Malayan Law Journal i. He said:

Tan Sri (Ismail Khan) kept in touch with the administration of justice in Malaysia. In the last few years Tan Sri was perplexed as to what was happening to the judiciary in recent years. He could not understand why some magistrates and even some judges were apparently resorting to abusing counsel and further having to rely on the frequent invocation of their powers of holding counsel in contempt of court in order to control their courts.

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!

from case law which is voluminous and not always consistent. Moreover, though a charge of contempt is as serious as a criminal charge, the trial is not in accordance with the required procedure that safeguards the trial of a criminal offence; it is by way of summary proceedings. There is no limit to the imprisonment that may be inflicted on the person or the fine that may be imposed. It is left to the courts unfettered discretion. Furthermore, the practices of purging the contempt after the contemnor tenders his or her apologies do not allow him or her to escape from the sentence. It also does not in any way clarify the law.

Therefore, in the circumstances, would it be sufficient or proper to leave the whole matter to be regulated by the courts themselves? Is it necessary to fetter their discretion since they have invariably stated that this power should be used sparingly and only in extreme cases and always with reference to the interests of the administration of justice?¹⁰ Besides that, the jurisdiction to punish for contempt touches upon important fundamental rights of the citizen that is the right to freedom of speech and expression. This right is also a vital importance in any democratic society. Thus, the contempt law should harmonise well with the needs of a modern democratic system.

1.2 OBJECTIVES OF THE STUDY

The objectives of this study are:

- 1) to examine the law relating to contempt of court and the procedure for the punishment thereof;
- 2) to examine the practice and the judicial approaches in the law of contempt of court;
- 3) to evaluate whether there is a need for amendments therein with a view to clarify and reform the law whenever necessary; and
- 4) to propose recommendations for the codification of the law in light of the examination made.

¹⁰ *Jaginder Singh & Ors v The Attorney General* [1983] 1 MLJ 71, p. 180.

1.3 RESEARCH QUESTION

The practice of leaving the formulation of the law of contempt to the courts has given them unfettered discretion in deciding what amounts to ‘contempt’, how to deal with it and what the punishments are to be imposed. The law of contempt and its application is much too vague and needs to be crystallised. Therefore, the question to be addressed is, ‘Does Malaysia need to have its contempt laws in a statutory form?’ as to overcome the uncertainties in the said area of law.

1.4 RESEARCH METHODOLOGY

This study is done by library research followed by empirical research and it covers the theoretical and applied aspects of contempt of court. It is conducted by examining and analysing laws as found in statutes and case law. As contempt of court is a common law offence, it requires references to a voluminous case law. References are also made to secondary sources in the forms of books, journals, reports, newspapers’ articles and reports, conference proceedings and other periodicals.

Amongst the objectives of this research is to evaluate the sufficiency of the current law and practice of contempt of court in Malaysia and to suggest amendments with the view to clarify and reform the law. Thus, this research suggests to examine the development in the approaches and practices taken by some selected jurisdictions, namely England, India, Canada, New Zealand, Australia and the United States of America (USA), in dealing with contempt of court in their jurisdictions. England and India have their contempt law codified but as to the former, only part of contempt laws are placed in statutory form. The other jurisdictions are mainly based on common law. Moreover, this research proposes to look at the international practice while referring to the international tribunals focusing on International Criminal Tribunal for the Former Yugoslavia (ICTY).

Apart from the theoretical analysis, this thesis requires empirical research that concerns the practical considerations. The empirical research will provide primary data. The methods for this research are questionnaires and semi-structured personal interviews with judges, advocates and solicitors, and prosecutors. The role of interviews in legal research is both to find out about the practical application of certain rules of law and to obtain the views of the experts on the subject under study.

1.5 LITERATURE REVIEW

Although contempt of court has attracted many discussions among the legal practitioners and academicians especially after the incidence of citation of contempt of court against Zainur Zakaria during Anwar Ibrahim's trial, little literature is written on this area under discussion. In Malaysia thus far, almost no research has been done on the subject matter. Some writers have included only small portions of the discussion in their available literatures.

In Malaysia, there is only one book that discusses contempt of court in general. The book by Mohd Nadzri Hj. Abdul Rahman *Penghinaan Mahkamah Undang-Undang. Sivil & Undang-Undang Islam* [Contempt of Court. Civil and Islamic Laws]¹¹ provides an overview relating to contempt of court. This book gives the general idea and basic understanding of contempt of court but it does not discuss in depth every offence of contempt, the procedure and the punishment of contempt. It is merely a descriptive work and not analytical.

The valuable article written by Jerald Gomez,¹² a joint article by Abdul Majid bin Nabi Baksh and Margaret Liddle,¹³ and a conference paper presented by Chew Swee Yoke¹⁴ are the literatures that directly discuss the subject under study. Gomez has outlined a brief introduction on the law of contempt of court. His work

¹¹ Mohd Nadzri Hj. Abdul Rahman, *Penghinaan Mahkamah. Undang-Undang Sivil & Undang-Undang Islam* [Contempt of Court. Civil and Islamic Laws] (Mahzum Book Services, Selangor 2008).

¹² Jerald Gomez, 'Contempt of Court-Freedom of Expression and the Rights of the Accused' (2002) 3 Malayan Law Journal xxxli.

¹³ Abdul Majid Bin Nabi Baksh and Margaret Liddle, 'Reforming the Law of Contempt of Court' (2006) XXXV No. 1 INSAF 119.

¹⁴ Chew Swee Yoke, 'Contempt of Court: Freedom of Expression and Rights of the Accused' (Paper presented at the 11th Malaysian Law Conference, Kuala Lumpur, 2001) .

discusses how the law of contempt of court has limited the right to freedom of speech and expression. The uncertainty of the law and the inconsistency in the application as well as the process of the law of contempt of court are also highlighted.

The article by Abdul Majid and Liddle also highlights reforming the law of contempt of court. It emphasises that having governed by common law with the major influence of English common law, the Malaysian contempt law is flexible as judges' perceptions may vary. The article discusses the predicaments in three species of criminal contempt, i.e. contempt in the face of court, scandalising the court and *sub judice* comment. It provides a suggestion that judges should be using summary procedure sparingly and in most urgent cases only. It also argues that lodging a complaint about a judge should cease to be contempt of court if the complaint is channelled to a proper authority. The article also suggests that a public comment upon a case that has been concluded at a court of first instance should no longer be contempt of court.

The work by Chew covers controversial incidents or cases relating to contempt of court. The writer points out the need for balancing the lawyer's right to freedom of speech and expression and the contempt of court. The problems relating to uncertainty and inconsistency, especially the practice of summary process by the judge in dealing with the law of contempt of court, in Malaysia are discussed. The writer also highlights the conduct of judges in court and the issues relating to criticism of judges.

Another type of literature is the one that discusses the role of lawyers and judges in the administration of justice. Karpal Singh, a prominent Malaysian lawyer, wrote on the role of the lawyers in upholding the rule of law and preserving the independence of the profession.¹⁵ He highlights the importance of having an independent judiciary as well as the independence of the Bar. His work is significant to the subject as he queries the proper action to be taken against a judge who makes a derogatory remark in an open court against a lawyer in his

¹⁵ Karpal Singh, 'The Role of Barrister in Upholding the Rule of Law: An International Perspective' (2003) XXXII No. 4 INSAF 72.

own court. This raises an issue whether the particular judge should be cited for contempt of court or addressed to the Judges' Code of Ethics. This unresolved issue shall be discussed in the proposed study.

The judge's conduct has been questioned in some of the Malaysian cases as seen in the articles written above. In Malaysia, there is little research relating to judge's conduct or misconduct in court. The discussion forms only a small part of some of the literature.¹⁶ The study proposes to examine the problem relating to the conduct of judges as this issue has been discussed on various occasions.¹⁷

The scarcity of literature discussing this issue in Malaysia necessitates exploration into literature outside of the country. The major references are Lowe and Suffrin,¹⁸ Arlidge, Eady and Smith,¹⁹ and C.J Miller²⁰ which provide a good explanation of the law and process for contempt of court under common law jurisdictions, in particular, the development of contempt of court in England. Apart from these, Jeffrey Miller²¹ explains the law of contempt in Canada. As for a basic understanding of the law of contempt in the USA, reference is made to Goldfarb.²²

¹⁶ Chandra Muzaffar, 'Assault on Judiciary:Public Perception' (Paper presented at the Independence of the Judiciary,Kuala Lumpur,1988); Chang Min Tat, 'Judging the Judge' (Paper presented at the Independence of the Judiciary Kuala Lumpur,1988); Hariram Jayaram, 'Security of Tenure of Judge' (Paper presented at the Independence of the Judiciary,Kuala Lumpur,1988); Krishna Iyer, 'No Free Judiciary, No True Democracy' (Paper presented at the Independence of the Judiciary Kuala Lumpur,1988); Salleh Abas, *The Role of Independence Judiciary* (Percetakan A-Z Sdn. Bhd., Kuala Lumpur 1989); Raja Aziz Addruse, *Conduct Unbecoming. In Defence of Tun Mohd Salleh Abas (the Former Lord President of the Supreme Court of Malaysia)* (Walrus, Kuala Lumpur 1990); Anuar Zainal Abidin, 'Appointment and Code of Ethics of Judge' (Paper presented at the Independence of the Judiciary In the Islamic and Non-Islamic Judicial Systems Perak,2004) ; K.C Vohrah, 'The Independence of Judiciary:Its Principles Within The Ambit of the Universal Declaration of Human Rights' (Paper presented at the Independence of the Judiciary In the Islamic and Non-Islamic Judicial Systems,Perak,2004); R.H. Hickling, 'Separation of Powers and Independence of Judiciary: Relations Between Judiciary and Executive in United Kingdom' (Paper presented at the Independence of the Judiciary In the Islamic and Non-Islamic Judicial Systems Perak, 2004) .

¹⁷ For example, *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281; *Attorney General, Malaysia v Manjeet Singh Dhillon* (n.8); *Public Prosecutor v Dato' Seri Anwar Ibrahim* [2002] 2 MLJ 730 and recently in *Fawziah Holdings Sdn Bhd v Metramac Corp. Sdn* [2006] 1 MLJ 435, the conduct of judges has been criticised openly.

¹⁸ Gordon Borrie, N. V. Lowe and Brenda Suffrin, *The Law of Contempt* (3rd edn Butterworths, London 1996).

¹⁹ Anthony Arlidge, David Eady and A. T. H. Smith, *Arlidge, Eady and Smith on Contempt* (3rd edn Sweet & Maxwell, London 2005).

²⁰ C. J. Miller, *Contempt of Court* (Oxford University Press, Oxford 2000).

²¹ Jeffrey Miller, *The Law of Contempt in Canada* (Carswell, Ontario 1997).

²² Ronald L. Goldfarb, *The Contempt Power* (Columbia University Press, New York, London 1963).

In India, much is written on the subject and at least three main references discuss principally the Contempt of Court Act 1971.²³

1.6 OUTLINE OF CHAPTERS

The present research is comprised of five chapters. The **first** is the introductory chapter which contains the background of the research.

Chapter 2 focuses on the Malaysian legal system. The focus of this chapter is on the sources of laws and the administration of justice in Malaysia. The last part of this chapter discusses briefly the fundamental liberties and human rights in Malaysia, in particular the freedom of speech and expression and contempt of court.

Chapter 3 examines the law and practice of contempt of court in Malaysia. The formulation of what contempt is and the procedures with which to deal are left with the courts with the objective of ensuring a credible and efficient administration of justice. This chapter evaluates the judges' approach to contempt of court and highlights the anomalies in the matter.

Chapter 4 is the central focus of this thesis where the main concerns or anomalies found in the current law and practice of contempt of court in Malaysia are analysed. There are **three parts** to this chapter. The **first part** studies the main areas of concerns and the response taken by the Malaysian Bar in addressing the problems. The Bar proposed for the law to be placed in statutory form. The Bar took a stance that codification would bring greater certainty to the identification of the basis of liability and clearer guidance to participants in judicial proceedings. The Proposed Contempt of Court Act 1999 which was submitted by the Bar Council to the Government is examined in this part.

²³ K.J Aiyar, *Law of Contempt of Courts, Legislatures and Public Servants* (9th edn The Law Book Company (P) Ltd, Allahabad 1997); Justice V.K. Mehrotra, *V.G. Ramachandran's Contempt of Court* (6th edn Eastern Book Company, Lucknow 2002); Samaraditya Pal, *The Law of Contempt* (4th edn Wadhwa and Company, New Delhi 2006).

The **second part** examines potential foundations for reform by reference to various levels. Judges play an important role in the final analysis of the law of contempt and are often invited to refer to foreign law as guidance. Nevertheless, the courts are reluctant to adopt foreign laws and to follow the development of contempt law in other jurisdictions. The reason given is the ‘suitability of local condition’. However, the courts offer no explanation as to how the conditions are different and why such differences are relevant. This part proposes that the Malaysian courts should take initiative to widen the horizon by referring to foreign materials not as a total transplant but as an inspiration for development in the domestic law.

The first potential foundation for reform is by examining the protection of human rights in Malaysia, taking into consideration the rejection by the Malaysian courts of international human rights law and foreign laws in interpreting the Malaysian human rights provision. The courts confined themselves to the ‘four walls’ doctrine as governing a principle of interpretation,²⁴ despite the right to freedom of expression being safeguarded internationally. It is enshrined in most of the international human rights law such as the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). Most of the countries are inspired by the UDHR and transformed the ICCPR in their domestic human rights law and constitutions. As far as it is concerned, the UDHR had not been referred to by the Reid Commission while preparing the Malaysian Constitution and the ICCPR has no legal binding effect unless and until Malaysia ratify and transform it into the domestic law. This is the justification given by the courts in rejecting international human rights law in interpreting domestic human rights provisions.²⁵

Therefore, under this part, the attitude of the Malaysian courts towards international and foreign laws as sources of reference will be evaluated. It will be argued that the ‘four-wall doctrine’ adopted by the courts does not require an exclusive reliance upon domestic legal sources, as the courts should refer to

²⁴ *Government of State of Kelantan v Government of Federation of Malaya & Tunku Abdul Rahman* [1963] 1 MLJ 355.

²⁵ *Mohammad Ezam bin Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309, p. 384.

foreign materials, which can give some insights to the national judiciary in addressing the matter. Moreover, Section 4 (4) of the Human Rights Commission Act 1999 (HRCA) acknowledges the UDHR as a source, as long as it is consistent with the Constitution. Therefore, it will be suggested that the Malaysian courts should not be too rigid in interpreting their provisions for human rights and should widen their horizon, looking at international and foreign materials in order to take some lessons and to learn from their experiences. In the era of globalisation, Malaysia should not stay aloof and should strive to be at par with the international standard.

The second potential incentive for the national judiciary in exercising their judicial creativity is by reference to the approaches adopted by the selected jurisdictions, namely England, India, Australia, New Zealand, Canada, the USA and also the international criminal tribunals such as the ICTY, in the issue of contempt of court. In some jurisdictions, particularly countries that base their legal system in common law, dissatisfaction with the law of contempt is not new. There had been movements for reform in the UK and India. In the UK, part of its contempt law has been placed in statute and the rest is still left to be dealt with by common law whereas India's contempt law can now be found in Contempt of Court Act 1971. Countries like Australia and Canada have once come out with the reform proposals but have not proceeded.

The third incentive is the results from an empirical study carried out among the judicial personnel, advocates and solicitors as well as prosecutors in Malaysia. The empirical study intends to elicit the opinions of the experts on the issues in the law and practice of contempt of court in Malaysia and also to gauge their attitudes towards the use of contempt power over lawyers. It offers in-depth discussions of the various issues pertaining to the hypothetical reasons for contempt sanctions being warranted, the anomalies in this area of law to the idea of codification.

The **third part** of Chapter 4 is an overview of the main issues and options to reform based on law and empirical research.

Lastly in **Chapter 5** some concluding remarks in which the findings of the research are highlighted and suggestions are proposed to improve the existing law and practice of contempt of court in Malaysia.

Chapter 2

The Malaysian Legal System

2.1 THE ORIGINS AND DEVELOPMENTS OF THE EXISTING MALAYSIAN LEGAL SYSTEM.

Malaysian law encompasses laws emanating from Malaysia as well as from jurisdictions outside Malaysia. The present legal system emerged as the outcome of the various impositions and adaptations. The traditional, British and independence periods have contributed towards the shaping of the existing system. The British were not the only power that came to the land but they left behind a lasting legacy.²⁶

The British came onto the Malayan scene during the late eighteenth century to the early nineteenth century. When the country was occupied by Japan from 1942 to 1945, the British were out of Malaya. After the World War II, the British came back to Malaya and formed the Federation of Malaya in 1948. Malaya became independent in 1957 and later was formed into Malaysia in 1963.

The British brought their legal system with them, although at that time a legal order was already in place in Malaya.²⁷ Therefore, in order to implement their law and legal system especially when the state of law in Malaya was in chaos regarding the issue of *lex loci*, the British judges asserted that there was no law or legal system applicable in the states, thus resolving the matter by introducing and imposing English common law, rule of equity as well as the English statutes.²⁸

Formal importation of the English common law and the rules of equity into the national legal system were done through a legislation called the ‘Civil Law

²⁶ Apart from Britain, the Portuguese, Dutch and Japanese had come onto the Malayan scene.

²⁷ The British footing began with the cession of Penang in 1786. Later, in 1819 and 1824, they occupied Singapore and Malacca respectively. These three territories were the British colonies and in 1826 were organised into one administrative unit called the Straits Settlements.

²⁸ Regarding the issue of *lex loci*, the Privy Council in *Ong Cheng Neo v Yeap Cheah Neo* [1872] 1 Ky. 326, pp. 343-344, decided that:

[i]t is really immaterial to consider whether Prince of Wales Island, or as it is called Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.

Ordinance'.²⁹ In 1956, a year before Malaya achieved its independence, the British introduced the final version of the Civil Law Ordinance (CLO), which was first introduced in the Straits Settlements in 1878. The CLO 1956 that remains until today was revised in 1972 and renamed as the Civil Law Act 1956 (CLA).³⁰

Shamrahayu A. Aziz³¹ observes that it is a general understanding that the CLO was meant to impose on judges the obligation to bring in the common law of England and the rules of equity into the local cases as the provision³² states, *inter alia* that:

[t]he common law and the rules of equity shall be applied in so far as the circumstances of the States of Malaysia and their respective local inhabitants permit and subject to such qualifications as local circumstances render necessary.

This qualification is similar to that in the treaties entered between the British and the Malay rulers which designated British reservation to the application of their laws into the local system. The application of the proviso was very much dependant on the court's attitude and interpretation. Terrel Ag CJ. stated in *Yong Joo Lin Yong Shook Lin and Yong Yoo Lin v Fung Poi Fong*³³ that the principles of English law had been accepted even before the formal introduction of English law in order to fill the lacuna where there was no provision on the matter in dispute. The legislation essentially sought to formalise what had been done by the judges earlier. The judges' inclination was towards finding solutions in English law as most of the judges at that time were English or English-trained. This continues even after Malaya won its independence from Britain as the judge

²⁹ Prior to the enactment of the CLO, English law was introduced into Malaya via the Charters of Justice and the Residential system. Under the Residential system, English officers were placed in the Malay states to assist the rulers in the states' administration. Based on their advice, a number of English statutes were imported to the Malay states. The English law was also applied through the judges who were British or British-trained as they would turn to English law when deciding cases before them. They had caused a great mass of rules of common law and equity to be adopted. For more, see Roland St. John Braddell, *The Law of the Straits Settlements: A Commentary* (Oxford University Press, Kuala Lumpur 1982).

³⁰ The CLA 1956 (Revised 1972) is in fact a consolidation of the CLO 1956, Sabah's Application of Laws Ordinance 1951 and Sarawak's Application of Laws Ordinance 1949.

³¹ Shamrahayu A. Aziz, 'The Malaysian Legal System: The Roots, The Influence and The Future' (2009) 3 *Malayan Law Journal* xcii.

³² Section 3 CLO.

³³ [1941] MLJ 63, p. 72.

further stated that the English courts' decision would have a 'salutary effect' in the Malaysian courts.³⁴

Apart from the CLO, the British had adopted statutory laws from India such as the Penal Code, the Evidence Act, the Criminal Procedure Code (CPC) and the Contract Act. These laws were actually English common law that was codified. In 1919, the Court's Enactment was introduced, which created a hierarchy of court. This Enactment had abolished the Court of Judicature of Prince of Wales' Island, Singapore and Malacca which was introduced via the Charters of Justice. With that, the judiciary had evolved into a modern form.³⁵

2.1.1 The Legal System in the Post-Independence Period

After independence, the Federal Constitution became the primary source of law and was also regarded as the supreme law of the country. According to Abdul Aziz Bari the Constitution is the bedrock of the system. It gives birth to other laws,³⁶ thus making it the main source of Malaysian law and its legal system. The Malaysian Constitution is a written constitution that is broadly and essentially based on the Westminster Parliamentary³⁷ model but modelled on the Indian Constitution.

The legal system in Malaysia is part of the constitutional structure. The Constitution created a federal type of government, the legislature and judiciary. As a federation, Malaysia has two levels of government, the federal and the state governments where the jurisdiction is separate.³⁸ The Parliament, which is

³⁴ *Re Tanjung Puteri Johore State Election Petition* [1988] 2 MLJ 111, p. 112.

³⁵ James Foong, *Malaysian Judiciary- A Record* (2nd. edn Sweet & Maxwell, Selangor 2002) p. 6. See also Braddell (n.29) p.121.

³⁶ Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (The Other Press, Kuala Lumpur 2003) p. 18.

³⁷ Abdul Aziz Bari by reference to S.A De Smith, *The New Commonwealth and Its Constitution* (Sweet & Maxwell, London 1964) p. 77, has listed down four of the major characteristics of the Westminster democracy, which include: (1) the head of the state is not the effective head of government; (2) the effective head of government is the prime minister who actually appoints and dismisses ministers; (3) the executive is appointed from members of the legislature, namely Parliament; and that (4) the executive is responsible to legislature. Abdul Aziz Bari, 'British Westminster System in Asia-The Malaysian Variation' (2007) 4, No.1 (Serial No. 26) *US-China Law Review* 1, p. 2.

³⁸ Article 74 and 9th Schedule of the Constitution.

bicameral,³⁹ is a principal law-making body which is responsible to legislate law for the whole country, while the State legislature legislates on matters under state jurisdiction and the law shall be operative in the respective state only. The Executive plays a role in the law-making process as they are the members of Parliament that sit in the House of Representatives. The Constitution creates the superior courts of the country, namely the Federal Court, the Court of Appeal and the High Courts.⁴⁰

Although the Constitution has become the primary source of law, there are other laws and values left or imposed by the foreign power on this country that can be seen until today. The obvious legacies are the CLO, the statutory laws from India and the judicial system. Section 3 CLA 1956 allows for the application of English common law and equity on certain conditions as provided by the proviso of that section. The courts can refer to the common law of England and the rules of equity in so far as the people in the country permit and the circumstances render it as necessary. Although the application of English common law and equity is restricted to the situation when there is no written law in the country, there is no clear stated reason for the retention. The courts also incline to find solutions from English common law even though the proviso in Section 3 CLA implies that the courts can develop their own common law and may find solutions from the indigenous or local sources.

Before the abolition of appeals to the Privy Council in 1985, the Privy Council was the last avenue for appeal and served at the peak of the hierarchy of the Malaysian court system. The Privy Council remained as the last resort for appeals for thirty years after independence. The abolition of appeals to the Privy Council may indicate that Malaysia is ready to build up its own legal system and develop its autonomy. However, the decisions of the Privy Council remain highly

³⁹ It has two houses: (a) the appointed Senate, the upper or the *Dewan Negara*, and (b) the popularly elected House of Representatives, the lower house or the *Dewan Rakyat*. Article 44 of the Constitution. For further reading on Parliament, see Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal, Kuala Lumpur 1996); Bari, *Malaysian Constitution A Critical Introduction* (n. 36); Abdul Aziz Bari and Farid Sufian Shuaib, *Constitution of Malaysia. Text and Commentary* (2nd edn Prentice Hall, Selangor 2006).

⁴⁰ The subordinate courts are created by the Subordinate Courts Act 1948 (Revised 1972) (SCA). Section 3 SCA lists down the subordinate courts into the Sessions Court, the Magistrate's Courts and the *Penghulu's* Courts.

persuasive and its application depends so much on the judges' attitude. Thus, the abolition of the appeal to the Privy Council does not mean a total rejection of English law.⁴¹

The administration of justice in Malaysia since independence has undergone three significant changes. At the time of independence in 1957, there existed a three-tier structure of the superior courts with the Privy Council at the apex. With the abolition of appeals to the Privy Council in 1985, the three-tier structure was reduced to two tiers, i.e. the two High Courts and the Supreme Court, which became the final court of appeal. In the most recent reorganisation in 1994, the three-tier structure was reinstated, with the Court of Appeal standing between the two High Courts and the apex court, renamed the Federal Court. This system gives more appeal opportunities to the aggrieved party in the legal proceedings.

The British had divided the court system into two; the civil courts and the *Shariah* courts. This segregation is retained by the Constitution. Malaysia has two parallel court systems. The civil courts have the general jurisdiction, having powers and jurisdiction to hear all types of cases except concerning Islamic matters. The *Shariah* courts, which are the state courts created by the state laws (with exception to Federal Territories),⁴² have jurisdiction over Muslims only and decide on Islamic civil and criminal matters.

2.2 THE JUDICIARY AND THE PRESENT MALAYSIAN LEGAL SYSTEM

In Malaysia, the administration of justice is in the hands of judges since the trial by jury has been abolished throughout Malaysia from 1 January 1975. According to M.P. Jain, the role of the judiciary in a democracy is 'that of multi-faceted

⁴¹ Michael F. Rutter, *The Applicable Law in Singapore and Malaysia* (Malayan Law Journal Sdn. Bhd., Kuala Lumpur 1989) pp. 430-437.

⁴² The *Shariah* courts in the Federal Territories are created by Parliament. See Sections 40-57 of the Administration of Islamic Law (Federal Territories) Act 1993. See also Farid Suffian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia* (Malayan Law Journal, Kuala Lumpur 2003) p.106.

activism and creativeness'.⁴³ However in Malaysia, as propounded by Andrew Harding, the judges are restrained and only act within the constraint of the doctrine of precedent.⁴⁴

Under the doctrine of separation of powers, the judiciary should be independent and free of any pressure from the government or anyone else as to how to decide any particular case. Hence, judicial independence of the judges refers to their ability to decide cases on merit, free from any pressure.⁴⁵ In Malaysia, the Constitution 'protects' the independence of the judiciary by providing express provisions relating to the procedure for the removal of superior judges, guarantees on the judges' remuneration and terms of office, prohibition on public discussion on judges' conducts and power of the judges to punish for contempt.⁴⁶

Article 125 (3) of the Constitution provides for the removal of the judge by the King on the grounds of inability or in breach of Judges' Code of Ethics. The Constitution protects judges by prohibiting discussion on their conduct but it is not entirely prohibited as according to Article 127 the judges' conduct can be discussed in Parliament provided a motion supported by at least a quarter of the number of the house has been passed. Apart from this, Article 126 has given the judges power to punish for contempt in order to protect the independence.

Abdul Aziz Bari argues that the protections provided for by the Constitution may not be sufficient. Whether the protection is implemented is actually depending on the judges themselves. If they were lacking integrity and courage to defend the Constitution, thus it would be difficult to protect the reputation. Power to punish for contempt and prohibition on discussion about judges' conduct will be of no

⁴³ M.P. Jain, 'The Role of the Judiciary in Democracy' (1979) 6 *Journal of Malaysian and Comparative Law* 240. For more on judicial activism, see Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford 2007).

⁴⁴ Harding (n. 39) p. 148. See also Bari, *Malaysian Constitution: A Critical Introduction* (n. 36) p. 98; Mohd Ariff Yusof, 'Changing Conceptions of Judicial Review in Malaysia' (1982) 9 *Journal of Malaysian and Comparative Law* 19, p. 38.

⁴⁵ Bari, *Malaysian Constitution: A Critical Introduction* (n. 36) p. 102.

⁴⁶ *Ibid.*

use if the judges show no commitment towards democracy and constitutionalism.⁴⁷

2.2.1 The Judiciary and the Sources Of Law

The courts have to interpret and apply the law by using the authorities within their legal bounds. Law in Malaysia is a mosaic of written and unwritten law. Article 160 (1) of the Federal Constitution says:

Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

The relevant sources relating to contempt of court are:

(i) Constitution⁴⁸

As discussed earlier, the Constitution was established in 1957 when Malaya gained independence from the UK. It contains basic structures consisting of supremacy of the Constitution, constitutional monarchy, separation of the powers of the three branches of Government. The Constitution contains provisions relating to institutions to citizens and their rights.⁴⁹ Articles 5 to 13 under Part II of the Constitution provide for the fundamental liberties to the citizens.

The Constitution is not static but evolving as it has to be developed and explained in accordance with the needs and changing circumstances.⁵⁰ It is also the fundamental law from which the validity of all other laws derive. It is superior to all other forms of law. Therefore, the judiciary has the power to declare a law as *ultra vires* as being contrary to the Constitution.⁵¹

⁴⁷ Ibid. pp. 103-104.

⁴⁸ As a Federation of thirteen states, Malaysia has altogether fourteen constitutions: the Federal Constitution and thirteen States Constitutions.

⁴⁹ *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, p. 71.

⁵⁰ Bari, *Malaysian Constitution: A Critical Introduction* (n. 36) p. 16.

⁵¹ This power is granted to the judiciary by Articles 4 (3), 4 (4) and 128 of the Constitution.

Another important feature of the Constitution is that it provides a group of provisions involving fundamental liberties. This is provided for under Part II of the Constitution. These are the provisions that are generally known as human rights or civil liberties – the rights that are considered important and basic for the development of a human being, spiritually and physically. This discussion will be deliberated below.

(ii) Judicial Decisions

In Malaysia, as in other common law countries, the law is to be found not only in legislation but also in cases decided by the courts. The law derived from decisions of the courts is known as the ‘common law’. This is the concept originated from England wherein the bulk of English law has not been enacted by Parliament but developed by judges. The judges derived the *ratio decidendi*⁵² that is the legal principle from the cases before them. The *ratio decidendi* is a source of law. This existing legal principle will be applied to new situations as they arise. It will become a precedent that is the decision made by judges previously in similar circumstance and will bind future courts in other cases with similar facts. The doctrine of *stare decisis* or the rule of judicial precedent dictates that it is necessary for each lower tier to accept loyally the decision of the higher tiers.

The doctrine of *stare decisis* in Malaysia has a two-way operation. The first is a vertical operation by which a court is bound by the prior decision of a higher court, and the other operation is horizontal. Under the horizontal operation, some courts are bound by their own prior decisions and prior decisions of a court of the same level, whether past or present.⁵³

As for the predecessor courts of the present Federal Court, the decisions are binding and continue to be binding until overruled by the present Federal Court.⁵⁴

⁵² It means to stand by the decision and not to disturb the settled matters, i.e. to stick with what has been decided, or like cases should be decided alike. Ashgar Ali Ali Mohamed, 'Recent Decisions Offending Stare Decisis in Malaysia' (2008) 3 Malayan Law Journal xcvi.

⁵³ Wan Arfah Hamzah and Ramy Bulan, *An Introduction to the Malaysian Legal System* (Penerbit Fajar Bakti Sdn. Bhd., Selangor 2003) p. 69.

⁵⁴ This was acknowledged in *Anchorage Mall v Irama Team (M) Sdn Bhd & Anor* [2001] 2 MLJ 520. The Court had to consider the submission advanced by the defendant urging the court not to follow *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ

Decisions from courts outside the Malaysian judicial hierarchy are not binding but only persuasive. Even decisions of English courts are only persuasive, (subject to the express reception of English law under the specific provisions of Section 3 CLA 1956). The courts also made reference to the other countries, especially those in the Commonwealth, for guidance on many civil, commercial and criminal matters. In *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia*⁵⁵ the Court followed Australian decisions in a case involving the question considering a pension in damages for personal injury. Raja Azlan Shah J said:

Although decisions of Commonwealth courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in *Parry v Cleaver* [1970] AC 1 and *James v Gleeson* (1965) 39 ALJR 258, so that the common law and its development should be homogenous in various sections of the Commonwealth: per Lord Parker CJ in *Smith v Leech Brain & Co Ltd* [1962] 2 QB 415.

Almost the same words have been reiterated by Chang Min Tat FJ. in *Director-General of Inland Revenue v Kulim Rubber Plantations*⁵⁶ wherein he referred to decisions of courts in Australia, England and New Zealand, in saying:

In so far as the decisions of other courts ... are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as *per incuriam*. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of the law, pay due and proper attention to them.

It appears that in general the Malaysian judiciary is willing to consider decisions of other countries, especially those in the Commonwealth, which then allow

241 and the Court held that it could not disregard or refuse to follow the decision in *Alor Janggus* unless and until it is reversed by the Federal Court. Since its judicial pronouncement emanated from the highest court, it deserved the utmost respect and should be followed as a guide. However, a final decision of the Final Court is binding; its correctness may be questioned in a subsequent case where the identical point of law arises for decision. *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 MLJ 474, p. 476 per Gopal Sri Ram JCA. For more details on the application of the doctrine of *stare decisis* in Malaysia, see Ashgar Ali Ali Mohamed, 'Recent Decisions Offending Stare Decisis in Malaysia' (n. 52); Ashgar Ali Ali Mohamed, 'Rationale for Departing from Stare Decisis: A Review of Re Hj Khalid Abdullah; Ex p. Danaharta Urus Sdn Bhd [2008] 2 CLJ 326' (2008) 6 Malayan Law Journal cxxv.

⁵⁵ [1970] 2 MLJ 151.

⁵⁶ [1981] 1 MLJ 214.

Malaysian law to progress with the development of common law in England and its counterparts.⁵⁷

(iii) English law

English common law and equity are part of Malaysian law and its reception is embodied in Section 3 (1) CLA 1956.⁵⁸ Section 3 (1) (a) CLA 1956 states that courts in Peninsular Malaysia should apply English common law and equity as administered in England on 7 April 1956. In Sabah and Sarawak, Section 3 (1) (b) and (c) CLA 1956 states that the courts in both states should apply English common law, rules of equity together with statutes of general application as administered in England on 1 December 1951 and 12 December 1949 accordingly.

Although English common law and rules of equity may be referred to in the court, this does not mean that the court has to import English law wholesale and without thought. English common law can be applied in the absence of local legislation. The Act of Parliament is regarded as highly as that of English common law. This means that where the common law on a given topic has been superseded by the legislation, the court's duty is to interpret the statute without recourse to the common law existing before the statute was enacted.⁵⁹ The English common law is only meant to fill in the lacuna, in which a local legislation is not present. Be that as it may, the fact that there is local legislation on the given topic does not

⁵⁷ *Harding* (n. 39) p. 78.

⁵⁸ Section 3 (1) provides for general application of English law. It states:

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

- (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951;
- (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to sub-section 3 (ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

⁵⁹ *Song Bok Yoong v Ho Kim Poui* [1968] 1 MLJ 56; *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 253.

necessarily mean that the common law in the area is always irrelevant. There will be occasions where the statute does not cover a point, and then, reference to case law or English common law may be necessary.⁶⁰

In applying English common law, at first the court has to determine whether there is any written law in force in Malaysia. If there is none, then the court should determine the relevant common law, and the rules of equity as administered in England on 7 April 1956.⁶¹ The ‘cut-off’ date signifies that the court should ascertain what was the English common law at the date of reception and in what way it has been modified and developed locally since that date. Having done that, the court should consider whether ‘local circumstances’ and ‘local inhabitants’ permit its application as such. If it is ‘permissible’, then the court should apply it. Thus, that English common law principle will be a binding authority.

However, if the court finds that such English common law principle is not ‘permissible’, the court is free to reject it totally or adopt any part which is ‘permissible’, with or without qualification. Where the court rejects it totally or in part, the court is free to formulate Malaysia’s own common law. In so doing, the court is at liberty to look at any source of law, local or otherwise, be it England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia.⁶² Any English law referred to after the date specified, and current decisions of the English courts will only be treated as persuasive authority and can at best be merely useful comparative analogies in a given situation.⁶³

Rutter⁶⁴ questions whether the reference to colonialism implies that the UK has an active interest in perpetuating the local application of English law. He, however, holds that this seems unlikely. He quoted Lord Scarman in *Jamil bin Harun v Yang Kamsiah*⁶⁵ as His Lordship said:

⁶⁰ Rutter (n. 41) pp. 517-518.

⁶¹ The cut-off date for Peninsular Malaysia.

⁶² *Nepline Sdn Bhd v Jones Lang Wootton* [1995] 1 CLJ 865, p. 871 per Abdul Hamid Mohamed J.

⁶³ Rutter (n. 41) p. 512.

⁶⁴ *Ibid.* p. 565.

⁶⁵ [1984] 2 WLR 668, p. 671.

... it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law.

According to him, this reflects that it is up to the locals to choose the application of English law, and it is not the desire on the part of English courts to subject Malaysia to the laws of England. This is supported by Sharifah Suhana⁶⁶ as she claims that the strong influence which the 'mother country' continues to have over its former colony is a reason why Malaysian judges as a matter of judicial practice and policy, tend to voluntarily choose and give priority to adopting a rule of English law over the laws of other commonwealth jurisdictions.⁶⁷

There were calls, as early as in 1971, to repeal or amend Section 3 CLA 1956 in order to allow a Malaysian common law to develop.⁶⁸ This idea received a negative feedback from some factions, especially from the Bar. The Bar refuted the view that the common law is exclusively English. The common law is a body of centuries of experience dealing with human affairs which are the same everywhere although it had its origin in England. The common law is a common heritage shared by most of the countries of the Commonwealth and the USA. Under Section 3 CLA 1956, the Malaysian courts examine the common law as practised in different jurisdictions to find a solution best suited to Malaysia.⁶⁹ The Bar is also of the opinion that Section 3 gives judges a wide discretion to accept any English common law principle or rule of equity. Once it is accepted, it will

⁶⁶ Sharifah Suhana Ahmad, *Malaysian Legal System* (Malayan Law Journal, Kuala Lumpur 1999) pp. 10-15.

⁶⁷ A.L.R Joseph, 'Flouting *Stare Decisis* and the Potential Impact of European Laws on Malaysian Common Law: Two Reasons for Vigilance' 2007 <<http://www.malaysianbar.org.my/content/view/3278/27/>>; Mohammed Imam, 'Malaysian Common Law: Reality and Feasibility' (1997) 1 *Current Law Journal* cv.

⁶⁸ Ahmad Ibrahim had advocated the repeal of Section 3 CLO 1956. See Ahmad Ibrahim, 'The Civil Law Ordinance in Malaysia' (1971) 2 *MLJ* lxi. In 1989, the then Lord President of the Supreme Court, Tan Sri Abdul Hamid Omar proposed the same. His idea was backed up by the then Chief Justice of Malaya, Tan Sri Hashim Yeop Sani Abdullah. The idea for repeal or amend was proposed in order to reject anything foreign and to incorporate Islamic values in the judicial making. See Hamzah and Bulan (n. 53) p. 121. The call to replace common law again arose in 2007 when Tun Ahmad Fairuz, the then Chief Justice of the Federal Court, questioned the need to use English common law. He strongly supported Ahmad Ibrahim's views to abolish the use of English common law and instead refer to Islamic law and the decisions of Malaysian courts, giving priority to local circumstances. See 'Is Common Law Still Needed?' *The Star* (22 August 2007) <http://www.malaysianbar.org.my/legal/general_news/is_common_law_still_needed_.html>. December 2007.

⁶⁹ Hamzah and Bulan (n. 53) p. 122.

become part of the Malaysian common law and Malaysian law will be developed in this manner.⁷⁰

Hence, the judges are free to develop the Malaysian law. They may refer to English common law before the cut-off date, English law after the cut-off date, laws of other commonwealth jurisdictions or even Islamic law in making their decisions, so long as it suits the local conditions and circumstances.

2.2.2 The Courts and the Legal Actors

2.2.2.1 The Structure and the Jurisdiction of the Courts

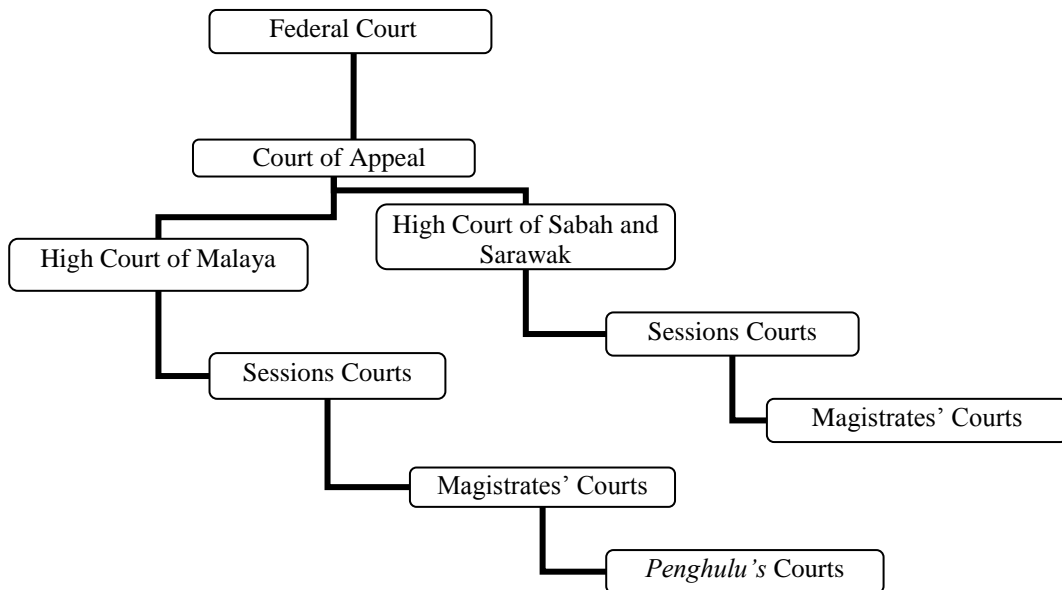
Malaysia has two parallel court systems. The federal courts, which are often called the civil courts, are the principal court that administers the general law of the land based on the common law tradition. Alongside the civil courts there also exist state courts which include *Shariah* and Native courts. The *Shariah* courts exist to administer Islamic law, mainly in Muslims' personal matters. The *Shariah* courts that exist in every state have jurisdiction over Muslims. For indigenous people in Sabah and Sarawak, they have to refer to the Native courts to deal with their customary matters. The Native courts have jurisdiction over Non-Muslims in these states.⁷¹

⁷⁰ Shaila Koshy, 'Call to Replace Common Law "Baseless"' The Star (23 August 2007) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/call_to_replace_common_law_baseless.html> accessed December 2007. The similar view was expressed by two former Lords President of the Malaysian judiciary. Tun Mohamad Suffian and Sultan Azlan Shah of Perak viewed that English common law was not applied in toto but with modification. Once received, it will be part of the Malaysian common law. Moreover, the Malaysian courts do not exclusively rely on English law as they refer to other countries where the common law applies. Furthermore, Tun Mohamad Suffian pointed out that it was not the job of the judiciary to propose a wide ranging law reform, but the executive's. Hamzah and Bulan (n. 53) p. 122.

⁷¹ The Native Courts have jurisdiction to hear and determine disputes among natives in relation to native customary laws. The courts may hear cases arising from breach of native law or custom in respect of religion, matrimonial or sexual offence to family matters from betrothal, marriage, divorce, and custody to succession. Section 6 of the Native Courts Ordinance 1992.

(i) **The Civil Courts**

**Diagram 2.1
Hierarchy of the Courts**



(a) **Federal Court**

The Federal Court, as the highest judicial authority and the final court of appeal in Malaysia was established pursuant to Article 121 (2) of the Constitution and came into being with the enactment of the CJA 1964. By the powers conferred by Section 17 CJA 1964, the Rules of Federal Court 1995 have come into being to deal with the rules and procedures of the Federal Court.

With regard to the jurisdiction, the Federal Court derives its jurisdiction from the Constitution Act of Parliament namely the CJA 1964, and from the common law jurisdiction with respect to inherent jurisdiction.

The Federal Court is principally an appellate court, but in addition, it has three other kinds of jurisdiction, namely original, referral and advisory jurisdiction.⁷²

⁷² Article 121(2) reads:

There shall be a court which shall be known as the Federal Court and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:

- (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
- (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
- (c) such other jurisdiction as may be conferred by or under federal law.

With respect to its appellate jurisdiction, Article 128 (3) of the Constitution provides that the Federal Court has jurisdiction to determine appeals from the Court of Appeal, a High Court or a judge thereof.

Article 128 (2) of the Constitution bestows a referral jurisdiction to the Federal Court. The Federal Court will exercise its referral jurisdiction when it is referred to for a decision by way of a special case. The Federal Court may determine the meaning of constitutional provisions as referred to that have arisen in proceedings in the High Court or in any of the subordinate courts. When the Federal Court has decided, it remits the case to the trial court to be disposed of in accordance with that decision.

The Federal Court may also exercise its inherent powers derived from common law jurisdiction as being placed under Rule 137 of the Rules of the Federal Court 1995, which states:

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In *Megat Najmuddin Bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd*,⁷³ the Federal Court considered Article 121 (2) of the Constitution in relation to inherent powers of the Federal Court. The Court observed that where there is a clear case of injustice being committed, the Court under its inherent powers must deal with it, i.e. to hear any application or make any order as may be necessary to prevent injustice.⁷⁴

(b) Court of Appeal

The Court of Appeal is established by Article 121 (1B) of the Constitution.⁷⁵ It was created in 1994 by the Constitution (Amendment) Act 1994⁷⁶ and the Courts

⁷³ [2002] 1 MLJ 385.

⁷⁴ *MGG Pillai v Tan Sri Vincent Tan Chee Youn* [2002] 2 MLJ 573; *Dato' Seri Anwar Ibrahim v PP* [2004] 4 CLJ 157; *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No. 1)* [2007] 2 MLJ 101; *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1; *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161.

⁷⁵ Article 121(1B) reads:

of Judicature (Amendment) Act 1994, to provide an additional level of appeal in Malaysia.

Under the CJA 1964 and the Rules of the Court of Appeal 1994, the Court of Appeal has jurisdiction to determine appeals from the courts below it.

(c) High Court

Article 121 (1) of the Constitution creates two High Courts of co-ordinate jurisdiction and status situated in the Peninsular Malaysia or West Malaysia and in the states of Sabah and Sarawak. These two High Courts are the High Court of Malaya and High Court of Sabah and Sarawak. These courts have such jurisdiction and powers as may be conferred by the CJA and the RHC 1980, which deals with the rules and procedures in the High Court.

The powers and jurisdiction of the High Court are rather extensive. The High Court is bestowed with the original, appellate, as well as revisionary and supervisory jurisdictions. Its original jurisdiction with respect to both civil and criminal cases is unlimited as cases outside the jurisdiction of the subordinate courts are brought before it.

In exercising its appellate jurisdiction, the High Court hears appeals from subordinate courts in both civil and criminal matters.⁷⁷

In addition to its appellate jurisdiction, the High Court also exercises powers of revision in respect of criminal proceedings in the subordinate courts,⁷⁸ and may call for records of civil proceedings so as to satisfy itself the correctness, legality

There shall be a court which shall be known as the Court of Appeal and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say:

- (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
- (b) such other jurisdiction as may be conferred by or under federal law.

⁷⁶ Section 13 of the Constitution (Amendment) Act 1994.

⁷⁷ Sections 26 and 27 CJA 1964. As provided by Section 28 CJA 1964, there is no appeal to the High Court from a decision of a subordinate court in any civil matter where the amount in dispute or the value of the subject matter is less than RM 10, 000, except on a question of law.

⁷⁸ Section 31 CJA 1964.

or propriety of any decision recorded or passed by the subordinate courts.⁷⁹ The High Court has general supervisory and revisionary jurisdiction over all subordinate courts.⁸⁰

(d) Subordinate Courts: Sessions, Magistrates' and *Penghulu's* Courts

Under Article 121 (1) of the Constitution, two inferior courts, namely, the Sessions⁸¹ and Magistrates' Courts have been created with jurisdictions and powers as may be conferred by or under the federal law. The Subordinate Courts Act 1948 (SCA) deals with the power and jurisdiction of the courts while the Subordinate Courts Rules 1980 (SCR) governs their rules and procedures.

Both the Sessions and Magistrates Courts have wide criminal and civil jurisdiction. The Sessions Courts have jurisdiction to hear all criminal matters involving offences other than those punishable with death and may pass any sentence allowed by the law except the sentence of death.⁸² In addition to its original jurisdiction, the Sessions Court is vested with a limited supervisory jurisdiction over the Magistrates' and *Penghulu's* Courts.⁸³

Magistrates' Courts⁸⁴ deal with the greatest volume of work as they deal with a host of minor offences and civil cases. It has jurisdiction to hear and determine

⁷⁹ Section 32 CJA 1964.

⁸⁰ Section 35 CJA 1964.

⁸¹ Sessions Courts are established under Section 59 SCA 1948. Each Sessions Court is presided over by a Sessions court judge appointed by the King, on the recommendation of the Chief Judge. The Sessions Court judge is appointed from a member of the Judicial and Legal Service of the Federation.

⁸² Section 63 SCA 1948.

⁸³ A Sessions Court's judge may call for and examine the record of any civil proceedings before the two courts below to satisfy him or herself of the correctness or propriety of any decision recorded or passed in any proceedings of that court. If there is any impropriety or irregularity found, the judge must forward the record with to the High Court for an order. Section 54 SCA 1948.

⁸⁴ Magistrates' courts are established under Section 76 SCA 1948. It consists of a magistrate sitting alone either by first or second class magistrates. Both classes of magistrates are appointed by the King in the federal territories and by the Ruler of the State in the states. The first class magistrates are legally qualified and must be members of Judicial and Legal Service of the Federation. They are appointed on the recommendation of the Chief Judge. Second class magistrates are not legally qualified as they are civil servants and court officials who do magisterial work in addition to their administrative duties. However, in practice at present, Second Class Magistrates are no longer appointed. See Sections 78 and 79 SCA 1948 respectively.

any civil or criminal matter arising within the local limits of its assigned jurisdiction. The Magistrates' Courts have the jurisdiction to hear criminal cases where the maximum sentence does not exceed ten years imprisonment.⁸⁵

The *Penghulu's* Courts exist only in Peninsular Malaysia but nowadays this court hardly ever tries cases owing to its minimal jurisdiction. This court has the power to hear civil matters in which claim does not exceed RM 50, where the parties are of an Asian race, speaking and understanding the Malay language.⁸⁶ The *Penghulu's* Court's criminal jurisdiction is limited to offences of a minor nature charged against a person of Asian race which is specially enumerated in his warrant, which can be punished with a fine not exceeding RM 25.⁸⁷

(ii) The *Shariah* Courts

The *Shariah* courts, being the state courts, are created and regulated by state laws and under the responsibility of the state authorities. The *Shariah* courts are established in all the states through the Administration of Islamic Law Enactment,⁸⁸ and in the federal territories, through federal law.⁸⁹ The courts are concerned with matters on which states are empowered to pass laws as enumerated in Item I List II of the Ninth Schedule of the Constitution.⁹⁰ Hence,

⁸⁵ The Second Class Magistrate can try offences for which the maximum term of imprisonment does not exceed twelve months' imprisonment. Section 88 SCA 1948.

⁸⁶ Section 94 SCA 1948 reads:

A *Penghulu's* Court may hear and determine original proceedings of a civil nature in which the plaintiff seeks to recover a debt or liquidated demand in money, with or without interest, not exceeding fifty ringgit and in which all the parties to the proceedings are persons of an Asian race speaking and understanding the Malay language.

⁸⁷ Section 95 SCA 1948.

⁸⁸ Administration of Muslim Law Enactment 1978 (Johore) (No. 14 of 1978); Administration of *Shariah* Courts Enactment 1982 (Kelantan) (no. 3 of 1982); Administration of the *Shariah* Courts Enactment 1985 (Melaka) (No. 6 of 1985); Administration of Islamic Law Enactment 1989 (Selangor) (No. 2 of 1989); Administration of Islamic Law (Negeri Sembilan) Enactment 1991 (No.1 of 1991); Administration of Islamic Law 1991 (Pahang) (No. 3 of 1991); Administration of Muslim Law Enactment 1992 (Perak) (No.2 of 1992); *Shariah* Courts Enactment 1992 (Perlis) (No. 5 of 1992); *Shariah* Courts Enactment 1992 (Sabah) (No. 14 of 1992); Administration of Islamic Religious Affairs Enactment 1993 (Penang) (No. 7 of 1993); *Shariah* Courts Enactment 1993 (Kedah) (No.4 of 1994); *Shariah* Courts (Terengganu) Enactment 2001 (No.3 of 2001); *Shariah* Courts Ordinance 2001 (Sarawak) (Ord. 4/2001).

⁸⁹ Administration of Islamic Law (Federal Territories) Act 1993 (AIL (FT) Act 1993) (Act 505).

⁹⁰ Item 1 of List II states:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage,

the *Shariah* courts have jurisdiction over Muslims only and decide on Islamic civil and criminal matters. In its civil jurisdiction, the courts shall hear cases on family and some personal Muslim matters as indicated by state legislation such as betrothal and marriage, divorce, nullification or separation, marital property claims, maintenance of dependants, legitimacy, guardianship and custody, testate and intestate and gifts *inter vivos* and charitable trust.⁹¹ In its criminal jurisdiction, the *Shariah* courts shall have jurisdiction over criminal matters of religious nature including offences relating to sexual relationship, incest, prostitution and other offences like consumption of liquor, non-payment of *zakat* (tithing) and failure to fast during *Ramadhan*. Although the *Shariah* courts have jurisdiction over criminal matters, their penal jurisdiction is very limited, with restricted jurisdiction not only regarding the types of triable crimes but also regarding punishment.⁹²

At present, the *Shariah* courts apply a three-tier system, namely, the *Shariah* Subordinate Courts, the *Shariah* High Courts and the *Shariah* Appeal Courts. The lower *Shariah* Courts remain in the hands of the states but the *Shariah* Appeal Court has been ‘federalised’ through the Department of *Shariah* Judiciary Malaysia. According to Shamrahayu A. Aziz, ‘federalised’ here does not involve the transfer of state power to the federal government, it is a mere administrative federalisation, whereby there is only one and the same panel of judges to form the

divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

⁹¹ See for example Section 46 (b) of the Administration of Islamic Law (Federal Territories) Act 1993.

⁹² The *Shariah* Courts (Criminal Jurisdiction) Act 1965 was passed by the Parliament conferring jurisdiction on *Shariah* courts. The Act was revised in 1984 and the punishment was increased from 6 months imprisonment, or RM 1,000 fine, or a combination of both to the maximum penalty of three years imprisonment or a fine not exceeding RM 5,000 or whipping not exceeding six strokes or any combination thereof. Aziz (n. 31).

bench of this *Shariah* appellate court throughout the country instead of having different panels for different states.⁹³

2.2.2.2 The Legal Actors

(i) The Judges

In December 2008, the Judicial Appointments Commission Act 2009 (JACA) was passed and the Judicial Appointment Commission (JAC) was established in order to appoint and promote judges of the superior courts.⁹⁴

The JAC is composed of the Chief Justice of the Federal Court as the Chairman, the President of the Court of Appeal, the Chief Judges of the High Courts, a Federal Court judge and four other eminent persons who are not members of the executive or public service appointed by the Prime Minister after consulting the Bar Council, Sabah Law Association, the Advocates Association of Sarawak, Attorney General and other relevant bodies.⁹⁵ The functions and powers of the JAC are listed under Section 21 JACA and amongst the JAC's functions and powers is to select a suitable qualified person to merit the appointment as a judge of the superior court before tendering a recommendation to the Prime Minister for his consideration.⁹⁶ The Act has laid down the criteria against which potential

⁹³ Ibid. (n. 31).

⁹⁴ 'Government Proposes to Set Up Judicial Appointment Commission' Bernama (17 April 2008) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/government_proposes_to_set_up_judicial_appointment_commission.html. > accessed September 2008.

In fact, on 1 April 2006, the UK ended seven hundred years of legal tradition when a new Judicial Appointments Commission came into existence and was charged with the task of judicial appointments. The establishment of the Judicial Appointment Commission in Malaysian scenario will ensure that the judiciary will be responsible for the selection of the judges. This will be good for public confidence in the judiciary. The change in the appointment of the judges is perhaps in response to the chaos in the judiciary especially after a series of scandals including a secretly taped video showing a lawyer allegedly brokering the appointment of senior judge (with the help of deputy minister who had direct influence in the appointment of judges) in a telephone conversation with someone who was later appointed the Chief Justice.

⁹⁵ Section 25 JACA 2009.

⁹⁶ In the subordinate courts, the appointment of the Sessions Courts' judges and Magistrates come almost entirely from the Judicial and Legal Service of the Federation. Their conditions of service, as members of the judicial and legal service, are governed by the rules that apply generally to public service. A Judicial and Legal Commission, created pursuant to Article 138 of the Constitution, is responsible for appointment, placement, promotion, transfer and the exercising of disciplinary control.

appointees can be assessed. Certainly, the candidates should fulfil the requirements as provided for under Article 123 of the Constitution, i.e. a citizen of Malaysia who has been an advocate or a member of the judicial and legal service for ten years preceding his appointment. As far as the criteria relating to personal attributes are concerned, the Act provides that the candidates should have the following qualities: integrity, competency and experience; objective, impartial, fair and of good moral character; decisiveness, ability to make timely judgments and have good legal writing skills; industriousness and the ability to manage cases well and also have excellent physical and mental health. The JAC in selecting candidates must also take into account the need to encourage diversity in the range of legal expertise and knowledge in the judiciary.⁹⁷ After making the selection, the JAC will submit a report of its recommendation to the Prime Minister who will tender his advice to the King for the appointment of the selected candidate in accordance to Article 122B.⁹⁸

The Constitution secures the independence of judges as individuals via Article 125 which provides after the appointment that the judges cannot be removed from office until their tenure expires or with the exception of misbehaviour or inability to discharge official duties. Any attempt to remove a judge from his office during his term requires a tribunal established under Article 125 of the Constitution to enquire into the allegation against him.⁹⁹ The King may then act upon the recommendation of the tribunal as to whether the judge in question ought to be removed.¹⁰⁰ Apart from that, the remuneration of the judges is set by Parliament¹⁰¹

⁹⁷ Section 23 JACA 2009.

⁹⁸ Sections 26 and 28 JACA 2009. With regard to the selection and appointment of the superior judges, the Prime Minister is still having the authority or final say. The JAC only helps in recommending the suitable candidates but not in appointing a judge. Although the Act is welcome, this new act is triggered with criticisms as it still gives the Prime Minister the final say in appointing senior judges including the Chief Justice. Ambiga Sreenevasan, 'Bar Council's Comments on the Judicial Appointments Commission Bill 2008' (17 December 2008) <http://www.malaysianbar.org.my/members_opinions_and_comments/bar_councils_comments_on_the_judicial_appointments_commission_bill_2008.html> accessed February 2009.

⁹⁹ If the Prime Minister or the Chief Justice, after consulting the Prime Minister, believes that a judge ought to be removed from office, such officials may represent this opinion to the King who will constitute a tribunal to consider the matter.

¹⁰⁰ A tribunal was appointed to enquire into allegations of misbehaviour by the then Lord President, Tun Salleh Abas, and the insubordination of five Supreme Court judges in 1988. The 1988 judicial crisis started when the High Court declared UMNO (one of the fractions of Barisan Nasional, a ruling party in the government) an illegal society. The Prime Minister began to attack the judiciary by making heated statements and later tabled a bill in Parliament to amend Articles 121 and 145 of the Constitution. These amendments divested the courts of the 'judicial power of

and there is also a mandatory retirement age of 65 years or for an extended period as provided by the Constitution. The Constitution also protects the judges against the reduction of their remuneration and the alteration of other terms of office that could be detrimental to them during their term of service.¹⁰² The independence of judges is also furthered by a rule that they are immune from personal liability for anything done in the course of their judicial office unless it can be shown that they acted outside the jurisdiction and *mala fide*¹⁰³ as provided for in Section 14 CJA 1964.¹⁰⁴ Furthermore, judges are ensured with privileges. The reputation of the judiciary is protected by the Constitution. Article 127 prohibits discussion of the conduct of every judge of the Federal Court, the Court of Appeal or High Court in either the House of Parliament or the State Legislative Assembly, except by way of a substantive motion that is one quarter of the Members of Parliament supporting the motion to discuss the matter in the House.¹⁰⁵ In exchange for this

the Federation', giving them only such power as Parliament might grant them. The Attorney General was also empowered to determine the venues in which cases would be heard. At this point, the Lord President of the Supreme Court began making strong statements about defending the autonomy of the judiciary. With the agreement of the other federal judges, he wrote a letter to the King with the hope that all the unfounded accusations against the judiciary would be stopped. Tun Salleh, Lord President, who was suspended from his post, was summoned by the Prime Minister who demanded his resignation. At first he agreed but upon finding that his suspension would be backdated so as to nullify some of his earlier actions in then pending cases such as the UMNO case, he withdrew his resignation. The government then initiated impeachment proceedings against him and was officially charged with writing 'a letter to the King without approval of all judges in the country', displaying 'bias and prejudice' against the government, and seeking 'to undermine public confidence in the government's administration.' The tribunal eventually found him guilty, and he was officially relieved of his position. Of the five judges who had supported him, two were convicted, and the other three were acquitted. For more detail, see A.J. Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International and Comparative Law Quarterly* 57.

¹⁰¹ Article 125 (6) of the Constitution; Judges' Remuneration Act 1971.

¹⁰² Article 125 (7) of the Constitution.

¹⁰³ Judges do not enjoy total immunity and one could proceed against a judge on grounds of *mala fides*. See 'Imuniti Hakim Tidak Mutlak (Judicial Immunity is not Absolute)' *Utusan Malaysia* (9 Februari 2006).

¹⁰⁴ Section 14 (1) CJA 1964 states:

[n]o Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

See also *Thiruchelvasegaram Manickavasegar v Mahadevi Nadchatiram* [2003] 2 CLJ 752; *Tai Choi Yu v Ian Chin Hon Chong* [2002] 2 CLJ 259; *Takang Timber Sdn Bhd v The Government of Sarawak & Anor* [1998] 3 CLJ SUPP 413.

¹⁰⁵ In *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1, the defendant intended to convene an EGM of the Bar for the purpose of discussing certain allegations relating to the judiciary that they considered matters of public interest. The plaintiff brought an action in the High Court to stop the EGM on the grounds that the EGM and the proposed resolution constitute contempt of court and amounted to offences under the Sedition Act 1948. The High Court granted an interlocutory injunction and held that the conduct of judges cannot be discussed even by the

protection from criticism, the judiciary is expected to observe the judicial code of ethics.

In 1994, the Constitution was amended to include a new clause 3A to Article 125. The clause enables the King, on the recommendation of the Chief Justice, President of the Court of Appeal and the Chief Judges of the two High Courts, after consulting with the Prime Minister, to prescribe a written code of ethics to be applicable to every judge of the Superior Court. The Judges' Code of Ethics 1994 was introduced to govern judicial conduct of superior courts judges.¹⁰⁶ In July 2009, the new Code has come into force. The Judges' Code of Ethics 2009 (JCE) states the basic standards to govern the conduct of all judges.

The Code provides guidance and imposition on judges, to ensure that their conduct, both in and out of court, is maintained at a high standard; both in their personal and judicial conduct. They must not conduct themselves in such a manner as to bring the judiciary into disrepute. They must also maintain and enhance the confidence of the public, the legal profession and litigants in the impartiality of the judges and of the judiciary.¹⁰⁷ The judges have the duty to comply with the Code; as non-compliance would render them to disciplinary

Parliament unless a substantive motion under Article 127 applies. The High Court observed that there is a need to protect and uphold the independence of judiciary. However, the Court of Appeal in *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155 emphasised on the consideration of freedom of speech in considering restriction on discussing conduct of judges.

¹⁰⁶ The Code of Ethics was referred to in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481, p.527, where the Court of Appeal considered the requirement to write judgment in the Malaysian courts. Gopal Sri Ram JCA observed that the judicial policy whereby a judge is duty-bound to give reasons for his decisions has received constitutional sanction via Article 125 (3A) of the Constitution. The Code of Ethics to which clause 3A of the article refers, proscribes a judge 'inordinately and without reasonable explanation of delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgment.' The effect of the breach of any provision in the Code could lead to removal of a judge from office as provided by Article 125 (3) on the ground of 'any breach of any provision of the Code of Ethics...'

¹⁰⁷ Sections 5 to 11 of the Code lay down the code of ethics to be observed by the judges. The judges are expected, among others, to uphold the integrity and independence of the judiciary. They must be free from any extraneous influence, inducement, threat or interference from any quarter or for any reason. The judges must not permit others to convey the impression that they are in a position to influence the judges. The judges are also expected to conduct themselves in a manner which is befitting of a judge. Judges must avoid a close relationship with lawyers. They must behave in a way that might not bring their private interests into conflict with their judicial duties. The judges are not allowed to give comment about pending or impending proceedings that might be heard before their courts.

proceedings.¹⁰⁸ Hence, the Constitution and the Code are empowered to deal with unbecoming and injudicious conduct of the judges. Any complaints against a judge can be forwarded to the Chief Justice in writing.¹⁰⁹ The Chief Justice after receiving a complaint against a judge for any breach of the provision of the Code will determine the degree of the alleged breach in order to either refer the matter to the tribunal under Article 125 (4) of the Constitution, if the breach warrants the judge to be referred to the tribunal,¹¹⁰ or to the Committee.¹¹¹

Even though the judges' ethical conduct is governed by the Code of Ethics, there was an 'attempt' to subject the judges to contempt of court. The issue relating to contempt by judges in their own courts was discussed briefly in *Public Prosecutor v Dato' Seri Anwar Ibrahim*.¹¹² In this case, the counsel for the defendant had filed a motion to commit a High Court judge for contempt for words uttered to the counsel in a proceeding in his own court. The Attorney General's application to represent the judge in the proceedings was rejected on the grounds of conflict in the doctrine of separation of power. This is because the Attorney General is the legal advisor to the Government under Article 145 (e) of the Constitution. The Court in this case did not discuss in depth the motion of contempt of court against the judge but only replied to the rejection of the Attorney General's application.¹¹³

¹⁰⁸ Section 4 JCE 2009.

¹⁰⁹ Section 12 JCE 2009.

¹¹⁰ The tribunal set up under Article 125 (4) of the Constitution deals with cases involving the removal of a judge for offence under Article 125 (3) of the Constitution.

¹¹¹ A Judge Ethics Committee is set up to deal with judges who breached the Judges' Code of Ethics. The Judges' Ethic Committee Act 2010 (JECA) came into force on 4 March 2010 to deal with matters relating to the conduct and discipline of all judges. Section 4 of the Judges' Ethic Committee Act 2010; 'Who Judges the Chief Judge?' *New Straits Times Online* (23 October 2009) <http://www.nst.com.my/Current_News/NST/articles/12eye/Article/> accessed December 2009; <<http://www.parlimen.gov.my/eng-index.php>> accessed 3 November 2009.

¹¹² [2002] 2 MLJ 730.

¹¹³ Hashim Yusoff J observes at pp. 734-735:

The words being the subject matter of the instant notice of motion were uttered by Augustine Paul J in the course of the proceedings of Wilayah Persekutuan Criminal Trial No 45-49-98 (*PP v Dato' Seri Anwar Ibrahim* [1998] 4 MLJ 481). It is therefore, done in the course of his duties as a judge of the High Court. Whether the words are contemptuous and if so, then whether Augustine Paul J can be cited for contempt in his own court are issues to be determined later in these proceedings. For the immediate matter at hand, I cannot agree with the argument that the AG cannot represent Augustine Paul in these contempt proceedings. It cannot be said that Augustine Paul has compromised the judiciary by accepting the services of the AG to appear and defend him in these proceedings ... If I may add, proper for the AG as the officer established under the Constitution and under the Act to step in and defend the judge not as a private individual but in the protection of such office and the institution of the judiciary and in the interest of the administration of justice in this country. I cannot see how it would affect the doctrine of separation of powers by the AG doing so. The AG has exercised his

(ii) The Lawyers

(a) The Advocates and Solicitors

In Malaysia, advocates and solicitors are the private practitioners and members of the Malaysian Bar.¹¹⁴ They are governed by the Legal Profession Act 1976 (LPA).¹¹⁵ The LPA establishes the Bar, of which all advocates and solicitors are members, and the Bar Council,¹¹⁶ which manages the dealings of the lawyers from their admission¹¹⁷ to their conducts.¹¹⁸

discretion and acted in the public interest by his application to represent Augustine Paul J in order to prevent interference with the administration of justice.

¹¹⁴ The Malaysian Bar is an independent Bar the aim of which is to uphold the cause of justice and oversee the interest of the legal profession. It is established under the Advocates and Solicitors' Ordinance 1947 which was subsequently repealed by the LPA 1976.

¹¹⁵ The advocates and solicitors in Sabah and Sarawak are professionally organised by the Advocate Ordinance of Sabah and Advocate Ordinance of Sarawak respectively. Since, the empirical study of this research is mainly conducted in the Central Region of the Peninsular Malaysia, the major reference will only be made to the LPA 1976. The Central Region is Malaysia's populous region whereby the number of lawyers and legal firms are bigger in this region as compared to other regions. It is reported that the number of lawyers in this region has reached to 8,100. See <http://www.malaysianbar.org.my/legal_directory_statistics.html>.

¹¹⁶ Under Section 47 LPA 1976, the Bar Council was established with the main function to manage the affairs of the Malaysian Bar and the proper administration of the functions of the Bar. The Bar Council is an autonomous body as it is a creation of statute. Its primary purpose is to uphold the cause of justice without regards to its own interests or that of its members, uninfluenced by fear or favour. The Bar Council consists of the President, the Vice President, the immediate past President, the Chairman of each of 11 State Bar Committees, one member elected by each of the 11 State Bars to be its representative to the Bar Council and 12 members elected from throughout Peninsular Malaysia by way of total ballot. See Section 42 LPA 1976. For more details, see 'The Role of Malaysian Bar - Its Struggles & Achievements' (11 October 2003) <http://www.malaysianbar.org.my/legal_profession/the_role_of_the_malaysian_bar_its_struggles_achievements.html> accessed July 2007.

¹¹⁷ In order to be admitted as an advocate and solicitor, he or she must be a qualified person. The definition of the qualified person is a measure of the formal academic prerequisites whereby in Malaysia he or she must possess a degree of Bachelor of Laws from the recognised universities. Besides that, as mentioned in Section 11 LPA 1976, he or she must attain the age of eighteen years, be of good character, a citizen or permanent resident of Malaysia and have satisfactorily served the period of pupillage of nine months under the supervision of a pupil-master who has been in active practice not less than seven years. Another stage that he or she must undergo is the admission to the Bar. After the completion of the pupillage, he or she must file a petition for admission to the High Court. On the hearing day of the petition and where there is no objection from the Attorney General, the Bar Council and the State Bar Committee of the State in which the pupil has served any part of his period of pupillage, against the petition, the High Court judge will order his or admission to the Role. Therefore, he or she becomes entitled to practice provided with an issuance of a practicing certificate from the Bar.

¹¹⁸ In relation to advocates' conducts in courts, apart from the LPA, the practice standards are also laid down in the Legal Profession (Practice & Etiquette) Rules 1978, the Bar Council Rulings 1997 and the Conveyancing Practice Rulings. Advocates, being members of the Bar are also officers of the court. Their duties are twofold: to their client and to the court. Rules 15 and 16 of the Legal Profession (Practice & Etiquette) Rules 1978 requires lawyers to act with candour, courtesy and fairness, and to fearlessly uphold the interest of their client.

The Malaysian Bar being an association of lawyers, pursues the objectives of the legal profession. They are independent, self-regulating and practise self-discipline.¹¹⁹ They speak up for the legal profession, they look after the interest of the profession and they also have the duty to protect public interest against delinquent lawyers. The recalcitrant lawyers are subjected to disciplinary procedures handled by the Disciplinary Board; separate and independent of the Bar Council to deal with complaints and matters of discipline.¹²⁰ The Disciplinary Committees appointed by the Board will investigate and hear complaints against advocates and solicitors.¹²¹ If the advocate is found guilty of any misconduct he will be liable to be struck off the Roll or suspended from practice for any period not exceeding five years or ordered to pay a fine or be reprimanded or censured, as the case may be.¹²²

The Bar, in order to realise its objectives, is often committed to upholding the rule of law, promoting a strong and independent judiciary and an independent Bar; ever vigilant to act in all matters without fear or favour and without regards to its own interests. The Bar speaks loud and clear in these matters, often at the peril of its own members. The active participation of the Bar in matters involving their members is often in conflict with the government. The executive views that the Bar's stand on several issues seemed to be politicised.¹²³ There has been continuous tension between the Bar, the government and the judiciary, especially

¹¹⁹ Section 77 LPA 1976 that empowers the Bar Council, with the approval of the Attorney General, to make rules regulating professional practice, etiquette, conduct and discipline of advocates and solicitors. Any advocate who fails to comply with any rules will be liable to disciplinary proceedings. Although the Bar is independent and self-regulated, the provision of Section 77 in requiring the approval of the Attorney General in making the rule, shows that the government tries to place its control over the Bar via the Attorney General.

¹²⁰ Section 93 LPA 1976.

¹²¹ Sections 95, 96, 99, 100, 103A, 103B and 103C LPA 1976.

¹²² Section 94 (2) LPA 1976.

¹²³ The Bar protested against the use of Internal Security Act 1960 (ISA), i.e. a preventive detention law which allows for detention without trial or criminal charges under limited, legally defined circumstances. Due to the alleged draconian nature of the Act, the Bar strongly criticised it and called for its repeal, as it seemed against the human rights, especially rights to be heard and to a full and fair trial. Noor Arianti Osman, 'ISA Rally-Utter Violations of Human Rights by the Police and FRU' (2 August 2009) <http://www.malaysianbar.org.my/human_rights/isa_rally_utter_violations_of_human_rights_by_the_police_and_fru.html> accessed 15 November 2009.

after the judicial crisis in 1988.¹²⁴ The government used legislative power to have a control over the Bar. For instance, Section 46 LPA was amended to prohibit any politician or Member of Parliament from holding office in the Bar Council or State Bar Committees. The Bar perceives the executive power's amendment of the LPA as to clip the wing and nip the power of independence and freedom of the Bar. Thus, the amendments of the LPA over the years have been the source of some controversy.¹²⁵

Tension between the Bar and judges remains after the Bar's vote of no confidence during the events of 1988.¹²⁶ The tension continues and has been aggravated by a series of high-profile political trials especially that of Anwar Ibrahim in 1998. Further, in 2000, the High Court granted an injunction to restrain the Bar Council from convening an EGM to discuss improprieties in the Malaysian judiciary.¹²⁷ It held that the conduct of judges cannot be discussed except in Parliament.¹²⁸ From the said scenarios, it is noted that the Bar doubts the integrity and independence of the judiciary, which, due to the political influence, has used the judicial power against lawyers. At the same time, the Bench feels that there is a decline in

¹²⁴ The removal of Salleh Abbas is regarded as one of the greatest blows to judicial independence in Malaysia as the judiciary's image has suffered considerably and has been struggling to live up to the doctrine of the separation of power.

¹²⁵ In 2006, the LPA was amended to introduce Section 28A which empowers the Attorney General to issue Special Admission Certificate to foreign lawyers to practice in Malaysia. This gave the Attorney General the absolute discretion and his discretion cannot be questioned by any court. The Attorney General seems to enjoy more power and control over the Bar. Even, in 1992, there was a suggestion by the then Prime Minister to place the Attorney General as the head of the Bar Council. This has been seen by the members of the Bar as a way to control the Bar by the government. Vijayan Menon, 'Bar Council Official: Attorney-General Shouldn't Be Our Head.' *New Straits Times* (3 January 1992).

¹²⁶ For more details on the 1988 judicial crisis, see 'Report of the Tribunal Established under Article 125 (3) and (4) of the Federal Constitution regarding Tun Dato' Hj. Mohamed Salleh Abas, Lord President Malaysia' (Kuala Lumpur 1988); Mohamed Salleh Abas and K. Das, *May Day for Justice: The Lord President's Version* (Magnus Books, Kuala Lumpur 1989); Peter Alderidge Williams, *Judicial Misconduct* (21st Century Strategic Studies, Kuala Lumpur 1990); 'The EGM of the Malaysian Bar Held at the Shangri-La Hotel, Kuala Lumpur - Saturday, 9 July 1988' (1988) <http://www.malaysianbar.org.my/malaysian_bars_resolutions/the_egm_of_the_malaysian_bar_held_at_the_shangri_la_hotel_kuala_lumpur_saturday_9_july_1988.html> accessed June 2007; *Attorney General v Manjeet Singh Dhillon* (n. 8).

¹²⁷ There were serious allegations of impropriety leveled against certain members of the judiciary that urged the Bar to call for an EGM. The EGM was intended to discuss these allegations, i.e. the conduct and propriety of the then Chief Justice who went on vacation with a lawyer with the view of urging the government to appoint a Royal Commission of Inquiry to make such inquiries and recommendations to ensure that the confidence in the judiciary was fully restored. But the court granted an injunction applied by one of the members of the Bar to prevent the EGM from commencing.

¹²⁸ *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* (n. 105).

standards in the Bar and the members of the Bar are ready to lower the prestige of the judiciary through unwarranted publicity in the media.¹²⁹ The relationship between the Bar and the Bench becomes more strained by the increased use, or threat to use, the contempt law against advocates.¹³⁰

(b) The Prosecutors

In Malaysia, the prosecution power is bestowed upon the Attorney General who is the Public Prosecutor.¹³¹ The Attorney General is a key officer in the legal system as he is the guardian of public interest. He is appointed by the King on the advice of the Prime Minister¹³² and his duty is to advise the King and the government on legal issues referred to him. He also has complete discretion to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a *Shariah* Court.

In regard to his prosecutorial discretion, the Attorney General functions via the Prosecution Division of his Chambers. The Division is headed by a Senior Deputy Public Prosecutor, deputised by also a Senior Deputy Public Prosecutor and the other staff members are the Deputy Public Prosecutors. These officers are civil servants and governed by the Judicial and Legal Service of the Federation. There is a lack of clarity in cases of unbecoming conduct, in terms of the prosecutors' disciplinary procedures.

¹²⁹Brendan Pereira, 'Bar Council vs. the Judiciary' (10 January 1999) <http://www.malaysianbar.org.gov.my/bar_news/berita_badan_peguam/bar_council_vs_the_judiciary.html> accessed September 2007.

¹³⁰ The removal of the Lord President, Salleh Abas had resulted in the finding of contempt against the Bar Council's secretary. The same goes to the counsel for Anwar Ibrahim wherein Zainur Zakaria was found in contempt. There were numbers of contempt cases against lawyers cited between 1988 and the early 2000s. See Table 4.1, Chapter 4, 4.2.2, p. 139.

¹³¹ Section 376 CPC.

¹³² Article 145 of the Constitution.

2.3 FREEDOM OF SPEECH AND CONTEMPT OF COURT: AN INTRODUCTION TO FUNDAMENTAL LIBERTIES AND HUMAN RIGHTS IN MALAYSIA

Part II of the Constitution provides for various fundamental liberties. Even though the term ‘fundamental liberties’ is explained neither by the Reid Commission nor the White Paper, those are the provisions which are generally known as human rights.¹³³ Nevertheless, the HRCA 1999 provides some provisions that may shed some lights on the term. Section 2 HRCA provides that ‘human rights refer to fundamental liberties in Part II of the Federal Constitution’. Therefore, the human rights in Malaysia are guaranteed by constitutional provisions.

Part II of the Constitution contains nine provisions on various aspects of fundamental liberties which are placed under several headings: personal liberty,¹³⁴ prohibition from slavery and forced labour,¹³⁵ prohibition on double jeopardy and retrospective criminal laws,¹³⁶ right to equality,¹³⁷ freedom of movement,¹³⁸ freedom of expression, assembly and association,¹³⁹ religious freedom,¹⁴⁰ educational rights,¹⁴¹ and propriety rights.¹⁴² Although these rights are entrenched in the Constitution, as in most legal documents, the Constitution makes it clear those rights are not absolute. There are restrictions imposed on the rights and these limitations are either passed by the law in Parliament, or the policy laid down by the executive or the ways the courts interpreted them.

Freedom of speech and expression is often viewed as one of the most important attributes to democracy, as through it, ideas are articulated and arguments are advanced.¹⁴³ Be that as it may, this right is not absolute. Freedom of speech and

¹³³ Bari, *Malaysian Constitution A Critical Introduction* (n. 36) p. 143.

¹³⁴ Article 5 of the Constitution.

¹³⁵ Article 6 of the Constitution.

¹³⁶ Article 7 of the Constitution.

¹³⁷ Article 8 of the Constitution.

¹³⁸ Article 9 of the Constitution.

¹³⁹ Article 10 of the Constitution.

¹⁴⁰ Article 11 of the Constitution.

¹⁴¹ Article 12 of the Constitution.

¹⁴² Article 13 of the Constitution.

¹⁴³ *Observer and Guardian v UK* A 216 (1992) 14 EHRR 153, para 63. For more details, see Helen Fenwick, *Civil Liberties and Human Rights* (4 edn Routledge-Cavendish Oxon 2007) pp. 300-309.

expression as enshrined in Article 10 (1) is expressly qualified from the outset. Its opening straight away mentions the restrictions. Article 10 (1) reads:

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.

The right conferred by Article 10 (1) (a) is made expressly subject to various limiting constitutional provisions that can be imposed by Parliament.¹⁴⁴ Parliament may under Article 10 (2), by law impose on these rights 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.

Therefore, the Constitution leaves the matter for Parliament to decide and that the Constitution allows important and basic rights to be curtailed or even to be taken away. This is what Harding says as Article 10 is remarkable for what it takes rather than what it gives.¹⁴⁵ This is due to the fact that many laws imposing restrictions on free speech have been passed by Parliament.¹⁴⁶

The law of contempt seeks to protect the interest in the administration of justice. It is used, among others, to curb pre-trial discussion or *sub judice* comments which might influence those involved in forthcoming and/or ongoing proceedings. Furthermore, contempt law seeks to protect the impartiality and independence of

¹⁴⁴ This is endorsed by the Court in *Lau Dak Kee v Public Prosecutor* [1976] 2 MLJ 229 as Mohamed Azmi J said:

Article 10 (1) of the Federal Constitution guarantees the rights to every citizen to freedom of speech, assembly and association. Those rights are, however, subject to any law passed by Parliament.

¹⁴⁵ Harding, *Law, Government and the Constitution in Malaysia* (n. 39) p. 189.

¹⁴⁶ For instance, on the grounds of 'security of the Federation or any part thereof', ISA 1960, Official Security Act 1972, Printing Presses and Publications Act 1984, Protected Areas and Protected Places Act 1959, Public Order (Preservation) Act 1958, Sedition Act 1948 and the Telecommunications Act 1950 were enacted. Shad Saleem Faruqi, 'Free Speech and the Constitution' (1992) 4 Current Law Journal lxiv.

the judiciary. The judiciary is protected from any comments or publications which might scandalise the court.

However, there is a significant tension between these rights and restraints as contempt law comes into conflict with free speech and expression. Contempt of court is a restriction or interference with the guarantee, i.e. freedom of speech. Whether the interference with the guarantee can be justified or not, the court has to strike a balance between these two fundamental principles of public interests. In striking a balance the Malaysian courts take rather a strict approach as in *Trustees of Leong San Tong Khoo Kongsai (Penang) Registered & Ors v SM Idris & Anor and Another Application*.¹⁴⁷ In this case, the Supreme Court had to determine whether the respondents' press statements commenting on the judgment of the Supreme Court amounted to contempt of court. The two respondents were advocates. In deciding whether contemptuous or not, the Court had to strike a balance between the rights of freedom of speech under Article 10 and the need to protect the dignity and integrity of the Supreme Court in the interest of maintaining public confidence in the judiciary. The Court had to decide whether the criticism was within the limits of reasonable courtesy and good faith by looking at the facts of each particular case. If the criticism is beyond the limits set it is likely to prejudice the confidence of the public in the role of the courts in the administration of justice. Apart from that, the Supreme Court pointed out that it should not lose sight of local conditions. The first and second respondents were found in contempt as the Court heard their speeches as blatant insinuations¹⁴⁸ that scandalised the Supreme Court and brought it into disrepute as they were outside the limits of reasonable courtesy and good faith. The Supreme Court has justified this strict approach by saying that Malaysia is unique as far as local conditions and peculiarities are concerned and thus should not follow the liberal approach adopted by the courts in the UK.¹⁴⁹ According to the Court, Malaysia is unique

¹⁴⁷ [1990] 1 MLJ 273.

¹⁴⁸ The speeches were delivered in Malay language and the inferences are that the court had acted recklessly and irresponsibly and that it was an abuse of the process of the court. There was also a suggestion that the Supreme Court judges were prejudiced, not gainfully employed and had not discharged or was in dereliction of their judicial duties and irresponsible. There was also suggestion that the Supreme Court decision was stupid and meaningless and that the Supreme Court sanctioned the lawlessness and disregard of the legal process. *Trustees of Leong San Tong Khoo Kongsai* (n. 147) p. 280.

¹⁴⁹ *Manjeet Singh Dhillon* (n. 8).

because the local condition is different and the sensitivity of the local courts need not be the same as courts in England.

Furthermore, in *Manjeet Singh Dhillon*,¹⁵⁰ the Supreme Court was invited to refer to foreign laws to cases in which these jurisdictions were useful in determining the law of contempt in Malaysia. The Court held that the English cases from 1981 onwards were of no assistance in determining the law of contempt in Malaysia, which was derived from the common law of England, as the common law was modified by statute and by the decisions of the European Court of Human Rights (ECtHR). The recent Canadian decisions also did not apply as they were based on the Canadian Charter of Rights and Freedom which had no parallel in Malaysia. The Malaysian courts were also resistant to the UDHR¹⁵¹ and no reference was made to international human rights bills even though freedom of speech and expression is specially promoted in international instruments on human rights. Interestingly, the courts offer no explanation in holding as to how the conditions are different and why such differences are relevant.

2.3.1 Malaysia and Human Rights

In the globalised era today, international law is increasingly becoming a tool for justice to ensure that governments live up to their legal obligations to their citizens under international laws, treaties and instruments. International laws and treaties are a form of supranational governance over the laws of member states ensuring legal integration with internationally recognised standards and rights. Under the international law, States assume obligations to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Therefore, for the enjoyment of

¹⁵⁰ Ibid. p. 172.

¹⁵¹ *Mohamad Ezam* (n. 25). It is interesting to note that there was no reference to any international documents in the Reid Commission Report even though the UDHR was adopted by the UN General Assembly about ten years before the birth of the Malaysian Constitution. Bari, *Malaysian Constitution: A Critical Introduction* (n. 36) p. 141.

human rights, the States have to bring their laws in line with the international human rights laws.

In order to have the international human rights laws applicable to domestic law, the Member States have to ratify the relevant convention or covenant and translate the rights and freedom in the covenant into their domestic legal systems.¹⁵² The ratification has the effect of bringing in line the national law with the international human rights laws ratified. In numbers of monist countries, the international laws take direct effect in law upon being signed by the government.¹⁵³ For dualist countries like Malaysia, the international laws were incorporated and transformed into their domestic law by means of statute.¹⁵⁴ According to Elizabeth Evatt,¹⁵⁵ States can be grouped into three categories, the first being those that incorporate the covenant rights into domestic law. This incorporation of covenant rights into domestic law is often with a status superior to ordinary national law.¹⁵⁶ The second group of states is those which protect the rights through the constitution or other entrenched law. In States which do not incorporate treaties or covenant into domestic law, the rights may be guaranteed by constitutional provisions or by

¹⁵² A State may limit its obligations by means of reservations but the reservations that are incompatible with the object and purpose of the covenant are not permitted. See Article 19 (3) of Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969—entry into force 27 January 1980.

¹⁵³ The continental or civil law countries, which are mostly monist countries, substantially incorporate international law in their national constitutions. The Convention took direct effect in law upon being signed by the government. These countries operate on the ‘doctrine of incorporation’ whereby international law is regarded as automatically incorporated in national law. For example in Germany, Article 25 of the Basic Law (Constitution) of Germany provides that:

The general rules of international law shall be an integral part of the federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

However, this constitutional provision is only applicable to rules of customary law and is not applicable to treaties. The ECHR and its protocol are international treaties and have been incorporated into German law by the federal legislature in a formal statute (Article 59.2 of the Basic Law). The ECHR and its protocols thus have the status of German statutes (Gesetzesrang). Abdul Ghafur Hamid, *Public International Law. A Practical Approach*. (Prentice Hall, Selangor 2007) 80; Federal Constitutional Court’s Press Release on ‘On the Consideration of the Decisions of the European Court of Human Rights by Domestic Institutions, in particular German Courts’, Press release no. 92/2004 of 19. October 2004, available at <<http://www.bundesverfassungsgericht.de/en/press/bvg04-092en.html>>.

¹⁵⁴ See Abdul Ghafur Hamid (n. 153) pp. 59-60.

¹⁵⁵ Elizabeth Evatt, ‘The Impact of International Human Rights on Domestic Law’ in Grant Huscroft and Paul Rishworth (ed) *Litigating Rights. Perspectives From Domestic and International Law* (Hart Publishing, Oxford-Portland, Oregon 2002) pp. 281-303.

¹⁵⁶ In these States, national courts can enforce the covenant rights directly and the effect can be to invalidate or render inapplicable national laws which are incompatible with covenant rights. Sometimes, however, the incorporation of the covenant into domestic laws gives its provisions only the status of ordinary laws which can be overridden by later domestic legislation.

entrenched legislation that overrides laws incompatible with their protection. If the rights protected are expressed in similar terms to the covenant, the courts may draw on the jurisprudence of the international human rights bodies. But in some cases the domestic provisions differ materially from the covenant. Canada is in this group. Thirdly are the states that rely on legislative or other solutions. This is by legislation which is modelled to a greater or lesser extent on the covenant or other international instrument. In these mainly common law countries, some rights may be protected under common law. The courts may try to ensure that as far as possible statutory interpretation, the development of the common law and administrative decisions are in line with the international obligations undertaken by the State. The UK, Australia and New Zealand are within this group.

In Malaysia, the human rights are entrenched in the Constitution but neither reference was made to the UDHR or any international bills of rights such as the ICCPR. Nonetheless, it is noted that international law affects Malaysians through the Constitution and the CLA 1956. Malaysia as a member of international organisations is being affected by the ratification of treaties and convention and the later incorporation through legislation into domestic law, Act of Parliament and judicial decisions.¹⁵⁷ It is also noted that international law, in particular international human rights law, can be incorporated into the domestic law through the judiciary.¹⁵⁸ This is due to the fact that the final analysis of the provision depends on the courts as their decisions form part of the law.

Hence, the court should be ready to take a broad liberal attitude and not be restrictive i.e. literal and pedantic approach in interpreting constitutional provisions relating to fundamental liberties.¹⁵⁹ This suggests that the judiciary should consider the use of comparative law or foreign materials as a tool of interpretation. Aharon Barak points out that comparative law or foreign materials enrich the options available to the judges. He suggests that examining a foreign

¹⁵⁷ Honey Tan Lay Ean, 'Measuring Up to CEDAW: How Far Short Are Malaysian Laws and Policies?' (Paper presented at the SUHAKAM Roundtable Discussion: Rights and Obligations under CEDAW, Kuala Lumpur, 2003)

¹⁵⁸ Jaspal Kaur Bhatt, 'Gender Discrimination in Employment- How Far Does Art. 8 of the Federal Constitution Guarantee Gender Equality?' (2006) 6 *Malayan Law Journal* xlv.

¹⁵⁹ Bari, *Malaysian Constitution A Critical Introduction* (n. 36) pp. 143-144; Gopal Sri Ram, 'The Workman and the Constitution' (2007) 1 *Malayan Law Journal* clxxii.

solution may help a judge choose the best local solution.¹⁶⁰ This point is elaborated in Chapter 4.

However, as described by Amanda Whiting, Malaysia's involvement in the international human rights regime is very 'limited'.¹⁶¹ Malaysia has not yet ratified the two Covenants, i.e. the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESR), which are collectively termed as the International Bill of Human Rights.¹⁶² The refusal on the part of the Malaysian Government to ratify the two international covenants was justified by a rather limp reason offered by a senior cabinet member when he said that the fundamental guarantees were entrenched in the Constitution. Thus it obviated the need to ratify these international instruments.¹⁶³ However, this was dismissed by Dato' Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers, as fallacious. He said:

Firstly, not all human rights which are provided in the Covenants are entrenched in the Malaysian Constitution. Secondly, how could something be described as being guaranteed when it can be removed or abrogated by two thirds majority in Parliament? As two thirds majority is required to amend any article of the Constitution, it cannot possibly be argued that fundamental rights are singled out for guarantee.¹⁶⁴

H.P. Lee observes that ratification of these instruments would lead to a greater degree of accountability to the international community in the face of complaints of infringement of the rights provided by the covenants.¹⁶⁵

Nevertheless, there are some encouraging signs of Malaysia's willingness to participate in the international protection of human rights. In 1995, the

¹⁶⁰ Aharon Barak, *The Judge in a Democracy* (Princeton University Press, New Jersey 2006) p. 197.

¹⁶¹ Amanda Whiting, 'Situating SUHAKAM: Human Rights Debates and Malaysia's National Human Rights Commission' (2003) 39 *Stanford Journal of International Law* 59, p.71.

¹⁶² Malaysia has also not signed the International Convention on the Elimination of All Forms of Racial Discrimination or the International Convention on the Protection of the Rights of All Migrant Workers and their Families. *Ibid.*

¹⁶³ Param Cumaraswamy, "Foreword" in *SUARAM'S Malaysian Human Rights Report'* (2002) p. i.

¹⁶⁴ *Ibid.*

¹⁶⁵ H.P. Lee, 'Human Rights in Malaysia' in Carole J. Peterson and Albert H.Y. Chen Randall Peerenboom (ed) *Human Rights in Asia. A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (Routledge Taylor & Francis Group, London & New York 2006) 191, p. 192.

Government ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) albeit with many reservations.¹⁶⁶ As regards CEDAW, reservations were made to Articles 5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g) and 16 (2). A declaration was made on Article 11. CEDAW sets out a definition of discrimination against women, outlines the obligation of the State and the measures to be taken by the State to eliminate discrimination. This far, the Malaysian Government has not passed an Act through Parliament to make CEDAW wholly applicable to Malaysian. Instead, CEDAW is given effect in a piecemeal fashion, i.e. by incorporating its principles in some of the domestic legislation¹⁶⁷ and Article 8 (2) of the Constitution.¹⁶⁸ For the ratification of the CRC and to make the rules applicable in Malaysia, the Child Act 2001 was enacted. The aim of the Child Act 2001 is to safeguard the welfare and interest of children which was promulgated based on the principles enumerated in the CRC. This Act provides for care, protection and rehabilitation of a child without discrimination as to race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status. Apart from this, Malaysia is a member state of United Nations and a signatory to the UDHR. Due to Malaysia's involvement in the UN Commission on Human Rights (UNCHR) which has enlightened the need to safeguard human rights, the Parliament passed the HRCA 1999 in 2000.

The Act established the Human Rights Commission of Malaysia, known as SUHAKAM.¹⁶⁹ The establishment of SUHAKAM is influenced by the growing

¹⁶⁶ Cumaraswamy (n. 163) p. 215.

¹⁶⁷ The Guardianship of Infants Act 1961 was amended to accord mothers and fathers equal guardianship rights over their children. The Domestic Violence Act 1994 was enacted to deal with domestic violence, the victims of which are mostly women and children. The Distribution Act 1958 was amended so that when a woman died intestate, her husband did not inherit the whole of her estate to the exclusion of the children of the marriage.

¹⁶⁸ The Constitution was amended in 2001, heralding formal equality for women in Malaysia. Article 8(2) of the Constitution now reads :

Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or *gender* in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. [Italic added].

¹⁶⁹ SUHAKAM is the acronym for '*Suruhanjaya Hak Asasi Manusia*' (the Human Rights Commission).

international emphasis on human rights and the recognition that the human rights issues transcend national boundaries, the changing political climate in Malaysia and the growing and dynamic civil society. Thus, SUHAKAM, which is a national human rights institution has been set up to protect and promote human rights in Malaysia.¹⁷⁰ Amongst its functions are to promote public awareness in relation to human rights, to advise and assist the government in formulating legislation and recommend necessary measure to be taken as well as regarding the subscription or accession of treaties and other international instruments in the field of human rights, and to conduct inquiries into complaints regarding infringement of human rights.¹⁷¹ Furthermore, Section 4 (4) HRCA provides:

For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

B. Lobo¹⁷² on this point argues that international human rights laws as in the UDHR are applicable into our domestic law. Section 2 HRCA defines human rights as enshrined in Part II of the Constitution and Section 4 (4) HRCA has imported the UDHR into Malaysian law to the extent that it is not inconsistent with the Constitution. By looking at these provisions he suggests that, Section 4 (4) in particular has made the provisions of the UDHR as supplemental, i.e. an extension or an appendage to Part II of the Constitution thus having constitutional status. The provisions of the Act, by specific reference to Part II of the Constitution, have been put on the same pedestal as Part II of the Constitution. Thus, this includes the provisions of the UDHR. He argues that the UDHR had been incorporated into domestic law, on a par with the supreme law and is the fundamental right of Malaysians.

Malaysia has still some way to go before it can be said that human rights are fully and effectively protected. However, there are a lot of initiatives taken by NGOs to

¹⁷⁰ The preamble to the HRCA 1999 states:

... an Act to provide for the establishment of the Human Rights Commission of Malaysia; to set out the powers and functions of such commission for the protection and promotion of human rights in Malaysia; and to provide for matters concerned therewith or incidental thereto ...

¹⁷¹ See Section 4 (1) and (2) HRCA.

¹⁷² B Lobo, 'Does the Law of Human Rights Pervade All Malaysian Law in View of Part II of the Federal Constitution?' (2007) 7 *The Malayan Law Journal* lxxxvi.

have human rights discourse and to highlight abuses of human rights. The national human rights Commission, SUHAKAM, is playing a role in promoting human rights although it has been attacked for being a 'toothless' watchdog.¹⁷³

¹⁷³ The SUHAKAM report is never read in Parliament. Ambiga Sreenevasan, 'Malaysian Bar President's Speech on the 60th Anniversary of the UDHR' (2009) <http://www.malaysianbar.org.my/human_rights/malaysian_bar_presidents_speech_on_the_60th_anniversary_of_the_udhr> accessed 13 November 2009.

Chapter 3

Contempt of Court in Malaysia

3.1 THE MALAYSIAN LAW OF CONTEMPT OF COURT

The law of contempt migrated to Malaysia with the British colonists and the common law judicial system.¹⁷⁴ According to Malaysian law, the contempt power is necessary to ensure that the due administration of justice is not impeded and to provide the courts with power to enforce their judgment. The Malaysian courts have the opportunity to establish and define the ambit of the law of contempt. The wide discretionary powers exercised by the judges render the contempt law substantially flexible in its application. Due to this, from time to time criticisms have arisen, especially from the Bar. The Bar perceives that contempt power is fraught with possible abuse.

The aim of this chapter is to consider whether the law of contempt of court in Malaysia is sufficiently clear and unambiguous to operate effectively in this jurisdiction. What this chapter seeks to do is identify some problems that exist with the law as it is currently applied in the Malaysian courts.

3.1.1 Jurisdiction

The Malaysian law of contempt in its present form is derived from two sources: first, from provisions contained in the Constitution, statutes and Rules of Court, and second, from common law – in particular English common law rules – which are still in force.

Article 126 of the Constitution and Section 13 CJA (which is a mere repetition of Article 126) provides:

¹⁷⁴ The contempt power migrated to Malaysia with the establishment of the Court of Judicature which exercised all the jurisdiction of the English Court of Laws and Chancery in 1807 through the First Charter of Justice. *Supra.* (n. 35).

The Federal Court, the Court of Appeal and the High Court shall have the power to punish any contempt of itself.

These provisions are the basis of the power of contempt for superior courts. The powers of the superior courts to commit for all forms of contempt are regulated by Order 52 RHC 1980. Order 52 r.1 RHC provides for the procedural vehicle to exercise the courts' power to order committal. The procedure under Order 52 RHC may be invoked to produce the sanction of imprisonment or a fine.

The subordinate courts are also empowered to punish anyone for contempt and the relevant provision is that of paragraph 26 of the Third Schedule under Section 99A SCA 1948.¹⁷⁵ Paragraph 26 of the Third Schedule provides that the subordinate courts have:

Power to take cognisance of any contempt of court and to award punishment for the same, not exceeding, in the case of a Sessions Court, a fine of three hundred ringgit or imprisonment for six weeks, in the case of a Magistrates' Court presided over by a First Class Magistrate, a fine of one hundred and fifty ringgit or imprisonment for three weeks, and in the case of a Magistrates' Court presided over by a Second Class Magistrate, a fine of fifty ringgit or imprisonment for one week, to such extent and in such manner as may be prescribed by rules of court. If the contempt of court is punishable as an offence under the Penal Code, the court may, in lieu of taking cognisance thereof, authorise a prosecution.

Order 34 r.1 of the Subordinate Courts Rules 1980 (SCR) provides for the procedural vehicle to exercise the courts' power to order committal.

In addition to Paragraph 26 of the Third Schedule of the SCA, a Magistrate is vested with a power to deal with any person who intentionally offers any insult or causes interruption while he is sitting in any stage of a judicial proceeding. This is provided for under Section 353 CPC¹⁷⁶ and read together with Section 228 Penal Code.¹⁷⁷

¹⁷⁵ It states:

In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule.

¹⁷⁶The section reads:

When any such offence as is described in sections 175, 178, 179, 180 or 228 of the Penal Code is committed in the view or presence of any Magistrate's Court, whether civil or criminal, the Court may cause the offender to be detained in custody and at any time

Article 126 of the Constitution and Section 13 CJA are, however, only conferring general powers to the courts. The content of the law is still very much developed in the common law.¹⁷⁸ Contempt of court has developed through case by case basis within the Malaysian courts; since there is no written law of the subject despite the authorisation given to the Parliament via Article 10 (2)¹⁷⁹ of the Constitution; to make laws against contempt of court. The courts continue to refer to English common law for guidance.¹⁸⁰ Thus, in the absence of any restriction imposed by Article 10 (2) of the Constitution, the path is well paved for the growth and development of the common law, in relation to contempt of court. In fact, the common law provision has been expressly preserved under Section 3 CLA.¹⁸¹

3.1.2 Definition of Contempt

*Halsbury's Laws of Malaysia*¹⁸² states *inter alia* that since the term 'contempt of court' has neither been defined in the Constitution nor any other statutes, it is for the courts to define it. Contempt is manifold in its aspect. However, over the years, the Malaysian courts have had the opportunity to establish and define the ambit of the law relating to contempt of court. The Supreme Court in *Manjeet Singh Dhillon* quoted a succinct definition of contempt as found in *R v Gray*,¹⁸³ where Lord Russell of Killowen CJ offered the following:

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of

before the rising of the Court on the same day may, if it thinks fit, take cognisance of the offence and sentence the offender to a fine not exceeding fifty ringgit and, in default of payment, to imprisonment for a term which may extend to two months.

¹⁷⁷ The section reads:

Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any state of a judicial proceeding, shall be punished with imprisonment for a term that may extend to six months, or with a fine that may extend to two thousand ringgit, or with both.

¹⁷⁸ *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241, p. 247.

¹⁷⁹ Article 10 (2) of the Constitution (n. 7).

¹⁸⁰ *In Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors* [2005] 3 CLJ 440, p. 478, the Court stated that since there is no specific statute in Malaysia covering the definition of contempt, in the meantime the courts have to follow common law approving the principle established in *Manjeet Singh Dhillon* (n. 8).

¹⁸¹ Section 3 CLA (n. 58).

¹⁸² Vol. 2, p. 75.

¹⁸³ [1900] 2 Q.B. 36, p. 40.

court. That is one class of contempt. Further, any act done, or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of court.

The Federal Court in *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd*¹⁸⁴ adopted the general definition of contempt of court as provided by Oswald, who defines contempt as follows:

... To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and the administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, their witnesses during the litigation.¹⁸⁵

The Courts took the view that contempt of court is ‘interference with the administration of justice’ and added further that the generality of that phrase renders the categories of contempt open wide.¹⁸⁶

The definition adopted in *Monatech* is an endorsement of the statement made by Low Hop Bing J in *Chandra Sri Ram v Murray Hiebert*,¹⁸⁷ which *inter alia* states that the circumstances and categories of facts that may arise and that may constitute contempt of court are never closed.¹⁸⁸ In *Dato’ Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd (No. 1)*¹⁸⁹ the Court classifies the broad categories of contempt of court into matters like:

- (i) disrupting the proceedings of the court and this is described as contempt in the face of the court,
- (ii) publications of court proceedings which would tend to interfere with the court proceedings itself,
- (iii) publications of court proceedings that would scandalise the courts,
- (iv) disobeying court orders, and
- (v) failure to fulfil undertakings given to the court.

¹⁸⁴ *Monatech* (n. 178).

¹⁸⁵ J.F. Oswald, *Contempt of Court* (3rd edn 1910) p. 6.

¹⁸⁶ See *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604 (FC), pp. 608-609 where the reference was made to Lord Morris of Borth-Y-Gest’s statements in *Attorney General v Times Newspaper Ltd* [1974] AC 273.

¹⁸⁷ [1997] 3 MLJ 240 (HC), p. 270.

¹⁸⁸ This is because the generality of the phrase ‘administration of justice’ renders that the categories of contempt are never closed.

¹⁸⁹ *Samy Vellu* (n. 180) p. 525.

The first three fall under criminal contempt whilst the last two are civil contempt. As can be seen, contempt of court is that broad offence that incorporates all branches of the rules that must be followed to ensure that the mechanisms of administration of justice are not in any way interfered with or jeopardised.

In general, contempt may be divided into civil and criminal contempt. Civil contempt usually arises where there is a disobedience to the courts' orders, decrees or undertakings by a party to a proceedings in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. It is also known as 'contempt by disobedience' or 'contempt in procedure' where its sanction is remedial, coercive¹⁹⁰ and for the benefit of the complainant.¹⁹¹

Criminal contempt is committed when there is an interference with the administration of justice in the nature of a public wrong that requires punishment from the public point of view, which is punitive in nature.¹⁹²

3.1.2.1 Civil Contempt versus Criminal Contempt

In broad terms it is easy to differentiate criminal contempt from civil contempt since the basis of the distinction is similar to that between crimes and torts generally, that is, in its character and purpose. In practice, the distinction between the two has become blurred and the two do on occasions overlap. For example, if the person against whom the order was made had broken it, he would be liable for civil contempt but the damage is also done to the administration of justice.

The standard of proof applicable in both type of contempt is beyond reasonable doubt as contempt carries penal punishment.¹⁹³ The penal element in enforcing

¹⁹⁰ It consists of imprisonment until such time as the order is complied with or waived.

¹⁹¹ *Dr. Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors* [1997] 1 MLJ 704; *T.O. Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151.

¹⁹² Gomez (n. 12).

¹⁹³ In *Re Bramblevale Ltd* [1970] Ch. 128 it is stated that the burden of proof in civil contempt is as similar as in criminal trial because contempt of court is an offence of criminal character since a contemnor may be sent to prison. This case has been referred to in *Wee Choo Keong v MBF Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549; *Murray Hiebert* (HC) (n. 187).

court order was emphasised by Cross J in *Phonographic Performances Ltd v Amusement Cateres (Peckham) Ltd*,¹⁹⁴ which was referred to in *Majlis Perbandaran Melaka v Yau Jiok Hua*.¹⁹⁵ Cross J in the former states:

... Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt ... 'bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest'. Civil contempt bears much the same character as criminal contempt.¹⁹⁶

Further, in the context of the procedural arrangement, in civil contempt not only the party aggrieved has *locus standi*, it is possible for the Attorney General to intervene or the court may proceed on its own motion.¹⁹⁷ This is no different to criminal contempt except to exclude the party aggrieved. There are also cases arising out of disobedience of an injunction; the application will be brought in the civil proceedings but the court may nevertheless make a finding of criminal contempt.¹⁹⁸

The distinction between civil and criminal contempt is important because it is only criminal contempt which may be dealt with instantly and possibly without further evidence if it occurs in the face of the court.¹⁹⁹ Where contempt occurs not in the face of the court, proceedings will commence on motion. Civil contempt should not be dealt with instantly but in accordance with the usual Rules of Court.²⁰⁰ In

¹⁹⁴ [1964] Ch. 195.

¹⁹⁵ [2006] 5 MLJ 389.

¹⁹⁶ [1964] Ch. 195, pp. 198-199.

¹⁹⁷ *Tommy Thomas v Peguam Negara Malaysia & Others* [2001] 3 CLJ 457.

¹⁹⁸ *Ibid.*

¹⁹⁹ Proceedings for criminal contempt could be commenced by the court of its own motion or by the Attorney General, and also by an interested party. For criminal especially contempt in the face of the court, it is usually dealt with summarily by the court, which causes the immediate arrest of the contemnor and sentences him to a fine or imprisonment as a punishment for his wrongdoing. Imprisonment for a criminal contempt is for a fixed term or alternatively until the court orders the release of the contemnor. A fine could always be imposed for criminal contempt, sometimes as addition to a sentence of imprisonment. Arlidge, Eady and Smith (n. 19) p. 151; Joseph H. Beale, 'Contempt of Court, Criminal and Civil' (1908) XXI Harvard Law Review 161, pp.169-174. For more on this, see H. Fisher, 'Civil and Criminal Aspects of Contempt of Court' (1956) XXXIV Canadian Bar Review 121; Robert J. Martineau, 'Contempt of Court: Eliminating the Confusion between Civil and Criminal Contempt' (1981) 50 University of Cincinnati Law Review 677.

²⁰⁰ Proceedings for civil contempt would normally be commenced by the party aggrieved. For civil contempt, i.e. disobedience contempt, a motion issues on affidavits, the alleged contemnor is

Malaysia, contempt of court has been regarded *sui generis*. The Court in *Re Abdul Aziz's Application*²⁰¹ perceives contempt as an offence *sui generis* which has been treated as a criminal matter and falls on the criminal side of the jurisdiction.²⁰²

Although the distinction between civil and criminal contempt continues to be made, Arlidge *et al.* consider that the two categories have rather more in common than their traditional separation implies.²⁰³ Anuar J in *Houng Hai Kong*²⁰⁴ opines that the distinction between civil and criminal law is irrelevant. According to His Lordship, whether the act is scandalising the court or the wilful disobedience of the orders makes no difference because in both circumstances the administration of justice is at stake. The same view was upheld by the High Court in *Asia Pacific Parcel Tankers Pte. Ltd. v The Owners of the Ship or Vessel 'Normar Splendour'*.²⁰⁵ The Court took a view that it is meaningless to have two categories of contempt since the standard of proof of the alleged contemptuous act is to the same exacting standards as in criminal cases. The Court supports the views ventilated by Salmon J in *Jennison & Ors v Baker*²⁰⁶ and Lord Oliver in *Attorney General v Times Newspapers Ltd.*²⁰⁷ that the classification is an unhelpful and almost meaningless one. Nevertheless, as observed by Paul Anthony McDermott,²⁰⁸ the modern view appears to be that behaviour may amount to civil or criminal contempt depending on the circumstances surrounding the contempt.

brought before the court and has an opportunity to disprove the facts alleged against him. If the disobedience is proved, the contemnor can be committed to prison to remain until he purges himself of contempt by doing the right or undoing the wrong. Generally, the imprisonment is for an unspecified period, i.e. until he purged his contempt or until the order of the court was obeyed. The imprisonment is not punitive but coercive. Arlidge, Eady and Smith (n. 19) p. 151; Beale, (n. 199) pp. 169-174. For more on this, see Fisher (n. 199); Martineau (n. 199).

²⁰¹ [1962] 1 MLJ 64. See also *Arthur Lee Meng Kwang* (n. 1).

²⁰² These were the observations by Lindley LJ and Lopes LJ in *O'Shea v O'Shea and Parnell* (1890) 15 PD 64, pp. 64-65 and also by Wills J in the *King v Parke* [1903] 2 KB 441, p. 441. See also *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239; *Achieva Technology Sdn Bhd v Lam Yen Ling & Ors* [2009] 8 MLJ 625.

²⁰³ Arlidge, Eady and Smith (n. 19) p. 144.

²⁰⁴ *Houng Hai Kong* (n. 1).

²⁰⁵ [1999] 6 MLJ 652, p. 670.

²⁰⁶ [1972] 1 All ER 997, pp. 1001-1002.

²⁰⁷ [1992] 1 AC 191, pp. 217-218.

²⁰⁸ Paul Anthony McDermott, 'Contempt of Court and the Need for Legislation' (2004) 4 Judicial Studies Institute Journal 185.

Although the two types of contempt overlap, the classification retains some importance. There is no clear rule or principle in Malaysia that provides the distinction between civil and criminal contempt as obsolete.

3.1.2.2 Classification of Contempt

(i) Civil Contempt

Civil contempt is known as procedure contempt or contempt by disobedience. A typical case of civil contempt of court is when a party refuses or neglects to do an act required by a judgment or order of court within the time specified in the judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specific act.²⁰⁹ In Malaysia, civil contempt may be committed by breach of injunction,²¹⁰ aiding or abetting a breach of injunction or court order,²¹¹ breach of an undertaking²¹² or by disobeying an order of the court.²¹³

These conducts give rise to a private injury or wrong at the suit of another party to the litigation. Thus, causing such private injury is not likely to be a criminal contempt unless it is deliberately repeated or otherwise indicates an intention to defy the court's authority. This is when a person's actions are designed to obstruct the course of justice by thwarting or attempting to thwart a court order.²¹⁴ Hence, civil contempt is also described as quasi-criminal as it partakes of a nature of a criminal charge²¹⁵ because in order to sustain a conviction for civil contempt of court, the standard of proof required is beyond reasonable doubt.²¹⁶ A 'penal'

²⁰⁹ *Societe Jas Henessy & Co & Anor v Nguang Chan (M) Sdn Bhd* [2005] 5 CLJ 515, p.531. The Court referred to *Halsbury's Law of Malaysia*, 4th edn., vol. 9, para. 52.

²¹⁰ *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 2 MLJ 313; *Monatech* (n. 178).

²¹¹ *T.O. Thomas* (n. 191); *Leela Ratos* (n. 191).

²¹² *Tommy Thomas* (n. 197).

²¹³ *Tam Lye Chian v Seah Heng Lye* [1998] MLJU 611.

²¹⁴ In *Tommy Thomas* (n. 197), the appellant knew of the order that prohibits him from publishing a defamatory words or any similar words as in his publication, nevertheless, he made a press statement that commented on the matter. Thus, his action deliberately thwarted a court order. As such, contempt can derive other than through direct disobedience of a court order.

²¹⁵ *Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part I)* [2007] 7 MLJ 250, p. 272.

²¹⁶ It is an accepted principle that contempt is an offence of criminal character because of its penal sanction. This is the test stated by Lord Denning MR in *Re Bramblevale Ltd* (n. 193) and has been referred to by the Malaysian Federal Court in *Monatech* (n.178) p. 416, when the Court took the

sanction may also be imposed to compel compliance and/or to punish the non-compliance.²¹⁷

The High Court in *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd*²¹⁸ has listed ingredients to be satisfied before a person could be cited for civil contempt. Firstly, there must be a court order, undertaking or injunction which specifically and unambiguously requires the relevant act to be done or omitted by the other party. The terms of the order etc. must be clear and unambiguous otherwise it is difficult to identify any particular act of contempt.²¹⁹

Secondly, the alleged contemnor must be shown to have had proper notice of the terms of the order as he cannot be held in contempt of what he does not know.²²⁰

Thirdly, there must be clear proof that the terms have been broken and the breach must be proved beyond all reasonable doubt.²²¹ There must have been an element of wilful disobedience of the order as mentioned by the Federal Court in *T.O. Thomas*.²²² The Courts accepted the principle in *Fairclough & Sons v Manchester Ship Canal Co. (No.2)*²²³ that contempt must be wilful and the order of court must have been contumaciously disregarded. It is no good if it is casual, accidental or unintentional.

As regards the requirement of *mens rea*, the Federal Court in *T.O. Thomas* took a view that an actual intention to prejudice or to interfere with the proper administration of justice is immaterial and there is only need to prove that the

stance that the standard of proof is the criminal standard of proof, be it classified as ‘civil contempt’ or ‘criminal contempt.’ See also *Tay Seng Keng v Tay Ek Seng Co. Sdn Bhd* [1978] 1 MLJ 126; *Polygram Records Sdn Bhd v Phua Tai Eng* [1986] 2 MLJ 87; *Tiu Shi Kian* (n. 210); *Lee Lim Huat v Yusuf Khan bin Ghaw Khan & Anor* [1997] 2 MLJ 472; *Asia Pacific Parcel Tankers* (n. 205); *Yau Jiok Hua* (n. 195).

²¹⁷ *Yau Jiok Hua* (n. 195).

²¹⁸ *Tiu Shi Kian* (n. 210).

²¹⁹ *Houng Hai Hong & Anor v MBf Holdings Bhd & Anor and 3 Other Appeals* [1995] 4 CLJ 427; *Mah Siew Keong v Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 2 MLJ 107.

²²⁰ Order 45 r. 7(2) (a) and (b) RHC and Order 30 r. 7(2) (a) and (b) SCR 1980 provide that no order can be enforced unless a copy of the order has been served personally on the person required to do or refrain from doing a specified act. See *Capital Insurance Bhd v B.S. Sidhu* [1996] 3 MLJ 1; *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381.

²²¹ *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1993] 4 CLJ 177.

²²² *T.O. Thomas* (n. 191).

²²³ [1897] WN 7.

alleged contemnor deliberately, wilfully or intentionally disobeys the order of the court. The Court approved the English principle as laid down in *AG v Walthamstow Urban District Council*,²²⁴ *Stancomb v Trowbridge Urban District Council*,²²⁵ *Regina v Odhams Press Ltd*²²⁶ and *AG v Butterworth*.²²⁷ Hence, the intention to disobey the order can be deduced from the circumstances arising out of a breach of undertaking, order or even injunction.²²⁸

(ii) Criminal Contempt

Criminal contempt can be committed in the face of the court (*in facie*) or outside the court (*ex facie*). The basis for this classification is, *inter alia*, the procedures that to be applied are dependent upon the classification. Contempt in the face of court may be punished instantly and summarily.

The act or conduct could fall under criminal contempt if there is a tendency of interference with the administration of justice. Lord Diplock in *Attorney General v Times Newspapers Ltd*²²⁹ explains what due administration of justice means:

... The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely on obtaining in the courts the arbitrament of tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

Thus, it is possible for any conduct that tends to prejudice any of the requirements of the due administration of justice to be punished as contempt of court.

²²⁴ (1895) 11 TLR 533.

²²⁵ [1910] 2 Ch 190.

²²⁶ [1957] 1 QB 73.

²²⁷ [1963] 1 QB 696.

²²⁸ *Hisham, Sobri & Kadir* (n. 202).

²²⁹ *AG v Times Newspapers Ltd*. (n. 186) p. 399.

In Malaysia, criminal contempt is not as straightforward as civil contempt, especially in terms of the procedures and the sentences to be imposed. Criminal contempt in Malaysia currently corresponds roughly with the common law offences of contempt in the face of court, contempt by scandalising the court and the common law rule of *sub judice*. Scandalising and *sub judice* contempt are often known as publication contempt.

(a) Contempt in the Face of the Court (*in facie*)

Contempt in the face of the court occurs in court or within the cognisance of the court. This was described by Lord Denning MR in *Balogh v St. Albans Crown Court*.²³⁰

Blackstone in his Commentaries, 16th ed. (1825), Book IV, p. 286, said: ‘If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges.’ In Oswald on Contempt, 3rd ed. (1910), p.23 it is said: ‘Upon contempt in the face of the court an order for committal was made ‘instanter’ and not on motion. But I find nothing to tell us what is meant by ‘committed in the face of the court.’ It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So ‘contempt in the face of the court’ is the same thing as ‘contempt which the court can punish of its own motion.’ It really means ‘contempt in the cognizance of the court.’

In Malaysia, the Court in *Re Kumaraendran, an Advocate and Solicitor*,²³¹ with reference to *McKeown v The King*²³² and *Balogh*²³³ established that contempt in the face of the court refers to an act or conduct in open court which immediately disrupts judicial proceedings. It is contempt in the cognisance of the court where all the circumstances are in the personal knowledge of the judge. *Re Zainur Zakaria*²³⁴ extends this definition to include misconducts in the course of proceedings either within the court itself or at least, directly connected with what is happening in court.

²³⁰ [1975] 1 Q.B. 73.

²³¹ [1975] 2 MLJ 45.

²³² (1971) 16 DLR 3rd 390.

²³³ *Balogh* (n. 230).

²³⁴ [1999] 2 MLJ 577.

Hence, contempt in the face of the court in Malaysia may be committed inside the courtroom within the sight and hearing of the presiding judge, which is within the personal knowledge of the court. It may also extend to misconduct committed outside the courtroom i.e. within the courtroom but outside the sight of the judge or when it happens at some distance from the court²³⁵ or which connected with what is happening in the court.

Judges can deal with contempt in the face of court summarily. This means that when the court encounters an unexpected situation of gross misconduct, the court may deal with it immediately without other evidence than the facts known personally to the judge to cite the contemnor. This immediate remedy is necessary for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance.²³⁶ The greater the power to deal with contempt in the face of the court, the more caution is to be exercised by the courts, so that this power is invoked by the courts as a last resort.²³⁷

The Malaysian courts take contempt in the face of court seriously when they exercise summary punishment. However, the judges are always reminded to exercise this power sparingly and when in real need. The approaches taken by the courts in 1970s were less pragmatic wherein the courts seemed very cautious in applying summary power in *in facie* contempt. This is evident in the case of *Karam Singh v Public Prosecutor*²³⁸ and *Re Kumaraendran*.²³⁹ In these two cases, upon appeal and revision by the higher court, the orders of committal were unsustainable in law and invalid on the basis of procedural irregularities despite maintaining the act as gross contempt in the face of court.

²³⁵ This was established by Lord Denning MR in *Balogh* (n. 230). See also *Morris v The Crown Office* [1970] 1 All ER 1079; *Moore v Clerk of Assize Bristol* [1972] 1 All ER 58. In *Morris*, a group of students interrupted proceedings by marching into court, singing, shouting and distributing leaflets while a case was before a court. They were sentenced to three months' imprisonment for contempt in the face of court, although on appeal, the court bound them over to keep the peace after having served seven days. Thus, the act or conduct to fall under contempt in the face of the court does not necessarily occur while the court is in session; it could happen outside the courtroom, within the court's precincts or relate to a case currently before the court.

²³⁶ *Re Zainur Zakaria* (n. 234) p. 593.

²³⁷ *Jaginder Singh* (n. 10).

²³⁸ [1975] 1 MLJ 229.

²³⁹ *Re Kumaraendran* (n. 231).

In *Karam Singh*, an advocate appealed against the summary conviction and sentence of two weeks imprisonment on the grounds of contempt in the face of the court. The facts disclosed in the appeal record were that there was heated argument between the Magistrate and the appellant who was appearing on behalf of the accused in the case. The Magistrate adjourned to Chambers for fifteen minutes and after considering the matter returned to the Bench and decided to deal with the appellant summarily. It was held by the High Court that a Magistrate's summary power to proceed of his own motion must never be invoked unless the ends of justice really require such drastic measures. The High Court commented that the Magistrate should not be both the prosecutor and the judge. It was further held that in this case the Magistrate should have adjourned the matter and reported it to the local Bar Committee. This decision was later followed in *Re Kumaraendran*.

In *Re Kumaraendran*, a defence counsel was recorded to have shouted and behaved in a manner which was most unexpected in the courtroom whilst the proceedings were in session in the Sessions Court before the President of the Sessions Court. He later made an application for the case to be heard before another judge or otherwise he would discharge himself from further acting for the accused. The judge allowed his application to discharge himself. After the ruling was recorded, the advocate said to the judge:

If you say this (referring to the ruling), outside the court, I will take on you certainly.

He was found to be guilty of contempt in the face of court and the judge exercised the summary power to commit him to two days' imprisonment. On revision, the High Court found that the remark as recorded by the President constituted insulting and contumacious behaviour in outrageous and provocative language tantamount to a deliberate challenge to the President's authority. It was clearly a gross contempt in the face of court as the insulting statement was made in the President's presence, in his hearing and indeed directed at and to him. However, the High Court ordered the order of committal as unsustainable because the charge was not distinctly stating the specific offence charged, thus depriving the advocate

from an opportunity of answering the charge. The High Court regarded this as a breach of the rules of natural justice, in particular, the right to a fair hearing.²⁴⁰

These two cases show that the Courts had adopted an originally protective attitude towards members of the Bar whose contumacious conduct no doubt constituted contempt. The Courts were more concerned with the rule of natural justice and the Courts will only resort to summary procedure when it is in real need and when there are no other options available.

However, starting from the 1980s, the approaches adopted by the courts were more pragmatic. The advocates' misbehaviour or contumacious conduct has been given a stricter treatment than that handed down in the above two cases. In *PP v Seeralan*,²⁴¹ a respondent, an advocate who was in court holding a watching brief²⁴² became emotional and made several allegations of bias against the Magistrate. He was ordered by the Magistrate to leave the courtroom, which he refused to do, saying that he had every right to be in the Court. He continued to make allegations of bias against the Magistrate saying that the Magistrate was unfair and prejudiced. The Magistrate eventually, after adjournment, took cognisance of the contempt committed and required the respondent to show cause why he should not be punished. The respondent denied and he was then cited for contempt with the imposition of a fine of RM 1,500 or, in default, one week's imprisonment.

The High Court, however, on the following day reversed and set aside the Magistrate's Order. This had moved the Public Prosecutor to refer the matter to the Supreme Court to consider whether the respondent's conduct amounted to contempt in the face of the court. The Supreme Court found that the respondent's uncompromising attitude, his unabashed arrogance and insolence towards the

²⁴⁰ The right to a fair hearing requires that a person is not to be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer it and the opportunity to present his own case. See *Brennan v United Kingdom* (2002) 34 E.H.R.R. 18; *Magee v United Kingdom* (2001) 31 E.H.R.R. 35; *Murray v United Kingdom* (1996) 22 E.H.R.R. 29.

²⁴¹ [1985] 2 MLJ 30.

²⁴² It is when a barrister who attends a trial in order to note and act on any point that may arise to affect the interests of his client who is not a party to the litigation. See Mahadev Shankar, 'Watching Briefs- Indulgence, Right or Potential Estoppel?' (1999) 1 Malayan Law Journal clxi.

Magistrate, constituted contempt of a serious kind. The Supreme Court also found that the Magistrate had exercised the power effectively as the contemnor was given the opportunity of being heard. Salleh Abbas LP observed that many cases of contempt of court have been reversed because of the failure of the court to give the contemnor an opportunity of being heard before he is punished.²⁴³

*Re Zainur Zakaria*²⁴⁴ is one of the notable and controversial cases of contempt of court. Zainur Zakaria was one of the lawyers for Anwar Ibrahim and was found in contempt during Anwar's trial. His act of filing an application supported with an affidavit to disqualify the prosecutors from further prosecuting the case (on the basis of fabrication of evidence on the part of the prosecuting team) was found contemptuous. When the motion came up for hearing, the judge informed the parties that he intended to commence proceedings for contempt against Zainur for having filed the motion. According to the judge it was scandalous and frivolous thus undermining the integrity of the trial. Zainur was given the opportunity to tender an unconditional apology to the court, the Attorney General and the two prosecutors, which he refused. He was asked to show cause and in doing so he explained that he filed the motion upon the instruction of his client.

Zainur applied for an adjournment to call for evidence but it was rejected by the judge. The court summarily cited him for contempt as his act had the tendency to deflect the court from determining the issues exclusively by reference to the evidence. He was sentenced to three months' imprisonment. This case went on appeal. The Court of Appeal upheld the High Court's decision but at the Federal Court level, it was overruled. The Federal Court decided that the High Court judge had incorrectly applied the summary procedure, resulting in injustice to Zainur. The refusal to grant an adjournment as requested by Zainur had deprived him from the opportunity to answer the charge against him thus offending the principle of natural justice.²⁴⁵

²⁴³ *Seeralan* (n. 241) p. 33.

²⁴⁴ *Re Zainur Zakaria* (n. 234).

²⁴⁵ *Zainur Zakaria v Public Prosecutor* [2000] 4 MLJ 134 (CA); *Zainur Zakaria* (FC) (n. 186).

In the aftermath of *Re Zainur Zakaria*, there were ‘unusual’ and extreme approaches in cases of contempt, especially the use of summary power by the judges. Writing letters to Chief Registrars about a matter pending before the court could be the subject for contempt in the face of court as decided in *Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong*.²⁴⁶

In a recent case of contempt in the face of court, a lawyer Matthias Chang was fined RM 20,000, in default a month’s jail by the High Court for contempt of court.²⁴⁷ He was called as the first witness in his defamation suit against *American Express (Malaysia) Sdn Bhd*²⁴⁸ and during the cross examination, there was an argument between him and the judge in which he tried to address the court on points of law. He then expressed his lack of confidence in the judge and walked out of the witness stand while being cross-examined.

Chang accused the judge of making snide remarks, belittling his counsel, denigrating their integrity and being rude and offensive to litigants and lawyers. He further claimed that the judge did so knowing that she was immune from any legal action and had the weapon of contempt of court to put down any opposition to her conduct as being disrespectful to the court.²⁴⁹ The judge ordered him to apologise but upon his refusal the judge cited him for contempt.

In this case, the contemnor claimed an abuse of contempt power by the judge. He alleged that he was cited for contempt after he had told the judge that he would file a complaint against her after she refused to retract some derogatory remarks against the contemnor’s counsel in the civil suit when they attempted to draw the judge’s attention to certain relevant laws. He walked out from the witness box as an act of dissatisfaction with the judge’s response.²⁵⁰ Chang attracted the attention

²⁴⁶ [1999] 6 MLJ 38.

²⁴⁷ 'Dr. M's Former Aide Matthias Chang Fined for Contempt' *The Star Online* (25 March 2010) <http://thestar.com.my/news/story.asp?file=/2010/3/25/nation/20100325195842&sec=nation> accessed April 2010; Teoh El Sen and Pearl Lee, 'Matthias Chang Sentenced to One Month Jail' *Malay Mail Online* (1 April 2010) <<http://www.mmail.com.my/content/32146-matthias-chang-sentenced-one-month-jail>> accessed April 2010.

²⁴⁸ *Matthias Chang Wen Chieh v American Express (Malaysia) Sdn. Bhd* [2010] MLJU 348.

²⁴⁹ 'Press Statement of Matthias Chang, 31st March 2010' (<<http://futurefastforward.com/feature-articles/3508>> accessed 4 April 2010).

²⁵⁰ Sen and Lee (n. 247); 'Press Statement of Matthias Chang, 31st March 2010' (n. 249).

by refusing to pay the fine and ‘surrendered’ himself to the order of contempt by which he was sent to a prison.²⁵¹ At a news conference, he said that he was prepared to be imprisoned in order to prove that judges should not get away with their unethical behaviour and lack of decorum. He claimed that the law of contempt is being exploited and used as a weapon to silence those who fight for their rights. ‘Unjust, has been abused and will be abused in the future’²⁵² renders this draconian law of contempt in Malaysia a need to be reviewed and revised.²⁵³

The citation of contempt against Chang was justified weighing his conduct of walking out of the courtroom during the proceedings. According to Rangunath Kesavan, the Bar Council Chairman, a witness is only allowed to step out of the witness box when judges release him from oath. Thus, Chang’s act of leaving the courtroom in the middle of the proceedings was found by the judge as disruptive to judicial process thus meriting the contempt citation.²⁵⁴ Nonetheless, this case sparks the discussion on reforming the law of contempt in Malaysia. The 1999 reform proposal by the Bar has been raised again by some lawyers and academicians.²⁵⁵

Most of the cases of contempt *in facie* in Malaysia were committed by the advocates and solicitors. Misbehaviour in court such as threatening or attempting violence in court, using abusive or provocative language, may place the advocates

²⁵¹ He was on hunger strike at prison and later was freed after twelve days serving his sentence. See , 'Lawyer Matthias Chang Refuses to Pay RM20,000 Fine, Opts to Serve a Month in Jail' *BERNAMA* (31 March 2010) <http://findarticles.com/p/news-articles/bernama-malaysian-national-news-agency/mi_8082/is_20100331/lawyer-matthias-chang-refuses-pay/ai_n53037851/?tag=rel.res2> accessed April 2010; 'Chang Freed After 12 Days in Prison' *The New Straits Times* (13 April 2010) <http://findarticles.com/p/news-articles/new-straits-times/mi_8016/is_20100413/chang-freed-12-days-prison/ai_n53130945/?tag=rel.res4> accessed April 2010; 'Matthias Chang on Hunger Strike at Prison, Says Children' *The Star Online* (2 April 2010 < <http://thestar.com.my/news/story.asp?file=/2010/4/2/nation/20100402105107&sec=nation>> accessed April 2010.

²⁵² Jonathan Fernandez, 'A Thankful Matthias Chang Recuperates at Home' *Malay Mail Online* (15 April 2010) < <http://www.mmail.com.my/content/33546-thankful-matthias-chang-recuperates-home>> accessed 20 April 2010.

²⁵³ 'Lawyer Matthias Chang Refuses to Pay RM 20,000 Fine, Opts to Serve a Month in Jail' (n.106); 'Press Statement of Matthias Chang, 31st March 2010' (accessed 4 April 2010); 'Incarceration of Matthias Chang Postponed to Thursday 1st April 2010' <<http://futurefastforward.com/feature-articles/3508>> accessed 2 April 2010.

²⁵⁴ Sen and Lee (n. 247).

²⁵⁵ Shad Saleem Faruqi, 'Justice not a Cloistered Virtue' *The Star* (7 April 2010) <<http://futurefastforward.com/feature-articles/3527-posted-by-administrator>>accessed 10 April 2010; Sen and Lee, (n. 247).

for contempt. Apart from this, accusing judge of judicial misconduct, incompetence or mishandling the case may also land the advocates in contempt.²⁵⁶ Furthermore, in *Leela Ratos*²⁵⁷ an advocate was found guilty of contempt in the face of the court for failing to give a satisfactory explanation for his client's absence on the hearing date. The High Court found that the advocate's conduct showed a deliberate attempt to mislead the court or to disrupt the proceeding by manoeuvring an adjournment.

The advocates are usually in a position where there is a conflict between his obligation to the court and his duty to his client. The advocates have the right of audience in court to argue their clients' cases fearlessly and resolutely, but as an officer of the court his obligation to the court prevails over his duty to the client. His duty to the court remains paramount in the administration of justice.²⁵⁸

Therefore, the advocates have to carry the duty and their clients' case professionally and give due courtesy to the court.²⁵⁹ Every advocate who handles a case for his client in court must know that decency is to be observed and due respect is to be paid to the judge. In endeavouring to defend his client in respect of any particular charge, he must not commit a new offence. At the same time, the judge should not use the power to cite an advocate for contempt as a method to suppress advocacy. It has to be borne in mind that not every act of discourtesy or breach of professional duty would attract contempt liability.²⁶⁰ Whilst not amounting to contempt an act might render an advocate liable to disciplinary procedures.²⁶¹

²⁵⁶ *Leong Siew Fung & Ors v Leong Shan Nam and Other Suits* [1998] 4 MLJ 352; *Re Tai Choi Yu* [1999] 1 MLJ 416.

²⁵⁷ *Leela Ratos* (n. 191).

²⁵⁸ *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299.

²⁵⁹ The role of the advocate is governed by the Legal Profession (Practice and Etiquette) Rules 1978. Rule 16 states:

An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

²⁶⁰ *Izoura v R* [1953] AC 327.

²⁶¹ *Hilborne v Law Society of Singapore* [1978] 2 All ER 757 PC); *Karam Singh* (n. 238); *Re Kumaraendran* (n. 231).

Section 99 (2) LPA allows any court to write a complaint against any misconduct of the advocates or pupils to the Disciplinary Board, a body that has power to take action against a lawyer for misconduct.²⁶² After receiving the complaint, the Board will review it and form an Investigating Tribunal to look into the complaint. The Tribunal will report to the Board whether a formal investigation is necessary.²⁶³ If the Board thinks that a formal investigation is necessary, it will then form a Disciplinary Committee to hear and investigate the matter. The Disciplinary Committee will hold a hearing. After hearing and investigating the matter, the Disciplinary Committee may recommend to the Disciplinary Board whether disciplinary action should be taken against the lawyer concerned.²⁶⁴ The Committee may recommend that the lawyer be reprimanded, fined, suspended from practice for a period of time or struck off the Roll.²⁶⁵ The complainant or the advocate concerned, if dissatisfied with the decision of the Board, may appeal to the High Court.²⁶⁶

(b) Contempt Out of the Court (*ex facie*)

Most conduct committed out of the face of the court that is ‘calculated’ to interfere with the proper administration of justice is contempt. This includes an attack on the integrity or impartiality of a judge if it interferes with or prejudices those proceedings and a publication *sub judice*. These two types of contempt are also known as publication contempt as it involves publication of material that tends to interfere with the proper administration of justice. Publication contempt always comes in conflict with freedom of speech and expression in which free speech is always ‘sacrificed’ for the greater protection of the administration of justice.²⁶⁷

²⁶² Section 93 LPA 1976.

²⁶³ Section 100 LPA 1976.

²⁶⁴ Sections 95, 103A, 103B, 103C and 103D LPA 1976.

²⁶⁵ Sections 94 and 100 LPA 1976.

²⁶⁶ Section 103E LPA 1976.

²⁶⁷ *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 (CA).

(i) Scandalising a Court or a Judge

Contempt by scandalising prohibits verbal or written attacks upon judges or courts. It is a principle of common law of contempt as stated in *R v Gray*²⁶⁸ which Lord Russell of Killowen CJ defined as:

... Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one case of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke L.C. characterised as 'scandalising a court or a judge'.²⁶⁹

R v Gray was cited with approval by the Supreme Court in *Manjeet Singh Dhillon*²⁷⁰ and still applies in Malaysia.

Contempt by scandalising involves publications interfering with the due course of justice as a continuing process. The offence of scandalising can be committed regardless of whether the words said or acts done occur before, during or after a trial or without reference to a particular trial at all. If the publication occurs before or during proceedings there is additional risk of committing *sub judice* contempt that is contempt by interfering with the course of justice in the particular case. Therefore, under the existing law contempt may be committed through publication of material such as an accusation of bias, prejudice or corruption which scurrilously attacks or abuses a judge, which is calculated to bring a judge or a court into contempt or to lower his authority. It is not confined to a particular medium. However, it is commonly committed by publication of written comment in a newspaper. It also extends to broadcasting on television and radio, or the words displayed on a poster and even by means of a cartoon. In Malaysia, signing

²⁶⁸ *R v Gray* (n. 183) p. 40.

²⁶⁹ The phrase 'scandalising the court' has its origin in Lord Hardwicke's judgment in *In Re Read and Ruggonson St. James' Evening Post* (1742) 2 ATK 291, p. 469:

... within the special contempt comes newspaper articles which tend to prejudice the fair trial of a case and acts done or writings published which are calculated to bring a judge into contempt or to lower his authority ... was not to vindicate the dignity of the individual judge or the judicial officer or even the court itself ... but to prevent an undue influence with the administration of justice in the public interest.

²⁷⁰ *Manjeet Singh Dhillon* (n. 8).

of prolix, frivolous and scandalous pleading amounts to contempt by scandalising.²⁷¹

The law of contempt by scandalising is aimed at prohibiting scurrilous attack or abuse of a judge or of a court and attacks upon the integrity and impartiality of a judge or a court²⁷² in order to prevent the undermining of public confidence in the administration of justice. If the judges should be scandalously abused, people will lose confidence in them and the whole administration of justice would suffer.²⁷³ Apart from this aim, the courts and judges are given powers of punishing under this kind of contempt because they are said not to be in a position to reply to criticism against them.²⁷⁴

However, in Malaysia, some of the judges have gone against the norm where they talk to the press to defend allegations made against them. In the case of the former Chief Justice Eusoff Chin, when he was alleged of corruption by 'tagging' alongside the lawyer V.K. Lingam on a family vacation in New Zealand in 1994, he replied that it was just a mere coincidence of holidaying with a lawyer in New Zealand.²⁷⁵

²⁷¹ Ibid.

²⁷² *In Re He Kingdon* (n. 1); *Arthur Lee Meng Kwang* (n. 1); *Manjeet Singh Dhillon* (n. 8); *Murray Hiebert* (CA) (n. 267).

²⁷³ *In Re He Kingdon* (n. 1), p. 18:

... it excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary.

See also *Houng Hai Kong & Ors* (n. 1) p. 526 in reference to *Gallagher v Durack* [1983] 152 CLR 238, p. 234, per Gibbs CJ, Mason, Wilson and Brennan JJ. The Australian court stated:

The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.

²⁷⁴ See J L Caldwell, 'Is Scandalising the Court a Scandal' (1994) *New Zealand Law Journal* 442, p. 446; *Regina v Metropolitan Police Commissioner, Ex parte Blackburn* (No. 2) (1968) 2 QB 150, p. 155, when Lord Denning MR said:

All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political. We must rely on our conduct itself to be its own vindication.

²⁷⁵ See 'Eusoff: I paid for NZ holiday' *News Straits Times* (7 June 2000) 5; 'Mohd Eusoff: I didn't over-react' *News Straits Times* (9 June 2000) 6; Steven Gan, 'Eusoff, Lingam Face New Allegations' (9 May 2000) <<http://www.malaysiakini.com/news/2760>> accessed 17 December 2009.

The judges also take an opportunity to defend themselves in their judgment. R.K. Nathan J in *Yusri Mohamad & Anor v Aznan Mohamad*,²⁷⁶ defended himself against 'personal vilification' by a Court of Appeal Judge in an unrelated case.²⁷⁷ With that, it is now questionable as whether it is justifiable for judges to exercise contempt power and at the same time have access to the media to reply to the criticisms.

Nevertheless, if people freely and openly criticise the judiciary, it may produce 'unwarranted public misgiving',²⁷⁸ that could lead to anarchy.²⁷⁹ That is why their judgments are allowed to be criticised provided it is done with reasonable courtesy.²⁸⁰ The judiciary needs to be accountable and answerable to society and moreover, the scrutiny might enhance their judicial performance.²⁸¹ Therefore, in determining whether the criticism does not amount to contempt of court, the court needs to strike a balance between the right to freedom of speech and the interest in protecting the administration of justice. The balance is that the conduct or the criticism must be within the limit of reasonable courtesy.

In *Arthur Lee Meng Kwang*,²⁸² the Court took a firm approach. This case dealt with the criticism of the court and was decided when the Malaysian courts system

²⁷⁶ [2002] 6 CLJ 43.

²⁷⁷ R.K Nathan J said in his judgment at p. 48:

Mr Justice Gopal Sri Ram has by making unwarranted and personal attack against me, sullied the hallowed name of justice. He must practice what he preaches. He must know that each time he makes a personal attack upon a judge in future, a response will come swift and fast.

The matter between these two judges started when Gopal Sri Ram SCJ quashed the conviction for contempt by R.K. Nathan J against a lawyer, Lee Chan Leong. Gopal SCJ was reported to say that judges ought not to make proceedings oppressive to lawyers. These comments were relevant to appeal before the Court of Appeal presided by Gopal SCJ and two other judges. This comment was due to the alarming number of contempt cases which emanated from Nathan J's court. Nathan J took offence from the remark, misconceived them as personal and reacted by attacking Gopal SCJ and at the same time defending himself. See 'Judicial Ego Out of Control' [2002] 2 Relevan <[http://www.klbar.org.my/publications/pdf/2-2002/Judicial ego out of Control.pdf](http://www.klbar.org.my/publications/pdf/2-2002/Judicial%20ego%20out%20of%20Control.pdf)> accessed Dec. 2008; Chelsea L.Y. Ng, 'Don't let ego rule, judges told' *The Star* (26 July 2002); 'Nathan: Sri Ram vilifying me' *New Straits Times* (1 August 2002); 'Don't make personal attacks, says judge' *The Star* (4 August 2002).

²⁷⁸ *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2005] 1 MLJ 12, p. 39.

²⁷⁹ *Houng Hai Kong & Ors* (n. 1). For more on this point, see Farid Sufian Shuaib 'Legal Restrictions on Publications under Malaysian Law' (PhD thesis, International Islamic University Malaysia 2007).

²⁸⁰ *Manjeet Singh Dhillon* (n. 8).

²⁸¹ See Van B Niekerk, 'The Uncloistering of the Virtue' (1978) 96 South African Law Journal 362, p. 534.

²⁸² *Arthur Lee Meng Kwang* (n. 1).

was two-tiered due to the abolition of appeal to the Privy Council. The contemnor, a lawyer, represented parties in an action for declaratory orders and other relief concerning certain properties. He was successful at the High Court but the decision was reversed in the Supreme Court. He had no forum for further appeal. This led him to write various letters to the three Supreme Court judges that reversed the decision, to the advocates for the respondents in the original case and to the President of the Bar Council. The letters were perceived by the Court as a tool to persuade and influence the panel that allowed the appeal to review the case by reversing its own decision which had been delivered earlier on. According to the Supreme Court, the advocate not only criticised the judgment of the Court but also alleged the decision of the Supreme Court to be unjust and biased.²⁸³ The letter inferred that there would be no justice if the Supreme Court failed to review its own decision in the original case.

The Supreme Court recognised that there must be a balance between the right to protect the integrity of the superior courts in the interest of maintaining public confidence in the judiciary and the right of free speech which is recognised in Article 10 of the Constitution. The balance adopted by the Court was that the conduct must be within the limits of reasonable courtesy and good faith. The Supreme Court accepted the common law principle of contempt of court as found in *R v Gray*²⁸⁴ and as referred to a test of ‘reasonable courtesy and good faith’ laid down in *R v Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)*.²⁸⁵ The Court in *Ex parte Blackburn* held:

Criticism, however vigorous of a judgment or a decision of a court will not constitute contempt if it is made in good faith and is reasonable, even though it contains error; but it is desirable that criticism should be accurate and fair, bearing in mind that the judiciary cannot enter into public controversy thus cannot reply to criticism.²⁸⁶

Although the Supreme Court referred to *Ex parte Blackburn* as a persuasive authority, the Court added the qualification that in determining the limit of reasonable courtesy it should not lose sight of local conditions. This is a

²⁸³ Ibid, p. 207.

²⁸⁴ *R v Gray* (n. 183).

²⁸⁵ *Ex parte Blackburn* (n. 274).

²⁸⁶ Ibid. pp. 320-321.

proposition laid down in *Public Prosecutor v The Straits Times Press Ltd*²⁸⁷ and *Public Prosecutor v SRN Palaniappan & Ors*²⁸⁸ where Spenser Wilkinson J. hesitated 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.

In the present case, sensitivity of the Malaysian courts is the reason given by the Supreme Court in deviating from the decision in *Ex parte Blackburn*.²⁸⁹ The Supreme Court was established on 1 January 1985, and its sensitivity need not be the same as courts of similar jurisdiction in England or other countries. Apart from this, after due consideration to local conditions, the Court held that criticisms that are considered as within the limit of reasonable courtesy in England and other jurisdictions are not necessarily so in Malaysia. Hence, the Court held that any allegation of injustice or bias however couched in respectful words and even if expressed in temperate language, cannot be tolerated, particularly when such allegation is made for the purpose of influencing or exerting pressure upon the court in the exercise of its judicial functions. It is also irrelevant whether the criticism was well founded or not as it could not be tolerated if merely intended to exert pressure upon the court.²⁹⁰ The advocate was found to be in contempt as he had exceeded the limit of fair criticism and fair comment. His letter scandalised the Court by accusing the court of being biased, thus intending to bring the Court into disrepute.

On the other hand, in the same year the courts took a different approach in *Lim Kit Siang v Dato' Seri Dr. Mahathir Mohamad*.²⁹¹ In this case, the applicant applied for a leave to commit the respondent, the then Prime Minister of Malaysia, for contempt of court with regard to the respondent's statement in *Time* magazine. In an interview with *Time* magazine the respondent had said that the judiciary could take away the legislative power of Parliament by interpreting law passed by

²⁸⁷ [1949] MLJ 81.

²⁸⁸ [1949] MLJ 246.

²⁸⁹ *Ex parte Blackburn* (n. 274).

²⁹⁰ *Arthur Lee Meng Kwang* (n. 1) p. 209.

²⁹¹ [1987] 1 MLJ 383.

Parliament contrary to the intention of Parliament.²⁹² The applicant argued that the statement by the respondent showed disrespect, disrepute and offended the integrity of the court as it threatened and intimidated the judiciary. It was also argued that the statement challenged the authority of the judiciary and the doctrine of separation of powers.

At the High Court, it was concluded that the statement merely expressed the Prime Minister's dilemma and confusion on the doctrine of the separation of powers.²⁹³ The High Court held further that in administering the law of contempt of court, a balance between the right to freedom of speech and the need to protect the integrity and authority of the courts has to be struck. The Court found that the statement was a statement in the desperation of a Prime Minister on the shortcoming of the lawmakers in translating policies into law. This finding was upheld by the Supreme Court, which viewed the statement as coming from a misunderstanding of the concept of separation of powers and that the courts should not be overly sensitive and overact impetuously. This is a liberal approach taken by the Supreme Court comparing to the earlier case of *Arthur Lee Meng Kwang*.²⁹⁴

However, in 1990, in *Trustees of Leong San Tong Khoo Kongsi*²⁹⁵ the Supreme Court applied the similar test as in *Arthur Lee Meng Kwang*²⁹⁶ in citing contempt against the two defendants.

*Manjeet Singh Dhillon*²⁹⁷ is one of the notable cases in the series of contempt cases, dealing with contempt by causing unwarranted aspersions upon the Acting Lord President's character as a judge who was performing the duties as the Acting

²⁹² The relevant portion of the statement states:

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, but once we do it, 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.

²⁹³ *Lim Kit Siang* (n. 291) p. 385.

²⁹⁴ *Arthur Lee Meng Kwang* (n. 1).

²⁹⁵ *Trustee Leong San Tong Khoo Kongsi* (n. 147).

²⁹⁶ *Arthur Lee Meng Kwang* (n. 1).

²⁹⁷ *Manjeet Singh Dhillon* (n. 8).

Lord President. This case arose out of the events in relation to the dismissal of the Lord President and around the contempt proceedings initiated by the Malaysian Bar against the Acting Lord President who was later appointed Lord President, with regards to the suspension of the five Supreme Court judges. The Bar applied for an order to commit to prison the Acting Lord President and this application was supported by an affidavit affirmed by the Secretary of the Bar Council, which became the subject matter of this case. The application was due to the allegation that the Acting Lord President abused his official powers by prohibiting a sitting of the Supreme Court to hear an application by Salleh Abas to prevent the submission of the report of the Tribunal regarding his removal to the King. The Acting Lord President was also claimed to have ordered the court to be locked for the purpose of impeding access to the court by the previous Lord President and he also ordered the court seal to be kept under lock.

The application of the Bar Council for leave for an order of committal against the Acting Lord President was rejected because what he tried to do was only to prevent an unlawful sitting. However, the Attorney General later made an application to commit the respondent, the secretary of the Bar Council, to prison for alleged contempt of court. This was in relation to the statement in the affidavit that was claimed to amount to scandalising a judge. The statement in paragraph 9 in the affidavit, in particular, was contended by the Attorney General as the grossest criticism alleged against the highest ranking judge in Malaysia, in these words:

... contempt apart, the aforesaid conduct of the respondent (i.e., the Lord President) also constitutes misbehaviour within the meaning of art. 125 of the Constitution deserving his removal from office.

The Supreme Court stated that there is a limit to what a person may say or write of a judge or a court. If it is beyond the limit permitted, it may be treated as contempt of court. In this case, the Supreme Court had to ascertain whether the above statement as contained in the affidavit were beyond the limit of reasonable criticism thus amounting to contempt by scandalising a judge. In determining this issue the Court had to turn to English common law as it stood on 7 April 1956 for guidance, bearing in mind the qualification of the local condition permits. The

Supreme Court accepted the common law principle as stated in *R v Gray*²⁹⁸ and further stated that this type of contempt is not obsolete as it survives in other common law jurisdictions.²⁹⁹

The Court decided that to find contempt requires strict proof in which an intention to disrepute the court or the judge is not necessary. It is enough to prove that the alleged contemnor intended to file the said application and affidavit in question. Furthermore, the Supreme Court took a view that it is not necessary to prove there was a real risk that the administration of justice is prejudiced, it is enough that it is likely to do so. A list of foreign cases such as *R v Kopyto*³⁰⁰ was tendered before the Court in order to persuade the Court to look at the development of this law in other jurisdictions. However, the Court rejected to accept this foreign reasoning on the basis of local condition.³⁰¹

Therefore, in cases of scandalising the court, the Malaysian courts took a stricter view as the sensitivity of the local court may not be the same as in England, the USA or Canada.³⁰² The Supreme Court affirmed the principle established in *Arthur Lee Meng Kwang*³⁰³ and *Trustees of Leong San Tong Khoo Kongsi*.³⁰⁴

However, Harun Hashim SCJ dissented. He took the view that in upholding the contention that the statements made by the respondent amounted to scandalising the Acting Lord President in his judicial capacity, it must be shown that the Acting Lord President was exercising some judicial power. It is not enough if the statements are made against the person of the Acting Lord President only. The judge opined that the publication was not likely to have an injurious effect on the minds of the public or of the judiciary which could lead to interference with the administration of justice. This is because the extent of the publication of the affidavit is very limited. He further said that mere abuse of a judge, however

²⁹⁸ *R v Gray* (n. 183).

²⁹⁹ *Regina v Murphy* [1969] 4 DLR (3d) 289; *Re Wiseman* [1969] NZLR 55.

³⁰⁰ *R v Kopyto* (1988) 47 DLR (4th) 213.

³⁰¹ *Manjeet Singh Dhillon* (n. 8) p. 180.

³⁰² *Ibid.*

³⁰³ *Arthur Lee Meng Kwang* (n. 1).

³⁰⁴ *Trustees Leong San Tong Khoo Kongsi* (n. 147).

defamatory, is not a contempt of court. The abuse must relate to the performance of a judicial duty by the judge for it to be a criminal contempt of court.

The majority decided that the respondent was guilty of contempt of court for the criticism made against the Lord President in his judicial capacity. He was fined with RM 5,000.

This case is significant as it highlights the right to free speech and expression in the sense of to what extent the conduct of the judges can be criticised. In principle, criticisms of a judge's conduct, so long as no aspersions are cast on a judge's personal character, do not amount to scurrilous abuse. It will not be contempt if the attack is only upon the personal reputation of the individual judge as such. Any personal attack is dealt with under the ordinary rules of slander and libel. However, what needs to be noted is that although the majority mentioned *Lim Kit Siang*,³⁰⁵ there is neither elaboration nor explanation in the present case on the liberal approach taken in *Lim Kit Siang*.

Manjeet Singh Dhillon represents a new kind of relationship between the Bar and the Bench. The Bar had not only shown the dissatisfaction and disagreement with the conduct of the judiciary in general but also had singled out the Acting Lord President as a person not fit to continue office. The case also showcases the use of contempt power by the judiciary against a member of the Bar for criticism made by the Bar against judges or judiciary. The citations of contempt of court against the members of the Bar have increased since then.³⁰⁶

In 1999, another notable case of publication contempt arose. In *Murray Hiebert*,³⁰⁷ the appellant, a Canadian, was a journalist and a correspondent for the magazine *Far Eastern Economic Review*. He wrote and published an article relating to the respondent's case against her son's school which was still pending. The respondent was the next friend of the plaintiff in the main suit and a wife to a

³⁰⁵ *Lim Kit Siang* (n. 291).

³⁰⁶ 'Justice in Jeopardy: Malaysia 2000. Report of a Mission on Behalf of The International Bar Association, The ICJ Center for the Independence of Judges and Lawyers, The Commonwealth Lawyers' Association, The Union Internationale Des Avocats ' (2000), p. 21.

³⁰⁷ *Murray Hiebert* (CA) (n. 267); *Murray Hiebert* (HC) (n. 187).

judge of the Court of Appeal at that time. The appellant wrote an article that contained amongst other claims that the respondent's son was the son of a prominent judge of the Court of Appeal and that the trial of his case began in less than seven months, insinuating that since the father is a prominent judge, he was able to influence the court. The High Court found that the article imputed that by hearing the case earlier than an ordinary one the High Court in hearing the case had been manipulated or influenced by the Court of Appeal judge. The article also imputed that by continuing to hear the case, the High Court was unable to dispense justice with fairness and impartiality. The High Court found the article contemptuous as it sought to influence the court to dismiss the civil suit or to prejudice its mind by the adverse criticism stated in the article in a case that was pending.

This case is important as it sets the current test for establishing contempt *ex facie*. On appeal, it was argued by the defence counsel that the High Court applied the wrong test of liability by referring to an Indian case of *Brig ET Sen (Retd) v Edatata Narayanan & Ors.*³⁰⁸ He submitted that the correct test is that there must be a 'real risk of prejudice as opposed to a remote possibility' as established in *Reg v Duffy & Ors; ex p. Nash*³⁰⁹ that was adopted in *AG v Times Newspaper Ltd.*³¹⁰ The Court rejected this argument and decided that *Brig ET Sen (Retd)* was a good authority even though India has a Contempt of Court Act. It is interesting to note that the Court of Appeal justified that since *Brig ET Sen (Retd)* referred to *Thakur Jugak Kishore Sinha v The Sitmarlin Central Co-operative Bank Ltd*³¹¹ and *Re PC Sen*³¹² in which reference was made to *R v Gray*, the Court of Appeal opined that *Brig ET Sen (Retd)* also echoed the principle of English common law. Apart from this, the test of tendency or likelihood to interfere with the administration of justice was consistently applied in the local cases of *PP v The Straits Times Press Ltd*³¹³ and *Re Sin Poh Amalgamated Ltd & Ors.*³¹⁴ Hence, the Court said that there was no reason to depart from this principle. It states:

³⁰⁸ 1969 AIR Delhi 201.

³⁰⁹ [1960] 2 QB 188.

³¹⁰ *AG v Times Newspapers Ltd.* (n. 186).

³¹¹ 1967 AIR SC 1494.

³¹² Criminal Appeal No. 119 of 1966.

³¹³ *The Straits Times Press* (n. 287).

³¹⁴ [1954] MLJ 152.

[W]hether there are local decisions in point on an issue namely, the test to apply as in *Straits Times Press Ltd, Palaniappan and Sin Poh Amalgamated*, that is the test for the High Court to apply until overruled by the Federal Court.³¹⁵

Therefore, it was not necessary to prove affirmatively that there had been an actual interference with the administration of justice by reason of the offending statement. It is enough if it is likely or tends to interfere in any way with the proper administration of justice, whether or not the alleged contemnor intended that result.

As regards *mens rea* or intention, the defence counsel argued that it was not his intention in any way either to prejudice the fair trial of the said suit or to prejudice its outcome. He did not intend to do more than report on a case of considerable public interest in the region. He also argued that he had no knowledge that the fact he stated or impression he gave was false. Besides that, he claimed that he had no intention to excite prejudice or exert pressure on the High Court. The defence counsel, therefore, submitted that the common law offence of contempt of court requires proof of *mens rea* that is an intention on the part of the alleged contemnor to impede or prejudice the administration of justice in order to constitute contempt of court.³¹⁶

The Court of Appeal rejected this argument and upheld the decision of the High Court. The Court of Appeal quoted a Singapore case of *AG v Wain & Ors (No. 1)*³¹⁷ where Sinnathuray J. held:

... However, from the reported cases in the Commonwealth jurisdictions and the opinions of textbook writers, the balance of authority is that it is not necessary to have an actual intention to commit the contempt of scandalising the court. The intention of the writer of the article complained of is irrelevant in contempt proceedings. I support this view because in English common law, *mens rea* is not an element that has to be proved to establish contempt and s. 8 (1) of the Supreme Court of Judicature Act, has incorporated that. So, when a person alleges bias against a judge, it is not necessary to prove that he intended to interfere with the administration of justice. What the court must do is to consider the effect the article complained of has, or is calculated to have, on the

³¹⁵ *Murray Hiebert* (CA) (n. 267) p.359.

³¹⁶ *Murray Hiebert* (HC) (n. 187) p. 240.

³¹⁷ [1999] 2 MLJ 525.

mind of the reader. The intention, however, is relevant to the penalty to be imposed.

The Court of Appeal however, held that in order to establish contempt of court as the result of a publication scandalising the court or interfering with the course of justice, intention or *mens rea* on the part of the alleged contemnor was not an essential ingredient and having no knowledge that the alleged conduct or publication amounted to contempt of court was not a defence for the alleged contemnor. Furthermore, the Court of Appeal agreed with the view of the High Court that intention on the part of the contemnor is irrelevant so long as he published an article that has tendency to sully the administration of justice.

The test and principle in *Murray Hiebert* is applied until it is overruled by the Federal Court. As to date, it was referred to in *Koperasi Serbaguna Taiping Barat Bhd*,³¹⁸ *Monatech*,³¹⁹ *Raja Segaran* [2005],³²⁰ *Yau Jiok Hua*,³²¹ *Achieva Technology*³²² and *Foo Khoon Long v Foo Khoon Wong*.³²³

(ii) *Sub Judice Rule*

The media have an important role in publicising certain matters that they believe are issues of public interests and concerns. With regard to the court proceedings, the basic principle of ‘open justice’ is applicable whereby the court proceedings must be held in open court, and press and public have the right to attend, evidence is communicated publicly and nothing is done to discourage the publication to the wider public of fair and accurate reporting of those proceedings.³²⁴ However, there are some restrictions placed on the media’s role in disseminating information, particularly when the subject matter concerned is relating to an ongoing trial in a courtroom.

³¹⁸ *Koperasi Serbaguna Taiping Barat Bhd*. (n. 246).

³¹⁹ *Monatech* (n. 178).

³²⁰ *Raja Segaran* [2005] (n. 278).

³²¹ *Yau Jiok Hua* (n. 195).

³²² *Achieva Technology* (n. 202).

³²³ [2009] 9 MLJ 441.

³²⁴ Ursula Smartt, *Media Law for Journalists* (Sage Publications, London 2006) p. 115.

The law on what may be published about current legal proceedings is known as the *sub judice* rule. The law of contempt operates to restrict what may be published about particular litigation only during the time the trial is ongoing. It is in fact, operated to postpone what may be said. Once the legal proceedings are over, the restrictions imposed under the contempt laws are, in general, lifted.³²⁵

The object of limiting what can be said during the currency of legal proceedings is to protect the fairness of that trial. This is to avoid ‘trial by the media’ which could influence the participants in the proceeding. ‘Trials by media’ put at risk the due administration of justice in the particular proceedings.³²⁶ They could also undermine confidence in the judicial system generally.³²⁷ Another concern when dealing with this kind of contempt of court is freedom of speech. The courts are well aware of the dilemma of reconciling these two important public interests, i.e. protection of fair trials and preservation of freedom of speech. The courts need to strike a balance between the two, but most of the time courts tend to favour the protection of a fair trial at the expense of freedom of speech.³²⁸

In Malaysia, to establish liability under *sub judice* rule, *Murray Hiebert*³²⁹ rules that ‘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’ which denotes the ‘inherent tendency’ test.³³⁰ This is the lower threshold for determining liability for publication contempt that interferes with particular proceedings. The Court of Appeal in *Murray Hiebert* disagreed with the test of liability established in *R v Duffy*³³¹ that there must be ‘a real risk of prejudice to the administration of justice as opposed to a remote possibility’, even

³²⁵ Borrie, Lowe and Sufrin (n. 18) pp. 67-68.

³²⁶ The publication perhaps could impose unwarranted pressure on the litigant to withdraw from the proceedings, or to give up his defence, or to come to a settlement on terms that he would not otherwise have been prepared to entertain. It also meant to prevent witnesses as well as parties to tailor their testimony due to public discussion. See *Re William Thomas Shipping Co. Ltd* [1930] 2 Ch. 368; *Vine Product Ltd v Mackenzie & Co Ltd* [1965] 3 All ER 58.

³²⁷ There is an element of protecting the administration of justice as a continuing process. See *AG v Times Newspapers Ltd* (n. 186) p. 300; Borrie, Lowe and Sufrin (n. 18) p. 69.

³²⁸ *Public Prosecutor v Straits Times (Malaya) Bhd* [1971] 1 MLJ 69, p. 71.

³²⁹ *Murray Hiebert* (CA) (n. 268); *Murray Hiebert* (HC) (n. 187).

³³⁰ *Murray Hiebert* (CA) (n. 268) p. 332.

³³¹ *R v Duffy* (n. 309).

though this test proposed that a minimal or small risk of interference as opposed to remote possibility should be satisfied.

In Malaysia, there is an imprecise time frame concerning when the case remains *sub judice*. In *R v Davies, ex parte Delbert-Evans*,³³² which was cited in *PP v Abdul Samad b. Ahmad & Anor*,³³³ it was found that contempt can be committed at any time until the case is ended, i.e. the case is finally over when the Appeal Court has heard and determined the appeal. The question is, how do we determine when does the case start?

In *Abdul Samad*, the Court held that the *sub judice* period starts in criminal process when summons or warrants have been issued or arrest has been made, or in civil case, when a writ has been issued or a plaint filed. In *The Straits Times Press*,³³⁴ it has been decided that a criminal case remains *sub judice* until the expiration of the time allowed for appealing or in the event of appeal until the conclusion of an appeal. From these cases, the *sub judice* period starts in criminal cases from the issuance of warrant or arrest made until the conclusion of appeal. In civil cases, it is from the issuance of the writ until the conclusion of appeal.

However, in *Abdul Samad*, the Court had to deal with the publication of an article while police investigation was going on. The Court decided that contempt would be committed if it was known at the time of the publication that police investigation was proceeding and that the prosecution was at the very least, under consideration, even though no one has been officially accused of the offence.

3.1.3 Mens Rea or Intent

In general criminal law, the burden is always on the prosecution to prove beyond reasonable doubt not only the *actus reus* of an accused person, i.e. that the accused had committed the wrongful act, but also his *mens rea*, i.e. his guilty mind, in that the accused intended the consequences of his act or was reckless as

³³² (1945) 1 KB 435.

³³³ [1953] 1 MLJ 118.

³³⁴ *The Straits Times Press* (n. 287).

to such consequences. To this general rule, there are exceptions in which a person may be guilty of an offence although he had no guilty mind. It is only required to prove that the accused committed the act. Contempt of court is one of those.

Lord Denning MR in *AG v Butterworth*³³⁵ observed that:

In considering whether a man has been guilty of contempt of court, you do not look at his knowledge or intention, but only look at what he did. If his action was calculated to interfere with the course of justice, that is enough, irrespective of his state of mind at that time.

AG v Butterworth has been referred to by the Malaysian courts and in Malaysia it has been established that the state of the accused mind i.e. whether it must be proved that the accused has intended to interfere with the course of justice, is irrelevant and all that is required to be proved is that the accused committed the requisite act.³³⁶

However, in England, after the coming into force the CCA 1981, Section 6 (c) of the Act, which deals with publication contempt, preserves the liability for contempt at common law if intention to prejudice the administration of justice can be shown. The requirement to prove specific intent has been reaffirmed in *Attorney General v Punch Ltd and Another*.³³⁷ The House of Lords held that to constitute contempt, the Attorney General had to prove that the alleged contemnor did the relevant act with the necessary intent. This is by showing that the alleged contemnor knew that the publication would interfere with the course of justice by defeating the purpose underlying the injunction. In other words, it must be shown that the alleged contemnor intended to publish with the intention to do what the order or injunction prevents him to do.

³³⁵ *AG v Butterworth* (n. 227) p. 722.

³³⁶ *Manjeet Singh Dhillon* (n. 8); *Murray Hiebert (CA)* (n. 268); *Re Zainur Zakaria* (n. 234); *Koperasi Serbaguna Taiping Barat* (n. 247); *Monatech* (n. 177); *Achieva Technology* (n. 202).

³³⁷ [2003] 1 AC 1046. The requirement to prove *mens rea* to prejudice the administration of justice was established in *AG v Times Newspaper* [1992] 7 AC 191 and *AG v News Group Newspapers plc* [1989] QB 110.

3.1.4 Mode of Trial or Procedures

In contempt cases, the court can commence the proceedings of its own motion. The prosecutor and persons interested in the litigation may also initiate the proceedings. The court can request that the Attorney General assumes conduct of the proceedings even if the parties do not wish to pursue a contempt motion.³³⁸ Therefore, in general there are two ways of commencing contempt proceedings: by way of *instanter* i.e. summary power,³³⁹ or by summary process i.e. by way of motion. The former is when a judge is allowed to deal with the matter immediately. It is normally when the contempt committed before him is in the face of the court. The latter procedure is adopted when the motion is brought before a judge before whom the accused must appear and show cause why he should not be cited for contempt of court.³⁴⁰ Therefore, for *in facie curiae*, the court may initiate contempt proceeding *suo motu* whereas for contempt *ex facie*, summary process will be initiated either by the court, Attorney General or by the affected party.

The court can deal with an alleged contemnor 'on the spot' only in cases of flagrant and disruptive contempt that create risk to the immediate administration of justice. It should be used sparingly due to reasons explained in *R v Griffin*³⁴¹ which was referred to in *Jaginder Singh*³⁴² and *Zainur Zakaria*.³⁴³

We are here concerned with the exercise of a jurisdiction which is *sui generis* so far as the English Law is concerned. In proceedings for criminal contempt, there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary inquiry or filtering procedure such as a committal.

³³⁸ *Arthur Lee Meng Kwang* (n. 1); *Tommy Thomas* (n. 197). See also Miller, *The Law of Contempt in Canada* (n. 21) p. 48.

³³⁹ The summary power was highlighted in *Balogh* (n. 230). Summary power is characterised as the court's inherent ability of its own motion to cite for contempt those who disrupt proceedings or who threaten people involved in the proceedings. In the summary power is the court's ability to punish immediately, without charge or trial as in ordinary trial.

³⁴⁰ See *R v Vallieres* (1973), 47 DLR (3d) 378.

³⁴¹ (1988) 88 Cr App R 63.

³⁴² *Jaginder Singh* (n. 10).

³⁴³ *Zainur Zakaria* (FC) (n. 186) pp. 617-618.

Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is to be used at all, omits many of safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt only in cases of real need.

In Malaysia, the procedure to deal with contempt of court can be found under Order 52 RHC and Order 34 SCR, for superior³⁴⁴ and subordinate courts respectively. For subordinate courts, apart from Order 34 SCR, Section 353 CPC provides for Magistrates' Court a procedure as to offences committed in court such as intentional insult or interruption to a public servant sitting in a judicial proceeding.³⁴⁵

3.1.4.1 Procedures in the Superior Courts

Order 52 r. 1 RHC provides for the procedural vehicle to exercise the High Court's power to order committal.³⁴⁶ The procedure under Order 52 may be invoked to produce the sanction of imprisonment or a fine independently of the Penal Code or the CPC.³⁴⁷ The High Court may punish for contempt committed in connection with proceedings set out in Order 52 r.1 (2):

³⁴⁴ The application of this provision is extended to the Court of Appeal and the Federal Court. Rule 3 of the Rules of the Federal Court 1995 and Rule 4 of the Rules of the Court of Appeal 1994, *inter alia*, state that where there is no other provision made by any written law or by these Rules, the procedure and practice in the Rules of the Court of Appeal 1994 and the Rules of the High Court 1980 shall *mutatis mutandis* apply.

³⁴⁵ Section 353 CPC is read together with Section 228 Penal Code. Section 353 CPC reads:
When any such offence as is described in section 175, 178, 179, 180 or 228 of the Penal Code is committed in the view or presence of any Magistrate's Court, whether civil or criminal, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognisance of the offence and sentence the offender to a fine not exceeding fifty ringgit and, in default of payment, to imprisonment for a term which may extend to two months.

Section 228 reads:

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

³⁴⁶ Power to make committal order for subordinate courts is contained in Order 34 r. 1 SCR.

³⁴⁷ *Arthur Lee Meng Kwang* (n. 1); *Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521; *Murray Hiebert* (HC) (n. 187).

- (1) any proceedings before the High Court;
- (2) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, which means to say that where these exceptional situations arise in any criminal proceeding, the High Court is empowered to deal with the matter summarily and instantly without going through the notice of motion;
- (3) proceedings in a Subordinate Court; or
- (4) contempt committed otherwise than in connection with any proceedings.

Order 52 r.4 further provides:

Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of court.

Therefore contempt proceeding may be initiated either by the court *suo motu* or by way of motion moved by Attorney General or any interested parties.

(i) Contempt in the Face Of the Court (*in facie*)

Order 52 r. 1A allows the court to act on its own motion for contempt committed in the face of the court. It allows the court to deal with such contempt instantly instead of serving a formal notice to show cause to the alleged contemnor. The court, however, must ensure that the alleged contemnor understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence. The court must also keep a proper record of proceedings.³⁴⁸

When the court is satisfied that contempt is clear, the alleged contemnor is ordered to appear before the court on the same day at the fixed hour for the purpose of purging his contempt.³⁴⁹ Where the alleged contemnor has purged his contempt by

³⁴⁸ In *Butler v Butler* (1993) Fam 167, p. 174, it states that the procedure is intended that:

- (1) no alleged contemnor shall be in any doubt as to the charges which are made against him;
- (2) he shall be given a proper opportunity of showing cause why he should not be held in contempt of court;
- (3) if an order of committal is made, the accused
 - (a) knows precisely in what respects he has been found to have offended, and
 - (b) is given a written record of those findings and of the sentence passed upon him.

³⁴⁹ Order 52 r 1A (2) RHC reads:

tendering his unreserved apology to the court, and it is considered such contempt is not of a serious nature, he will be excused and no further action is to be taken against him.³⁵⁰ If the alleged contemnor refuses to purge his contempt, the court will pass a sentence on him.³⁵¹

(ii) Contempt Out of the Court (*ex facie*)

Order 52 r 1B RHC provides that in other cases of contempt of court, the alleged contemnor will be served personally with a formal notice to show cause why he should not be committed to the prison or fined. This is the procedure to be applied in any other branches of out-of-court contempt.

In order to bring contempt to the notice of the court, the party aggrieved or the Attorney General will move the court by applying leave for an order of committal, to commit the alleged contemnor to prison.³⁵² However, in practice, the courts also act on their own motions in these branches of contempt in light of the saving provisions of Order 52 r. 4 RHC.³⁵³

Order 52 r.2 (1) RHC stipulates that no application for an order of committal may be made unless leave to make such an application has been granted. This leave must be applied for *ex parte* in open court supported with a statement and an affidavit verifying the facts relied on.³⁵⁴ If the applicant fails to apply for leave, it may nullify the proceedings.³⁵⁵ The person against whom an *ex parte* leave is granted may apply to set it aside. In the absence of an application by an alleged contemnor to set aside an *ex parte* leave for committal proceedings, the post-leave

Where a Judge is satisfied that contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.

³⁵⁰ Order 52 r 1A (3) RHC.

³⁵¹ Order 52 r 1A (4) RHC.

³⁵² Order 52 r. 1 (1) RHC.

³⁵³ In *Tommy Thomas* (n. 197) the Court of Appeal took a view that although the contempt committed was not in the face of the court during the proceedings, the matter had the effect of undermining public confidence in the dignity and integrity of the judiciary and should be promptly remedied. The Court held that the High Court had taken the right steps in issuing the notice to show cause even after nine days the alleged offence was committed since neither the Attorney General nor the parties took any step to bring committal proceedings against the appellant.

³⁵⁴ Order 52 r. 2 RHC.

³⁵⁵ *Tan Gin Seng v Chua Kian Hong* [1999] 1 MLJ 29.

procedure would follow. After obtaining the leave, the application for an order of committal must be made to the court by way of motion.

The court will fix the hearing date for the said motion.³⁵⁶ Order 52 r. 3 (3) RHC provides that the notice of motion applying for the order of committal, accompanied by a copy of the statement and affidavit in support of the application for leave under Order 52 r. 2 (3) RHC, must be served personally on the person sought to be committed, so that he will be informed of the facts upon which leave has been obtained so as to allow him to answer the claim against him.³⁵⁷

The hearing of the motion is held in open court except in cases stated in Order 52 r 5 (1) RHC.³⁵⁸ During the hearing the parties shall rely only on the grounds set out from the statement and affidavit filed in under Order 52 r. 2 RHC unless the parties have obtained the leave to rely on new grounds.³⁵⁹ Since the proceedings are started by motion, a civil form of process, interlocutory order relating to the filing of evidence, cross examination and discovery are made available. After the hearing and if the court finds the alleged contemnor guilty of contempt, the court

³⁵⁶ Order 52 r. 3 (1) RHC reads:

When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

³⁵⁷ In *Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and Another Appeal* [2009] 5 MLJ 362, p. 380, the Court held that the notice must state with sufficient particularity the alleged breaches to enable the alleged contemnor to defend himself.

³⁵⁸ It states:

Subject to paragraph (2), the Court hearing an application for an order of committal may sit in private in the following cases, that is to say-

- (a) where the application arises out of proceedings relating to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
- (b) where the application arises out of proceedings relating to a person suffering or appearing to be suffering from mental disorder within the meaning of the Mental Disorders Ordinance, 1952 (31/52);
- (c) where the application arises out of proceedings in which a secret process, discovery or invention was in issue;
- (d) where it appears to the Court that in the interests of the administration of justice or for reasons of national security the application should be heard in private, but except as aforesaid, the application shall be heard in open Court.

³⁵⁹ *UMBC Bhd v Chuah Sim Guan @ Chai Chong Chin* [1999] 3 AMR Supp. Rep. 803 rules that the parties are bound by their respective affidavits which constitute pleadings in committal proceedings and so a party may only raise questions of facts in the affidavits. Moreover, in *Wong Soo Teong [Trading as Chop Yeok Lan] v Long Foo Kang & Anor* [1996] 2 BLJ 47, the Court refused to accept the fresh affidavit filed by the party in support of the application for leave. The reason for this is that as the application for leave is made *ex parte* the person sought to be committed should be informed of the facts upon which leave was obtained so as to allow him to prepare for his defence. Besides, the fresh affidavit could prejudice the committal as the grounds upon which leave was granted may be substituted with other grounds.

will sentence him to prison or fine him or both. However, during the hearing, the alleged contemnor may tender his unreserved apology in order to purge his contempt.³⁶⁰

3.1.4.2 Procedures in the Subordinate Courts

In the subordinate courts, the procedure for committal proceedings is provided for under Order 34 SCR. There is nothing in the provisions mentioned in the subordinate courts' jurisdiction to initiate contempt proceedings on their own motion. Order 34 r. 2 SCR provides that no application to a court for committal order may be made unless leave has been granted by the court in which an application for such leave be made *ex parte* supported by an affidavit. Thus, the leave to move the court for contempt proceedings is applied either by the party aggrieved or by the Attorney General.

After the leave has been granted, the application for an order of committal must be made to the court by filing a notice in Form 94. The court will fix the hearing of the said notice by allowing at least seven clear days between the service of the notice and the hearing date.³⁶¹ The notice of motion in Form 94 together with the affidavit filed in accordance to Order 34 r. 2 SCR, must be served personally on the person sought to be committed so that he will be well informed of the alleged contempt.³⁶²

The hearing of the notice is held in open court but the court may sit in chambers if for reasons of the interest of administration of justice or of national security. If the court decides to make an order of committal against the person sought, the court will in open court state the person's name, the nature of the act or omission in respect of which the order of committal is being made and the length of the period for which he is being committed.³⁶³

³⁶⁰ In *Chung Onn* (n. 347), apology can operate as mitigating factor in contempt proceedings.

³⁶¹ Order 34 r. 3 (1) SCR.

³⁶² Order 34 r. 3 (3) SCR.

³⁶³ Order 34 r. 4 SCR.

The provisions in the SCR do not provide specifically the procedures for contempt in the view or presence of the court, i.e. *in facie* contempt. However, in *Public Prosecutor v Lee Ah Keh & Ors*³⁶⁴ and *Seeralan*,³⁶⁵ the subordinate courts initiated contempt proceedings on their own motion by virtue of Section 228 Penal Code³⁶⁶ read together with Section 353 CPC,³⁶⁷ for its procedure. Magistrates may invoke their power under Section 228 if an alleged contemptuous act is an offence of intentional insult or interruption occurs before him during a judicial proceeding. Therefore, in *Lee Ah Keh*³⁶⁸ Ali J said:

When contempt is committed in the view or presence of the court, the first thing to do is to order the offender to be detained by the police and at the same time to record the act or statement constituting the contempt. The court then proceeds with its other business for the day. After completing other business but before rising, offender shall be produced again to deal with. If the magistrate decides to take cognisance of the contempt, the act or statement constituting the contempt shall be read out to the offender who is then asked to show cause why he should not be punished.

As there is no standard parameter in procedure to deal with contempt *in facie* in the subordinate courts, the High Court in *Bok Chek Thou & Anor v Low Swee Boon & Anor*³⁶⁹ has set out guidelines for Magistrates and Sessions Courts judges to follow. Suriyadi J lists down these guidelines, as follows:

- (i) to have cognisance of, or to be personally conscious and aware of the conduct, remarks, act of refusal to answer to questions and/or evidence of the contemnor;
- (ii) to record that witnessed conduct, remarks, act of refusal to answer and/or evidence of that intended contemnor. These notations will be a point of reference subsequently when the intended contemnor is required to explain the above 'contemptuous' acts or statements. It must be borne in mind that these are mere guidelines as it is not possible to particularise all the acts or statements which can or cannot constitute contempt in the face of the court;
- (iii) in the event of any comparative evidence being made available, to show that perjury had occurred, such comparative evidence are to be recorded;

³⁶⁴ [1968] 1 MLJ 22.

³⁶⁵ *Seeralan* (n. 241).

³⁶⁶ Section 228 Penal Code (n. 357).

³⁶⁷ Section 353 CPC (n. 357).

³⁶⁸ *Lee Ah Keh* (n. 364) p. 24.

³⁶⁹ [1998] 4 MLJ 342.

- (iv) any apparent evinced intentions to obstruct and frustrate the administration of justice connected to that perjury are to be minuted;
- (v) having concluded that a probable offence of contempt had been committed, the contemnor is to be informed of the court's desire to pursue a contempt proceedings;
- (vi) when the contempt is committed in the view and presence of the judge, he is to order the offender to be detained by the police, pending the commencement of the contempt proceedings;
- (vii) that the proceedings be adjourned for a short while, if necessary, for a 'cooling-off period' or for purposes of permitting the judge to prepare the charge;
- (viii) when the proceeding commences, the charge is read out to the intended contemnor, with it having sufficient particularities, especially the perjured testimony, together with the evinced intention to frustrate or obstruct the administration of justice. If the charge is based on conduct, remarks or refusal to answer questions witnessed by the judge or which he has cognisance of, then those appropriate particulars are to be specified;
- (ix) as this is a criminal proceeding, the contemnor must be given the opportunity to answer the charge. This conferment of such an opportunity is essential, especially when the committal may be a sentence. This is of opportunity to reply invariably brings forth the consideration of the concept of the necessity of representation for the contemnor...[a] summary proceedings requires instant action...courts should not rigidly follow the time honoured 'right of legal representation';
- (x) having given that opportunity to reply, and if admission is elicited, the court may proceed with the sentencing. If he has adequately explained his perjury/remarks/conduct, and/or reason for refusing to answer to questions, then he may be dealt with appropriately or even entitled to an outright acquittal. Otherwise the sentencing procedure follows.³⁷⁰

3.1.5 Sanctions and Remedies

Sentencing is another unique feature in the law of contempt of court. In general, the purpose of sanction or punishment in criminal contempt is punitive. However, for civil contempt, if disobedience is proved, the contemnor can be committed to prison to remain until he purges himself by doing the right or undoing the wrong.

In Malaysia, the courts have wide discretionary powers in sentencing for contempt. In contrast to statutory offences that have a definite range of sentencing,

³⁷⁰ *Bok Chek Thou* (n. 369) pp. 349-350.

there is no limit to punishment for contempt of court. Sentences as provided under Order 52 r. 8 RHC include mere admonition,³⁷¹ a fine³⁷² or imprisonment.³⁷³

As for civil contempt, the High Court in *Chung Onn*³⁷⁴ stated that the courts have theoretically unlimited jurisdiction to mete out any sentence for contempt of court. Custodial sentence by way of imprisonment may be imposed only in the most serious cases. Seriousness is judged by reference to the unrelenting interference with the administration of justice and the unmitigated culpability of the offender. In the less serious case, the imposition of a fine is appropriate. However, there is also no limit to the imposition of a fine. The court assessing a proper fine, will take into account participation of the offender in the interference with the course of justice, the damage done to the public interest in addition to the seriousness of contempt. Besides that, the decision of the courts is made on previous cases that may be referred to as guidance.

In addition, tendering unreserved apology is significant in contempt proceedings as it may purge the contempt or may operate as a mitigating factor. Low Hop Bing J. in *Yau Jiok Hua*³⁷⁵ says:

As the contempt is of a continuous nature, and so long as the contempt has not been purged by the contemnor, it continues unabated every day. For that, I impose a daily fine of RM750, to be paid from day to day, until the contemnor purges the contempt, i.e. by paying the money to the applicant pursuant to the 2003 order. For the daily fine, I impose a day's imprisonment in default thereof.

For contempt *in facie* as in *Re Zainur Zakaria*,³⁷⁶ the contemnor was given an opportunity to tender an unconditional apology but refused to do so. The High Court considered the attitude of the contemnor in refusing to apologise and

³⁷¹ In *Koperasi Serbaguna Taiping Barat Bhd* (n. 246), a contemnor was discharged after due admonition.

³⁷² In *Arthur Lee Meng Kwang* (n. 1) the respondent was imposed a fine of RM 5,000. The sentence was followed in *Trustees of Leong San Tong Khoo* (n. 147). In *Manjeet Singh Dhillon* (n. 8) the respondent was imposed a fine of RM 5,000, in default three months' imprisonment.

³⁷³ In *Re Zainur Zakaria* (n. 234) the contemnor was sentenced for three months' imprisonment.

³⁷⁴ *Chung Onn* (n. 347).

³⁷⁵ *Yau Jiok Hua* (n. 195).

³⁷⁶ *Re Zainur Zakaria* (n. 234).

sentence him to three months' imprisonment. The imprisonment imposed reflects the punitive nature of punishment.

3.2 MAIN AREAS OF CONCERN IN THE LAW AND PRACTICE OF CONTEMPT OF COURT IN MALAYSIA

3.2.1 What is Contempt and Its Classification: *Actus Reus* and its Test of Liability

In Malaysia, given that contempt is a growth of the common law, there is no authoritative definition or limitation on contempt and the categories are not closed. The courts perceive that an interference with the administration of justice is contempt of court and since there are no clear guidelines as to what amounts to contempt, there is always a possibility and a risk for the alleged contemnor to fall victim to variable and unpredictable judicial 'creation' of categories or scope of contempt of court.

With regard to contempt in the face of the court, even though the boundaries of *in facie* contempt have not been precisely defined, it is contempt of court if the misconduct occurs in the course of the proceedings, either within the court itself³⁷⁷ or directly connected with what is happening in court.³⁷⁸ The *actus reus*, or the ways by which contempt in the face of the court may be committed, are as many and varied as permutations of human conduct may permit. Different views also have been taken as to whether a particular set of circumstances did or did not constitute contempt. That being the case, the view of the presiding judge would hold the balance. Nevertheless, there is always a propensity for perception and approaches to vary from judge to judge as to how they view the alleged misconduct occurring before them. One judge might see the alleged act as contempt in the face of court justifying the exercise of summary power but another judge might not.

³⁷⁷ *Re Kumaraendran* (n. 231); *Seeralan* (n. 241).

³⁷⁸ *Re Zainur Zakaria* (n. 234).

In *Koperasi Serbaguna Taiping Barat Bhd*³⁷⁹ the High Court instituted proceedings for contempt in the face of court on its own motion against a legal firm and its client for writing letters to Chief Registrars of the High Court, the Federal Court and to the Chief Justice of the Federal Court on a matter pending before the court. The letters, according to the Court, had not only prejudged the issues to be tried by the Court, but had suggested defiance of the order of stay made by the court. This was due to the content of the letters whereby the defendant's solicitor was seen as directing the registrar to fix a new auction date as soon as possible. However, the counsel for the contemnors contended that this case was not a case of *in facie* contempt as the letters were not written with regard to something occurring in the face of court.

The Court, nevertheless, found that the acts and conduct of the alleged contemnors based on the letters written by them in respect of matters arising from the case constituted *in facie* contempt. It was contempt in the cognisance of the court, as such acts and conduct took place during pending proceedings and when the case has not been finally disposed of by the court. The justification given by the Court was that the circumstances and categories of facts which may arise and may constitute contempt in the face of the court in a particular case are never closed. It may arise from any act, any slander, any contemptuous utterance and any act of disobedience to an order of the court. Any of these acts in varying degrees that affect the administration of justice or may impede the fair trial of *sub judice* matter can be deemed to be contempt in the face of the court. The Court also viewed that any comment or views expressed on a pending proceeding which purports to prejudge the issues to be tried by the court is a usurpation of the proper function of the court. This may be punished as contempt irrespective of the effect or likely effect on the particular proceeding in question.

To rebut the contemnors' contention that this case was not contempt *in facie* since the letters were not written with regard to something occurring in the face of the court, the High Court held that to constitute contempt in the face of the court the acts or words must interfere or tend to interfere with the administration of justice.

³⁷⁹ *Koperasi Serbaguna Taiping Barat Bhd* (n. 246).

It is unnecessary that all the circumstances of the act of contempt should take place in either a courtroom or within the personal knowledge of the presiding judge. Instead of approaching the matter by way of *sub judice* contempt, the High Court decided this was a case of *in facie* contempt. Thus, it allowed the Court to invoke its *suo motu* jurisdiction and dealt with the matter summarily.

As regards publication contempt, especially *sub judice* comment, there have been growing signs of concern particularly in newspaper circles that the law of contempt unduly inhibits the freedom of speech and expression, and freedom of the press. However, the press, media and public are concerned that at many key points the law is uncertain, particularly as to whether comment on matters that might become the subject of criminal proceedings is inhibited by the law of contempt only while the proceedings are ‘pending’ or from the time they are ‘imminent’. It is yet to be defined clearly what publications are held to ‘prejudice’ a criminal case as well as in connection with civil proceedings. Furthermore, as mentioned earlier, the problem of when the law of contempt begins to operate in relation to criminal proceedings is perhaps one of the most troublesome areas of contempt. A publication that is likely to prejudice a fair trial will amount to contempt proceedings if the trial may be said to be ‘pending’ or ‘imminent’. Any attempt to give meaning to ‘pending’ and ‘imminent’ must necessarily be speculative.³⁸⁰

Another issue is regarding the test of liability. Under *sub judice* contempt, general proposition of the *actus reus* is that any publication that has a tendency to ‘prejudice’ a fair trial or the due course of justice will amount to contempt. The test of liability in *Murray Hiebert*³⁸¹ has been accepted as the test to be applied in determining *sub judice* contempt in Malaysia; it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of the offending statement. It is enough if it is likely or tends in any way to interfere with the proper administration of justice. This means that even if the possibility of interference of the proceedings is remote, the publication

³⁸⁰ Borrie, Lowe and Sufrin (n. 18) p. 142.

³⁸¹ *Murray Hiebert* (CA) (n. 267).

may amount to contempt. The Court rejected the test established in *R v Duffy*³⁸² that is ‘real risk of prejudice to the administration of justice as opposed to remote possibility.’

In contempt by scandalising a court or a judge, the same test applied. In *Manjeet Singh Dhillon*,³⁸³ it has been ascertained that there can be contempt if there is a reflection upon the administration of justice. The Court found that the criticism made by the alleged contemnor if repeated would indisputably undermine the authority of the Lord President and lower the dignity of the court in the eye of the public.³⁸⁴ Therefore, as to the test of liability, the Malaysian courts emphasise on the tendency of a publication to interfere with the administration of justice and not whether there is any practical reality that the publication would indeed interfere with the administration of justice. In these two cases, the contemnors were punished for the tendency of the perceived evil of their conducts even though the perceived evil could not and would not materialise.³⁸⁵

Another area of concern regarding contempt of court is the dichotomy between civil and criminal contempt. In broad terms it is easy to differentiate criminal contempt from civil contempt. However, this is not a principled distinction. In practice, the distinction between the two has become blurred. This is due to the concept of ‘interference with the administration of justice’. For instance, if the court has made a peremptory order, its breach is necessarily an interference with the way in which the court has expressly determined to administer the course of justice. Therefore, if the person against whom the order was made had broken it, he would be guilty of civil contempt but the damage is also done to the administration of justice. This is evident in *Tommy Thomas*³⁸⁶ as discussed earlier. The Court exercised its *suo motu* jurisdiction ordering the appellant to show cause as to why he should not be cited for contempt for breaching his undertaking of the pledge not to repeat his remarks or statements published in the magazine.

³⁸² *R v Duffy* (n. 309).

³⁸³ *Manjeet Singh Dhillon* (n. 8).

³⁸⁴ *Ibid.* p. 180.

³⁸⁵ Shuaib (n. 279) pp. 238-239.

³⁸⁶ *Tommy Thomas* (n. 197).

3.2.2 *Mens Rea* and Defences

In Malaysia, *mens rea* is not an essential ingredient to constitute contempt. On the existing state of the authorities, i.e. *Murray Hiebert*³⁸⁷ and *Koperasi Serbaguna Taiping Barat Bhd*³⁸⁸ it is reasonably clear that in proceedings for criminal contempt, lack of intention or knowledge for the contemptuous conduct is not a defence. It means that any person acting contemptuously could not argue that he does not intend to or does not know that the behaviour or act in question constitutes contempt of court.³⁸⁹ The Courts in both cases further stated that since intention on the part of the contemnor is irrelevant, contempt of court is a strict liability offence.

In *Leela Ratos*,³⁹⁰ the alleged contemnor was held in contempt as his conduct was calculated to disrupt court proceedings by manoeuvring an adjournment and he was found to have intention to do so. The Court inferred the alleged contemnor's intention by evaluating his acts of giving contradictory statements to the court regarding his client's failures to attend the court.³⁹¹ From this, the court inferred that he knew about his client's absence beforehand and had come to court prepared with intention to apply for another postponement, i.e. for the third time.

From this authority, it can be said that if the contemnor has 'knowledge' that the alleged act will produce a contumacious act, it would fasten him with liability. Such knowledge will be inferred by applying the test as to whether objectively 'the effect' of the publication would result in interfering with the administration of justice.³⁹²

³⁸⁷ *Murray Hiebert* (HC) (n. 187) pp. 272-273.

³⁸⁸ *Koperasi Serbaguna Taiping Barat Bhd* (n. 246) p. 63.

³⁸⁹ *Murray Hiebert* (HC) (n. 187) p. 272.

³⁹⁰ *Leela Ratos* (n. 191).

³⁹¹ *Ibid.* p. 733.

³⁹² *Wain* (n. 317) p. 532.

The confusion as to *mens rea* as a requirement in establishing contempt is due to the fact that the definition of contempt contains no reference to *mens rea*.³⁹³ Contempt is simply ‘any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the court’. This has led to an assumption that the offence is an absolute or strict liability offence whereby there is no need to have intention; completely and utterly disrespectful action in itself is sufficient to constitute contempt.

In Malaysia, therefore, intent as established in contempt cases does not relate to obstructing or interfering with the due course of justice. It relates to the commission of the particular act which in turn obstructs or interferes with the due course of justice. As intent to disrupt or hinder the course of justice is not required to warrant a finding of contempt, what must be found is only intent to commit an act which tends to undermine public confidence in the courts or tends to interfere with the course of justice. If it needs to prove intent beyond the act, that is, intent to undermine public confidence in the courts or to interfere with the course of justice, the courts would have no remedy against contempt committed against it. It would not be able to stop those who employ vulgar and abusive language in court or those who defy court orders.

Currently, intent is not an ingredient to constitute contempt. Any argument or defence saying that an alleged contemnor who engages in angry and abusive language in court does not intend to undermine public confidence in the court is not acceptable defence. Therefore, in relation to publication and media contempt, the author, publisher, printers and distributors may be found in contempt if the alleged contemptuous article is published and distributed to public at large. There might be only a very slim chance to avoid citation of contempt, even though the printers and distributors argue that they have no knowledge of the contemptuous article.

³⁹³ Miller, *The Law of Contempt in Canada* (n. 21) p.9. Miller refers to this *mens rea* as one of the two major confusions manifest in the law of contempt. The second confusion is about the word ‘summary’.

Defences may offer a counterbalancing measure but when treated as strict offences, some defences are 'deprived' from the contemnor. In publication contempt, defences such as innocent dissemination, public interest and fair criticism have not been considered by the Malaysian courts. In *Murray Hiebert*, the Court by reference to *R v Griffiths, ex p. AG*,³⁹⁴ held that the defence of innocent dissemination was not available to those who in practising their trade were responsible for putting the offending writing into circulation. This was extended to the printers and distributors. The Singaporean courts in *Wain*³⁹⁵ and *Attorney General v Pang Cheng Lian & Ors*³⁹⁶ also held that despite no knowledge of the existence of the offending articles by the printers and distributors, neither lack of intention nor the defence of innocent dissemination was available to them since what was printed was in fact contemptuous.

In determining whether a discussion may amount to contempt or a factor to be considered as a defence in *sub judice* rule, public interest in the nature of discussion or comments should be taken into consideration. *AG v Times Newspapers Ltd*³⁹⁷ and *Ex parte Bread Manufacturers Ltd: Re Truth & Sportmans Ltd*³⁹⁸ provide that the interest of the due administration of justice should give way to the interest in discussing matters of public interest. However, the Malaysian courts have never considered a defence of public interest.

It is in the interest of the due administration of justice that the judiciary should be accountable and transparent. It is not acceptable that there should be a complete ban for discussing the judiciary since it is an organ of government under the democratic framework. On the right of criticism, Lord Atkin said:³⁹⁹

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.

³⁹⁴ [1957] 2 QB 192.

³⁹⁵ *Wain* (n. 317) p. 527.

³⁹⁶ [1975] 1 MLJ 69, pp. 73-74.

³⁹⁷ *AG v Times Newspapers Ltd* (n. 186).

³⁹⁸ (1937) 37 SR (NSW) 242.

³⁹⁹ *Ambard v Attorney General of Trinidad & Tobago* (1936) AC 322, p. 335.

Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Therefore, there is no reason, apart from the phrase ‘maintaining the confidence of the public’ to deny the defence of fair comment in the law of contempt. The Malaysian judiciary should withstand fair criticism as the comments made in good faith may ensure that the judges and the courts provide their best service possible as arbiters of dispute and defenders of constitution.

3.2.3 Mode of Trial or Procedures

The procedures for trial of contempt cases are various, sometimes obscure and highly unusual. The summary power is also criticised because it offends the basic principle of natural justice, i.e. the rule against bias – the judge acts as a complainant, a prosecutor, a chief prosecution’s witness as well as a judge with the task of imposing the sentences. The combination of several responsibilities in one person will cause at least two main difficulties. The first relates to bias – how can a judge be the judge of his own case? Secondly, there is a problem of presumption of innocence. By ordering the alleged contemnor to show cause as to why he should not be cited for contempt, it shows that the judge has already formed his opinion that the alleged contemnor is at guilt.

The summary power is fraught with possible abuse because it can deprive the alleged contemnor of a clear and distinct charge and also his best possible defence. More importantly, punishment being meted out on the spot usually precludes the alleged contemnor from seeking legal advice or representation.⁴⁰⁰

In invoking summary contempt power, the courts have to evaluate the situation in each particular case. The judges will apply their perception and exercise their discretion in deciding what circumstances and facts of the case might allow them

⁴⁰⁰ The Federal Court in *Zainur Zakaria* (FC) (n. 186) found that the High Court’s and the Court of Appeal’s refusal to allow counsel time to prepare defence or to call witness was an abuse of summary contempt procedure.

to punish contempt *suo motu*. This is supported by Lee Hun Hoe CJ. in *Cheah Cheng Hoc*⁴⁰¹ when His Lordship said:

The power must be used sparingly but fearlessly when necessary to prevent obstruction of justice. We feel that we must leave the exercise of this awesome power to the good sense of our judges. We will interfere when this power is misused.

In general, summary power is used in cases of flagrant and disruptive contempt that create risk to the immediate administration of justice. It is used in contempt *in facie*. However, in Malaysia, there are cases where the courts exercise their summary power even in cases arguably serious and urgent to act immediately.⁴⁰²

In some earlier cases, such as *Karam Singh*⁴⁰³ and *Re Kumaraendran*⁴⁰⁴ the courts had adopted protective attitude towards the advocates who had engaged in contemptuous conducts by referring them to the Bar for disciplinary action. The courts seemed reluctant to exercise this great power except when in real need and only resorted to this power as the last option. The *nemo iudex in sua causa* rule that says a complainant cannot be a judge in his own cause received higher consideration by the courts.

Many cases of contempt of court have been reversed due to procedural irregularities particularly because of the failure of the court to give the contemnor an opportunity of being heard before he is punished. In *Re Zainur Zakaria*⁴⁰⁵ the higher court had reversed the lower court's decision when the Federal Court⁴⁰⁶ found that the High Court judge was too quick to use summary power to cite the alleged contemnor for contempt, which deprived him of the opportunity to answer the charge against him. The procedure employed by the High Court did not ensure sufficient fairness and had not been correctly applied resulting in injustice to Zainur.⁴⁰⁷ Zainur should have been given a reasonable opportunity to prepare for his case and to call for witnesses. The refusal of his application for an

⁴⁰¹ *Cheah Cheng Hoc* (n. 258) p. 301.

⁴⁰² *Tommy Thomas* (n. 197).

⁴⁰³ *Karam Singh* (n. 238).

⁴⁰⁴ *Re Kumaraendran* (n. 231).

⁴⁰⁵ *Re Zainur Zakaria* (n. 234).

⁴⁰⁶ *Zainur Zakaria* (FC) (n. 186).

⁴⁰⁷ *Ibid.* p. 619.

adjournment by the High Court judge had deprived his right to a full and fair trial. N. H. Chan⁴⁰⁸ observes that the application filed by the alleged contemnor to discharge the prosecutors from further prosecuting the case was an absurd application which had no merit. According to him, the High Court judge in this case should have dismissed the application and carried on with the case before him as it was not for the judge to investigate into the complaint. Recourse should have been sought elsewhere such as reporting it to the police or to complain to the Attorney General. He views that the judge was wrong to resort to summary procedure since no contempt was disclosed at all.⁴⁰⁹ Furthermore, the Federal Court took a view that in this particular case the judges had not exercised their discretion judicially.⁴¹⁰

In the aftermath of *Re Zainur Zakaria* there were ‘unusual’ and extreme approaches in contempt cases as evident in *Koperasi Serbaguna Taiping Barat Bhd.*⁴¹¹ The crucial issue in this case is whether the alleged contempt was so gross as to merit *immediate* punishment. Two of the three letters alleged to constitute contempt were written sometime in the middle of December 1997 and the third was undated. By 17 February 1998, the court hearing an application in a pending case had all three letters before it. The hearing of the application was adjourned to 6 April 1998. During the adjournment the court formed the view that the three letters constituted a *prima facie* case of contempt. Accordingly, the court ordered letters to be issued to the alleged contemnors to show cause why they should not be cited for contempt. The show cause hearing was fixed for 17 March 1998 but seems to have commenced on 6 April 1998. The fact that a show cause letter could be issued and that the hearing thereof was fixed at a future date indicates that the alleged contempt was not one that justified the use of summary power.

The frequent use of summary contempt power by judges after the 1988 judicial fiasco is not acceptable to the litigants and the lawyers; to a certain extent it has

⁴⁰⁸ N.H. Chan, *Judging the Judges* (Alpha Sigma Sdn Bhd, Petaling Jaya 2007) pp. 59-60.

⁴⁰⁹ *Ibid.* p. 60.

⁴¹⁰ *Zainur Zakaria* (FC) (n. 186) p. 619.

⁴¹¹ *Koperasi Serbaguna Taiping Barat Bhd.* (n. 246).

been perceived as being misused by some judges.⁴¹² The summary contempt power is a necessary power but it must be exercised with caution.

Albeit the caution, they are still cases of contempt that are ‘unusual’ such as *Koperasi Serbaguna Taiping Barat Bhd.* contrary to what had been practised previously. The courts were reluctant to exercise this power except in most serious cases when they are urgent to act immediately.⁴¹³ The Bench entrusted the Bar to handle the disciplinary matters of their members.

The current procedure and practice relating to contempt cases reserved to the courts an undefined degree of discretion, which to some extent may be justified. However, the discretion may sometimes lead to variable approaches thus leaving uncertainties in the area. In the matter of contempt outside court, it is unclear as to whether the court is justified to exercise its *suo motu* jurisdiction. Should the matter be initiated only on a motion by the Attorney General instead of the court taking the matter in its own hand? Besides that, the current procedure does not explain at what juncture the Attorney General should initiate a contempt action.

3.2.4 Sanctions and Remedies

There is no structure of maximum sentences provided for the courts. Consequently, while exercising their judicial discretion the judges can impose whatever term of imprisonment or fine they consider appropriate, but must have a stipulated limit. The imposition of sanction or punishment that is not fixed may be excessive in one case to another depending on the discretion of the judge. Hence, the absence of a clear guideline on the limit of sentences appears to leave a contemnor entirely at the court’s mercy.

In *Chung Onn*,⁴¹⁴ it was decided that the unmitigated culpability of the offender as one of the factors to be considered in weighing the seriousness of the offence. Tendering unreserved apology is significant in contempt proceedings as it may

⁴¹² Chan (n. 413) p. 61.

⁴¹³ *Cheah Cheng Hoc* (n. 258) p. 300.

⁴¹⁴ *Chung Onn* (n. 347).

purge the contempt⁴¹⁵ or may operate as a mitigating factor.⁴¹⁶ This is an ‘unusual’ feature in contempt proceeding as an apology rather than a publicised retraction that would give the grounds for mitigation of penalty. In *Arthur Lee Meng Kwang*,⁴¹⁷ the Supreme Court, after imposing a fine on the contemnor, said that they wished the contemnor had tendered his apology before the hearing of his contempt case and he would plead for leniency after he is found guilty in order for the court to consider these as additional mitigating factors.

Hence, the entire criminal justice system rests on the assumption that a person accused of a crime is considered innocent until proven guilty beyond reasonable doubt. Therefore, for the alleged contemnor to tender his unreserved apology before he is proven guilty of the alleged contempt would in fact be self-incriminating. It has to be borne in mind that every accused person enjoys the rights to silence and to be presumed innocent.

3.2.5 Judges and Judicial Approach

3.2.5.1 Inconsistencies in the Application of English Common Law and Attitudes towards Foreign Law

Another concern in the law and practice of contempt of court in Malaysia is the application of English common law of contempt and other foreign sources in the law of contempt in Malaysia. Although reference is made to English common law of contempt by virtue of Section 3 CLA, the judges have repeatedly justified taking a different approach from their counterparts in other jurisdictions on the basis of ‘local conditions’.

The refusal to follow the English principle of the test of liability in publication contempt is witnessed in *Murray Hiebert*⁴¹⁸ and *Manjeet Singh Dhillon*⁴¹⁹ cases.

⁴¹⁵ *Re Lee Chan Leong; Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors* (No 3) [2001] 1 MLJ 371. In this case, the Court vacated an order to show cause after the alleged contemnor tendered unreserved apology.

⁴¹⁶ *Yau Jiok Hua* (n. 195).

⁴¹⁷ *Arthur Lee Meng Kwang* (n. 1) p. 210.

⁴¹⁸ *Murray Hiebert* (HC) (n. 187); *Murray Hiebert* (CA) (n. 267).

⁴¹⁹ *Manjeet Singh Dhillon* (n. 8).

Abdul Aziz Bari⁴²⁰ observes the reluctance of the Malaysian courts to follow their English counterparts in areas where development has taken place. According to him, the reluctance is evident in the area of contempt of court, the impact of which on the scope of freedom of speech is very significant. The reasons given were that Malaysian social conditions are very different from those in England and that the sensitivity of the local courts need not be the same as courts of similar jurisdiction in England. Nonetheless, there is often no explanation provided in the holdings as to exactly how the conditions are different or why such differences are relevant.

The courts have also been inconsistent in applying the cut-off period.⁴²¹ In *Monatech*,⁴²² in determining whether the defendant's act in disposing the assets pending an application of Mareva injunction by the applicant would amount to contempt, the Federal Court referred to post-1956 English cases.⁴²³ However, as noticed in *Murray Hiebert*⁴²⁴ the Court of Appeal refused to follow the decisions of English courts⁴²⁵ but instead applied local cases decided in 1949.⁴²⁶ The Court in *Murray Hiebert* preferred to follow the local cases, which referred to the English cases that were decided before 1956⁴²⁷ which provide that the test is whether the statement is 'likely or it tends in any way to interfere with the proper administration of justice.'

Farid Suffian Shuaib argues that there is no valid reason for the courts to exclude post-1956 development of English law and adhere to pre-1956 local case law but the Court justified its approach on the basis of the different 'local conditions'.⁴²⁸ The local conditions in this respect have to take into account the time, space and place. The local condition changes and does not mean that time should stand still.

⁴²⁰ Abdul Aziz Bari, 'Teaching Constitutional Law in Malaysia: An Appraisal' (1999) 1 Malayan Law Journal clxvii.

⁴²¹ See Shuaib (n. 280) p. 231.

⁴²² *Monatech* (n. 178).

⁴²³ The Federal court referred to *Harrow London Borough Council v Johnstone* (1997) 1 WLR 459 which considered *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191.

⁴²⁴ *Murray Hiebert* (HC) (n. 187); *Murray Hiebert* (CA) (n. 267). In this case, the Court of Appeal held that the correct test for contempt is whether the statement is 'likely or it tends in any way to interfere with the proper administration of justice.'

⁴²⁵ The Court of Appeal rejected the test applied in *R v Duffy* (n. 309) which provides that there must be 'a real risk of prejudice to the administration of justice as opposed to a remote possibility.'

⁴²⁶ *The Straits Times Press Ltd* (n. 287); *SRN Palaniappan* (n. 288).

⁴²⁷ *Murray Hiebert* (HC) (n. 187) p. 271; *Murray Hiebert* (CA) (n. 267) p. 332; following cases of *Reg. v Payne* [1896] 1 QB 577; *Rex v Parke* [1903] 2 KB 432; *Reg. v Odham* [1956] 3 WLR 796.

⁴²⁸ Shuaib (n.279) p. 231.

The principle of law develops with the development of time. The contempt law in England develops and it is argued that the English cases, particularly the post-1981⁴²⁹ are adequate to free speech and democratic framework.

Another reason given for the refusal in not following English cases, for example *Attorney General v English*,⁴³⁰ is the existence of the Contempt of Court Act 1981.⁴³¹ The Act provides that contempt against *sub judice* would only be committed by publication 'which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.'⁴³² This means that the prejudice need not have materialised but the degree of its risk must be substantial, as distinct from merely possible or remote.⁴³³ It may be said that the case law after the enactment of this Act cannot be considered as constituting common law of England. It is argued that the post-Act decisions are persuasive⁴³⁴ even though they were influenced by the ECHR. Shuaib views that although the details of the provisions for freedom of expression in the ECHR are dissimilar, the basic guarantee of free speech exists in the ECHR as in the Malaysian constitution.⁴³⁵ Therefore, the Malaysian courts should take initiative to refer to parts of the developed English contempt law where substantial risk to the administration of justice is required before the publication is considered contemptuous.

Freedom of speech and expression that often comes in conflict with contempt of court is not only protected in the Constitution but is also specially promoted and protected under the international legal system. There are numerous instruments known as international human rights laws that guarantee this right, amongst others are the UDHR and the ICCPR. Nonetheless, Malaysian courts are reluctant to refer to these instruments on the basis that the UDHR is not a binding instrument

⁴²⁹ See *AG v Guardian Newspapers* [1999] EMLR 904. For detailed discussion on this case, see Chapter 4, 4.3.2.2 (d) (i), pp. 206-211.

⁴³⁰ [1983] 1 AC 116.

⁴³¹ Shuaib (n.279) p. 235.

⁴³² Section 2 (2) of the CCA 1981.

⁴³³ See Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn Penguin Books, London 2008) p. 410.

⁴³⁴ See *Jamil bin Harun* (n. 65), on the ability of the Malaysian courts to develop Malaysian common law based on post-1956 English cases.

⁴³⁵ Shuaib (n.279) pp. 236-237.

and the ICCPR has no legal impact since Malaysia has not ratified it.⁴³⁶ Although the judges are frequently invited to determine the current practice of contempt law with regards to international standard and practices in other foreign jurisdictions, they have always backed down on the basis of non-legal binding and also differing social conditions in Malaysia and foreign countries. Harun Hashim SCJ. in *Manjeet Singh Dhillon*⁴³⁷ viewed:

In view of Article 10 of the Constitution, it was suggested that the American decisions should apply. I think not. The First Amendment to the Constitution of the United States guarantees freedom of speech to the extent that it cannot even be restricted by legislation. The American Courts are quite clear that the free speech guarantee permits far greater criticism of Judges as Judges than would be allowed in England.

In Canada, *R v Gray* applied until the Canadian Charter of Rights and Freedoms came into force by the Constitution Act of 1982 which guaranteed freedom of expression. In *R v Kopyto* 47 DLR 213, the Ontario Court of Appeal quashed the conviction of a lawyer by a trial Court for contempt of court by scandalising the court on the ground that the statements were now protected by the guarantee to freedom of expression. This reasoning will not apply here in view of Article 10 (2) of the Constitution and s. 3 of the Civil Law Act 1956.

Hence, the Court in *Manjeet Singh Dhillon* was not willing to interpret Article 10 of the Constitution in light of analogies drawn from other countries such as the USA and Canada. The Malaysian courts prefer that the provision be interpreted within its own four walls.⁴³⁸

3.2.5.2 Judges and Judicial Misconduct

The power to summarily punish a person for contempt is a useful and valuable weapon in the judicial armoury. When properly used, it upholds the course of justice by instilling confidence in the judiciary. However, this power is open to misuse. Once it is misused or is being perceived to be misused and abused, it will erode the confidence of the public in the justice system. The confidence in the judiciary started to be eroded after the 1988 judicial fiasco mentioned above. It was the starting point of the strain relationship between the Bar and the Bench. It

⁴³⁶ *Mohamad Ezam* (n. 25).

⁴³⁷ *Manjeet Singh Dhillon* (n. 8) p. 176.

⁴³⁸ *Government of the State of Kelantan* (n. 24).

resulted that in recent years, there appears to have been a tendency to launch contempt proceedings against judges in Malaysia.

The Malaysian Bar applied to commit Abdul Hamid Omar when he was an Acting Lord President for contempt for preventing a sitting of the Supreme Court.⁴³⁹ The motion, however, was denied due to the lack of *locus standi* or alternatively, he had acted within his power.⁴⁴⁰ In *Anthony Ratos s/o Domingos v City Specialist Centre Sdn Bhd (Berniaga sebagai City Medical Centre)*,⁴⁴¹ an advocate was held in contempt of court for initiating contempt proceedings against a High Court judge who had given an order to strike out his client's petition in the High Court.

The issue of judges being in contempt was raised again in the motion to cite Augustine Paul J for contempt by Christopher Fernando, one of the counsels for Anwar Ibrahim's corruption trial.⁴⁴² The alleged contempt was committed in the said corruption trial when Augustine Paul J, as the presiding judge, remarked against a counsel that:

[I]f the way of speaking is like an animal, we can't tolerate him. We should shoot him.⁴⁴³

This case has not been reported but it was mentioned in *Anwar Ibrahim* [2002].⁴⁴⁴ It is rather unfortunate because the Court did not proceed to decide on the issue of contempt against a judge as the Court said that it would determine the issues later. The Court however proceeded to grant an application by the Attorney General to represent His Lordship in these contempt proceedings set to hear the application of the Attorney General to dismiss the motion.⁴⁴⁵ However, a stay of the proceeding was granted by the Court of Appeal until the disposal of an appeal⁴⁴⁶

⁴³⁹ *Abdul Hamid bin Omar* (n. 17). See also A.L.R. Joseph, 'Contempt of Court and Removal of Judges' (1993) 4 *Current Law Journal* xxxvii.

⁴⁴⁰ *Abdul Hamid bin Omar* (n. 17) pp. 282-283.

⁴⁴¹ [1996] 3 CLJ 415.

⁴⁴² 'Give Judge a Chance in Contempt Proceedings' *New Straits Times* (14 December 2001) p. 12; 'Court of Appeal Nod to Stay In Case to Cite Paul' *New Straits Times* (21 March 2002) p. 8.

⁴⁴³ *Anwar Ibrahim* [1998] (n. 113).

⁴⁴⁴ *Anwar Ibrahim* [2002] (n. 112).

⁴⁴⁵ 'A-G Can Represent Paul, Rules Court' *New Straits Times* (5 March 2002) p. 5.

⁴⁴⁶ 'Fernando Files Appeal Against Ruling Over Paul' *New Straits Times* (5 March 2002) p. 5.

against allowing the Attorney General to represent Augustine Paul J.⁴⁴⁷ The case is still pending until today and will probably be closed as both parties to the proceedings are deceased.

The attempt to cite judges for contempt shows symptoms of the strained relationship between the Bar and the Bench. The Bar claimed that the judiciary 'was widely seen to be complicit in political prosecution by the government'.⁴⁴⁸ This strained relationship affected the application of the law of contempt by increasing the sensitivity of judges to any statement or conduct that may be interpreted as being disrespectful or scandalising them.

The position on contempt of court by judges is not clear in Malaysia as compared to India where law clearly provides that judges may be held in contempt of their own court.⁴⁴⁹ In general, any party, whoever he may be, who interferes with the administration of justice commits contempt. However, as mentioned, there seems to be uncertainty as to whether a judge can be subject to contempt of court. Section 14 CJA bestows judicial immunity on judges and any person acting judicially. The purpose of this rule is to preserve the integrity, independence and resolve of the judiciary. It is also to ensure that justice may be administered by the judges independently without any apprehension of personal consequences.⁴⁵⁰ Thus, if an action were to lie, the judge would lose their independence which is necessary for the administration of justice.⁴⁵¹ Furthermore, the ethical conducts of judges are governed by the Judges' Code of Ethics 2009 and there is a proper forum to decide on judges' misconduct.

⁴⁴⁷ 'Court of Appeal Nod to Stay In Case to Cite Paul' (n. 439).

⁴⁴⁸ International Commission of Jurists, 'Attacks on Justice 2000-Malaysia' (2006) <http://www.icj.org/news.php?id_article=2580&lang=en> accessed 23 April 2006.

⁴⁴⁹ In India, Section 16 CCA 1971 provides:

- (1) Subject to the provision of any law for the time being in force, a Judge, Magistrate or other person acting judicially shall also be liable for contempt of his own court or of any other court in the same manner as any other individual is liable and the provisions of this Act shall, so far as may be, apply accordingly.
- (2) Nothing in this section shall apply to any observations or remarks made by a Judge, Magistrate or other person acting judicially, regarding a subordinate court in an appeal or revision pending before such Judge, Magistrate or other person against the order or judgment of the subordinate court.

⁴⁵⁰ *Rajski v Powell* [1987] 11 NSWLR 522, p. 527.

⁴⁵¹ *Anderson v Gorrie* [1895] 1 QB 668; *Sirros v Moore* [1975] QB 118.

The administration of justice is not merely in the hands of judges. The Bar is a partner for that purpose. The Bar and the Bench work together. Thus to have an erring judge and erring contemnor are both a danger to the ‘pristine purity of the seat of justice’.⁴⁵² It is worth noting the words of Gopal Sri Ram JCA in *Lee Chan Leong*⁴⁵³ when he said:

The Bar is a critical partner in the function which the court carries out, which is to ensure that members of the public and litigants receive justice in an untainted form. Proceedings for contempt are there to protect and defend integrity of justice itself. It is not there to protect the self-righteousness of individual judges or their personal pride. Taking offence on small points and becoming enraged on trivia to the extent of subjecting an advocate and solicitor to contempt proceedings is neither in the best traditions of the Bench nor enhances the dignity of the court. Members of the Bar are already under considerable pressure to canvass their clients’ case to the best of their ability. Judges should not make that burden even greater by instituting oppressive contempt proceedings.

⁴⁵² Mehrotra (n. 23) p. 3.

⁴⁵³ *Lee Chan Leong* (n. 415) p. 727.

Chapter 4

A Proposal for Reform

4.1 INTRODUCTION

Parliament, thus far, has not enacted laws covering contempt of court in Malaysia even though competent to do so under Article 10 of the Constitution.⁴⁵⁴ As seen in the preceding chapter, the formulation of the law of contempt is left to the courts. Due to the absence of written law on the subject matter, the courts may refer to English common law and also the law and practice of some selected common law jurisdictions for persuasive reasoning and guidance.⁴⁵⁵ Nevertheless, the courts are inconsistent in accepting and rejecting foreign law and generally the courts will put a disclaimer as to ‘suitability of local condition’ when persuaded to accept foreign legal reasoning on the matter. Unfortunately, the courts often offer no detailed explanation as to why and how Malaysia is unique in this context. The effect of wide discretionary power exercised by the judges in determining contempt, and accepting or rejecting foreign law, led to uncertainties in the law and practice of contempt.

Chapter 4 analyses the main concerns in the law and practice of contempt of court in Malaysia as highlighted in Chapter 3 in light of a proposed reform by the Malaysian Bar and also will examine other potential incentives for improvement by reference to various levels. There are three parts of this chapter. The first part studies the main areas of concern and the response taken by the Malaysian Bar in addressing the problems. The second part examines the potential foundations for reform by reference to human rights protection in Malaysia taking into consideration the rejection by the Malaysian courts of international human rights law and foreign laws in interpreting the Malaysian human rights provision. Secondly, to the approaches adopted by some common law jurisdictions such as England, India, Australia, New Zealand, Canada and the USA. The practice of the

⁴⁵⁴ Parliament in exercising the power bestowed under Article 10 (2) of the Constitution has in fact enacted legislation such as the Official Secrets Act 1972, the Internal Security Act 1960, the Printing Presses and Publications Act 1984 and the Sedition Act 1948 on the basis of security of the Federation.

⁴⁵⁵ Section 3 CLA 1956 (n. 58).

ICTY will be examined too. Lastly, the results from the empirical study which was carried out among the legal actors in Malaysia will be evaluated in order to provide another option or incentive for reform. The last part is the overview of the main issues and options for reform based on law and empirical research.

4.2 THE MAIN AREAS OF CONCERN AND THE BAR'S MOVEMENT FOR REFORM

The following are the main areas of concern in the Malaysian law of contempt of court as highlighted in the preceding chapter:

- (i) Contempt and its classifications of contempt: *Actus reus* and its test of liability.
- (ii) *Mens rea* and defences.
- (iii) Mode of trial and procedures.
- (iv) Sanctions and remedies.
- (v) Judges and their judicial creativity.

The Malaysian Bar highlights the significant tension created by the law of contempt as a tool to protect the interest of the administration of justice at the expense of the freedom of expression. The Bar views 'the *sub judice* rule' and 'scandalising the judiciary' as an encroachment on freedom of speech and thus called for a review. In response to these anomalies and to seek for clarity in this area of law, the Bar proposed to place the law in a statute. The Bar took into account the movement in other Commonwealth jurisdictions such as England and India, which had recognised this unsatisfactory legal position and codified substantially their law of contempt.⁴⁵⁶

In 1999, the Bar, through the Bar Council, sent a memorandum together with a Proposed Contempt of Court Act 1999 (the Proposed Act) to the Prime Minister, his deputy and the Attorney General. The proposal seeks to address the ambiguity of the law of contempt of court in common law and to provide statutory safeguards in the exercise of contempt powers by the courts.

⁴⁵⁶ In India, a law reform committee, known as Sanyal Committee recommended a draft bill and the bill was enacted as the CCA 1971. In the UK, the CCA 1981 was enacted governing media publication.

The Bar highlighted several governing factors in drafting the proposed law. They are:

- (i) To clearly define what is and what is not ‘contempt’.
- (ii) To specify a maximum limit to the punishment that can be imposed.
- (iii) To clearly specify that the standard of proof for any charge of contempt, whether civil or criminal, is ‘beyond reasonable doubt’ and to set out the defences available.
- (iv) To lay out a proper, fair and comprehensive procedure for dealing with contempt in line with the UDHR, to which Malaysia is a signatory, in particular Articles 10⁴⁵⁷ and 11.⁴⁵⁸
- (v) To strive for uniformity and consistency with other common law jurisdictions, primarily the English and Indian positions.⁴⁵⁹

4.2.1 The Proposed Contempt of Court Act 1999⁴⁶⁰

The preamble of the Proposed Act declares its object as ‘an Act to define Contempt and limit the powers of Court to punish for Contempt and to regulate the procedure in relation thereto’. The Proposed Act is to be applied throughout Malaysia and is divided into nine parts.

⁴⁵⁷ It states:

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.

⁴⁵⁸ It states:

- (1) Everyone charged with a penal offence has the 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.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

⁴⁵⁹ The references relied primarily on England and India because as known England is the ‘mother country’ for this common law doctrine of contempt of court, whilst India and Malaysia share quite similar legal history as both are heavily influenced by English ideas. The Bar in preparing the Proposed Act has duly considered the reports of the Phillimore Committee in Britain and the Sanyal Committee in India, the English Contempt of Court Act 1981 and the Indian Contempt of Courts Act 1971.

⁴⁶⁰ The Proposed Act is attached as Appendix A.

- (i) Part 1- Preliminary
- (ii) Part II- Criminal Contempt
- (iii) Part III-Civil Contempt
- (iv) Part IV-Other Forms of Contempt
- (v) Part V- Procedure for Dealing with Criminal Contempt
- (vi) Part VI- Appeal in All Cases of Contempt of Court
- (vii) Part VII- Limitation and Punishment for Contempt
- (viii) Part VIII- Execution
- (ix) Part IX- General

At present, only the courts are invested with the power to maintain its authority and to prevent its process from being abused. The position of the Industrial Court and other Tribunals are unclear. The Proposed Act, however, does not define the word 'court' in the strict sense of the term, it defines 'court' as the Federal Court, Court of Appeal, High Court, Sessions Court, Magistrate Court and Industrial Court. With that, the authority to decide on contempt of court is extended to the Industrial Court.

4.2.1.1 The Proposed Act and the Responses to the Main Areas of Concern

(A) Contempt and its Classification: *Actus Reus* and the Test of Liability

In Malaysia, since the expression 'contempt of court' does not appear either in the Constitution or in any statute, what is contempt can be found in the judicial interpretation. It is indeed difficult and almost impossible to frame a comprehensive and complete definition of contempt of court.⁴⁶¹ This is due to the fact that the law in this area is evolving, thus rendering contempt protean in its character. Moreover, it has never been subjected to legislative scrutiny. As pointed out by the Sanyal Committee in India, the categories of contempt are not closed.

⁴⁶¹ In *Telhara Cotton Ginning Co. Ltd v Kashinath*, ILR 1940 Nag. 69, the Indian Court admits that it is difficult to attempt comprehensive definition as well as neat and clear-cut classifications of contempt as highlighted by the Sanyal Committee.

Nevertheless, the Committee attempted to define contempt in the most general terms.⁴⁶²

Contempt of court is not a single offence. It describes several different types of offence from misbehaving in court, obstructing justice, disobeying court order, breaching the *sub judice* rule and scandalising the court.⁴⁶³ In general, contempt is stated broadly to fall into two groups: civil and criminal contempt.

Section 2 of the Proposed Act also defines ‘contempt of court’ as civil and criminal contempt. This definition merely makes a characteristic classification of the expression ‘contempt of court’. However, the Proposed Act goes further by defining civil and criminal contempt.

Under Section 3 (2) of the Proposed Act, civil contempt means:

wilful disobedience of any judgment or any order requiring a person to do or abstain from doing a specified act or any writ of habeas corpus or wilful breach of an express undertaking given to Court on the faith of which the Court has given its sanction.

Criminal contempt is defined under Section 3 (3) of the Proposed Act as:

publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any act whatsoever which:

- (a) is a falsehood and is intended to bring a Court into disrepute;
- (b) interferes with the due course of any judicial proceedings or obstructs the administration of justice in any other manner.

Therefore, the definition of ‘contempt of court’ illustrates that contempt is not a single offence and may not be exhaustive. The categories of contempt are not closed by the definition as the Proposed Act suggests ‘publication or act done which obstructs the administration of justice in any other manner’. Again, what is contumacious is for the court to decide since the discretion cannot be confined within the four walls of a definition. Nevertheless, it must be borne in mind that this does mean that the court should not be guided by the definitions given in the

⁴⁶² Sanyal Committee Report, p. 19.

⁴⁶³ Pal (n. 23) p. 35.

Proposed Act. It is only the categories of contempt that may not be closed by the definitions.⁴⁶⁴

(i) Distinction between Civil and Criminal Contempt

Albeit dividing contempt into civil and criminal, the clause further provides for the standard of proof for establishing contempt of either type, which is beyond reasonable doubt. The same standard of proof applies to civil contempt since the penalty imposed ranges from fine to imprisonment. Due to this, some confusion in distinction between the two types of contempt is caused. In *Home Office v Harman*,⁴⁶⁵ while explaining the difference between civil and criminal contempt, Lord Scarman pointed out that civil contempt constitutes an injury to private rights of a litigant. It is left to the litigant to bring to the notice of the court. He may either decide not to act in which he may waive, or consent to the non-compliance. Criminal contempt, on the other hand, involves defiance of the court, revealed in conduct which amounts to obstruction or interference with the administration of justice.

The Proposed Act does not explain further the distinction between civil and criminal contempt but the courts may consider the test for distinction suggested by the Sanyal Committee as follows:

...the question whether a contempt is civil or criminal is not to be judged with reference to the penalty which may be inflicted but with reference to the *cause* for which penalty has been inflicted.⁴⁶⁶[Emphasis added]

For instance, where a person commits a breach of an order, he is guilty of civil contempt but a third party aiding and abetting the breach commits criminal contempt because he interferes with the administration of justice.

⁴⁶⁴ See *Ahmed Ali v Superintendent, District Jail, Tejpur* 1987 Cri LJ 1845, p. 1849.

⁴⁶⁵ (1983) 1 AC 280.

⁴⁶⁶ Sanyal Committee Report, Ch. IV, p.22.

(ii) Types of Contempt of Court

(a) Civil Contempt

Civil contempt as observed in the Proposed Act is initiated for effective implementation of an order. Its aim is primarily coercive, that is, to bend the will of the person to comply with the court order.

As defined in Section 3 (2) of the Proposed Act,⁴⁶⁷ civil contempt involves the existence and proof of the following:

- (i) there must be a *judgment* or *order* or *writ of habeas corpus* or *undertaking* of a court;⁴⁶⁸
- (ii) the judgment, order, writ of habeas corpus or undertaking must be given to a *court*;
- (iii) there must be a *disobedience* to such judgment, order or writ of habeas corpus or breach of such undertaking;
- (iv) the disobedience or breach must be *wilful*.

The important element injected by the Proposed Act to the definition of ‘civil contempt’ is the qualification of ‘wilful’ disobedience as an essential ingredient of the offence of civil contempt. The requirement of ‘wilful’ connotes that there is a need to prove that the alleged contemnor wilfully or deliberately disobeys the order. This is basically to ‘formalise’ the ingredients laid down in *T.O. Thomas*.⁴⁶⁹

Thus, to constitute civil contempt, it must be shown that there is an order, injunction or undertaking which the terms of this order etc. are known to the alleged contemnor. There must also be clear proof that the terms have been broken and breach must be proved beyond reasonable doubt. The disobedience must be wilful and the order of court must have been contumaciously disregarded. It is not enough if it is casual, accidental or unintentional but must be wilful or deliberately disregard the order.

⁴⁶⁷ See Chapter 4, 4.2.1.1 (A), p. 118.

⁴⁶⁸ The words or expressions of the judgment, order, writ of habeas corpus, undertaking given to a court, are not defined by the Proposed Act. But they are well understood legal terms.

⁴⁶⁹ In *T.O. Thomas* (n. 191) the Court accepted the principle in *Fairclough & Sons* (n. 223) that contempt must be wilful and the order of court must have been contumaciously disregarded.

With this new law, mere disobedience without a wilful element is not sufficient to constitute contempt. It is noted that before a contemnor is punished for non-compliance of the order of the court, the court must not only be satisfied about the disobedience of the order but should also be satisfied that such disobedience is wilful and intentional. Therefore, an alleged contemnor will be liable if he intentionally breaks a court order in the sense that he is aware of the order and acts with the intention of breaking it. Intent in this sense is in relation to the act but not intent to obstruct the due course of justice.

(b) Criminal Contempt

Part II of the Proposed Act covers criminal contempt. Section 3 (3) of the Proposed Act defines the class of criminal contempt under which it has the essential element of 'publication'. The word 'publication' has not been defined technically but Section 4 (1) provides that publication includes any speech, writing or other communication in whatever form which is addressed to the public at large. Section 3 (3) of the Proposed Act classifies criminal contempt as:

the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any act whatsoever which:

- (a) is a falsehood and is intended to bring a Court into disrepute;
- (b) interferes with the due course of any judicial proceedings or obstructs the administration of justice in any other manner.

With regard to the definition in the Proposed Act, the first precondition to be satisfied is that there is a publication or doing of any act, and secondly, such publication or doing of the act has resulted in any or all of the consequences specified in clauses (a) and (b) of Section 3 (3).

The publication may be made by written words, spoken words, signs, and visible representations or otherwise. The scope of publication is wide. However, it is difficult to understand what publication would come and be covered by 'otherwise'. Apart from the publication, criminal contempt could be committed by 'doing of any act'.

Analysis of the definition of criminal contempt shows that, it covers *ex facie* contempt, in particular, publication contempt. Therefore, at least, three classes of action have been classified as criminal contempt committed out of courts. They are:

- (i) any publication or act done which is falsehood and is intended to bring a Court into disrepute;
- (ii) publication or act done which interfere with the due course of any judicial proceedings;
- (iii) publication or act done which obstructs the administration of justice in any other manner.

The third class of criminal contempt is far wider in scope than the phrase ‘course of any judicial proceedings’. Furthermore, the last words ‘in any other manner’ further extend its ambit and give it a residuary character and it indicates that the species of criminal contempt are not always mutually exclusive. Part II,⁴⁷⁰ Chapter I of the Proposed Act further deals with publication amounting to criminal contempt.

In facie contempt is placed under Section 9 of Chapter 3 of the Proposed Act. The provision states:

It is contemptuous if any person in the presence of the court engages in any conduct that substantially interferes with or obstructs the continuance of the proceedings.

Hence, the element of ‘presence’ differentiates between *in facie* and *ex facie* contempt under this Proposed Act.

(i) Publication or Act Done which is Falsehood and is Intended to Bring a Court into Disrepute

This new stipulation is a response to the current practice of the offence of contempt by scandalising the court or the judge. Contempt by scandalising in common law connotes ‘any act done or writing published calculated to bring a

⁴⁷⁰ Sections 4 to 9 of the Proposed Act.

court or a judge of the court into contempt or to lower his authority'.⁴⁷¹ This is the definition of contempt by scandalising applied in Malaysia at present.⁴⁷²

Currently, to convict a person for contempt by scandalising, the court has to determine whether or not the alleged contemptuous criticism or statement is within the limit of reasonable courtesy and good faith, and has an inherent tendency to interfere with the due administration of justice.

This new law, however, proposes to deviate from the current test applied in scandalising contempt because the current test limits freedom of expression to an unjustifiable degree. This is because the criminal liability is imposed without it being necessary to establish that the person or the institution has been harmed or being prejudiced in a significant way. Furthermore, the criminal liability is imposed without the offence being defined in sufficiently precise terms to give fair warning to the alleged contemnor as to what type of statement or publication gives rise to criminal liability. Therefore, the Bar proposes to replace the word 'scandalising' to 'publication or act done to disrepute the court' thus diverging from the current test to determine liability in this kind of criminal contempt.

Under this new law, it is required to prove that the content of the publication is false and the alleged contemnor intends to publish and also have intention to disrepute the administration of justice by his false publication. Therefore, it is noted that the test of liability or the degree of danger to the administration of justice is higher than the one at present. As it has to prove the element of falsehood, the risk must be serious, real and present danger,⁴⁷³ so that the administration of justice, the judiciary or judges, will be brought into serious disrepute.

⁴⁷¹ See *R v Gray* (n. 183) p. 40.

⁴⁷² This is a type of scandalising contempt as established in *R v Gray* (n. 183). The principle applied affirmatively in Malaysia as can be seen in *Arthur Lee Meng Kwang* (n. 1) and *Manjeet Singh Dhillon* (n. 8).

⁴⁷³ In the USA, it has been established in *In re Little* 1972 404 U.S. 553 that for a statement or publication to be contemptuous it must constitute an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or probable, it must be immediately imperil. See also *Bridges v California* 1941 314.S. 252.

This new rule would protect any court from statements of falsehood which intend to bring down the court's reputation. The 'falsehood' requirement connotes statements that are true cannot be punished. Therefore, the statements or criticisms made against the court or judiciary as a whole must be in the form of reasonable argument, made in good faith, free from imputation of improper motives and true. With that, a person may express fair, reasonable and legitimate criticism of any act of a judge done in his judicial capacity or any decision given by him as 'justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful, even though outspoken comments of ordinary men'.⁴⁷⁴ Although the preference is given to freedom of expression, it must be borne in mind that the right to criticise the judiciary must be exercised in such a manner that people's faith in the judiciary is not shaken.

(ii) Publication or Act Done which Interferes with the Due Course of Any Judicial Proceedings

This new branch of criminal contempt responds to the common law of *sub judice* rule. One of the concerns in *sub judice* contempt is trial by media. 'Media trials' are objected because they put at risk the due administration of justice in the particular case. It might influence the judge in his decision making. In the long run, such trials could undermine confidence in the judicial system in general.⁴⁷⁵

On the other hand, putting a restriction on the media in reporting the matter, to a certain extent may be in conflict with the right to free expression and media freedom. This is the issue in *sub judice* which involves the confrontation of what are essentially competing values. The norms of freedom of expression are not always comfortably harmonised with those relating to the right to a fair trial and preservation of public confidence in the administration of justice. Hence, the law as it stood currently contains uncertainties which restrict and impede free speech, freedom of the press to inform the public and the right of the public to be properly informed.

⁴⁷⁴ *Ambard* (n. 399).

⁴⁷⁵ Borrie, Lowe and Sufirin (n. 18) p. 69.

Under the common law rule of *sub judice*, writers, publishers and distributors are prevented from discussing or publishing material which is related to the trial which is still under the court's deliberation. However, there is doubt over the precise start of the *sub judice* period, deriving from the interpretation of the words *pending*⁴⁷⁶ and *imminent*⁴⁷⁷ laid down by the courts.⁴⁷⁸ Borrie and Lowe suggest that once proceedings have begun the law is right to insist that the media should have no role to play in the administration of justice.⁴⁷⁹ Thus, this uncertainty leads to another issue: are the media free to publish material without fear of contempt proceedings during the gap between the conclusion of proceedings at first instance and the initiation of an appeal?

The Proposed Act overcomes this uncertainty by specifying the trial is '*sub judice*' when the proceedings in question have commenced and *active* at the time of the publication.⁴⁸⁰ Section 4 (4) (a) of the Proposed Act provides that a criminal proceeding is commenced and active from the time the accused is charged or summons is issued until the final determination of the substantive issues in the proceedings at first instance. In the case of civil proceedings, as provided by Section 4 (4) (b), when it is instituted by the filing of an action or other originating process. The Act precludes the appeals as Section 4 (5) provides that 'active means all proceedings at first instance where there has yet to be a final determination of the substantive issues in the proceedings'. If the prejudicial material published is in relation to an ongoing appeal proceeding, the chance of being found in contempt is very slim.⁴⁸¹

⁴⁷⁶ The criminal trial, for example, is pending from the time a person has been arrested and it remains pending until he has been acquitted, the time for an appeal has expired or all possible appeals have been completed. *The Straits Times Press Ltd* (n. 287) p. 83 following *R v Davies* (n. 332).

⁴⁷⁷ Under the common law as applied by English courts, proceedings are taken to be *sub judice* from an earlier time, that is, from the time they are imminent. Thus, criminal proceedings are imminent if it is obvious that a suspect is about to be arrested. See Sally Walker, 'Freedom of speech and Contempt of Court: The English and Australian Approaches Compared' (1991) 40 *International and Comparative Law Quarterly* 583.

⁴⁷⁸ *SRN Palaniappan* (n. 288); *The Straits Times Press Ltd* (n. 287).

⁴⁷⁹ Borrie, Lowe and Sufrin (n. 18) pp. 5-6.

⁴⁸⁰ Section 4 (3) of the Proposed Act states:

This Part applies to a publication only if the proceedings in question have commenced and are active within the meaning of this section at the time of the publication.

⁴⁸¹ Sections 4 (3), (4) and (5) of the Proposed Act.

In addition, the Proposed Act diverges from the current test practice in determining whether the alleged material amounts to contempt. The requirement of ‘substantial risk’ makes significant changes to the current law which is based on the test of a ‘inherent tendency’.⁴⁸² This Act proposes that in order to be contemptuous, the publication must present a substantial risk so that the prejudice to the litigation is serious. Section 4 (2) of the Proposed Act reads:

This Part applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded.

This in fact limits liability for contempt under the ‘strict liability rule’. Therefore, the liability is strict under Section 4 (2) of the Proposed Act when the publication create a substantial risk so that the course of justice in the particular trial will be seriously impeded or prejudiced and the proceedings in question must be ‘active’ at the time of the publication. This new provision requires ‘double test’ which means that first, there must be a substantial risk of prejudice i.e. the risk must be a *practical risk* but not a *theoretical risk*⁴⁸³ and secondly, the risk will seriously impede the proceedings. The court has to test whether or not the publication will bring an impact on the judge at the time of the trial. The law should now aim at preventing serious prejudice as such; trivial cases ought not to be brought before the court.

This new law bears a strong resemblance to Section 2 (2) CCA 1981 under which England has recognised the rule of strict liability where a publication carries a substantial risk of serious prejudice to an ongoing trial i.e. active proceedings. Under the strict liability rule, *mens rea* is not an ingredient, provided the publication is the one that causes a substantial risk of serious prejudice and it falls within the ‘active’ period of that ongoing proceeding.

The Proposed Act introduces a ‘protection for good faith discussion of public affairs and public interest’ under Section 8 (2) which is an equivalent of Section 5

⁴⁸² *Murray Hiebert* (HC) (n. 187); *Murray Hiebert* (CA) (n. 267).

⁴⁸³ *AG v Guardian Newspapers Ltd.* (1992) 3 All ER 38.

CCA 1981.⁴⁸⁴ The provision provides, *inter alia*, that even a serious interference to a trial has been created, there will be no liability arises so long the publication in question is part of a discussion in good faith of public affairs or matters of public interest. Section 8 (2) is treated as a measure intended to protect media freedom when the publication in question concerns a general issue of public interest. Section 8 (2) reads:

A publication made as or as part of a legitimate discussion in good faith of public affairs or other matters of general interest held in public is not to be treated as contempt if it only incidentally and unintentionally resulted in a serious interference to particular legal proceedings.

(iii) Publication or Act Done Obstructs the Administration of Justice in any Other Manner

This is a catch-all provision. The use of the expression ‘in any other manner’ indicates that sub-clause (b) is intended to cover the residuary cases of contempt not expressly covered by Section 3 (3) of the Proposed Act. ‘Administration of justice’ itself is an expression which is obviously wide enough to include the specific situations covered by sub-clause (a) and first part of sub-clause (b). Thus, anything said, done or published which does have the effect of obstruction of the administration of justice in a manner otherwise than publication or act done which is falsehood and intended to disrepute the court or by interfering with the due course of judicial proceedings would amount to criminal contempt within this sub-clause.

This provision seems to provide a ‘solution’ for any special circumstances where contempt of court may not be covered. It is a nature of contempt of court that the conducts amounting to contempt are not exhaustive. Therefore, by having this new branch of contempt of court, it will give the judiciary a chance to ‘create’ a new type of contempt of court.

⁴⁸⁴ For more see Chapter 4, 4.3.2.2 (d) (i), pp. 206-211.

(iv) Filing of Pleadings and Complaint against any Presiding Judge

The Act proposes that a person should not be found guilty for the sake of filing an action, pleading, application or affidavit in court,⁴⁸⁵ unless it carries a substantial risk of prejudice to the administration of justice.⁴⁸⁶ Under this new law, an application to seek disqualification of the Presiding Officer on any ground or statement made by him⁴⁸⁷ cannot be immediately ruled as contempt of court. This recusal application can be made to the court where the Presiding Officer presides or to any co-ordinate court, a superior court or to a Presiding officer who has supervisory jurisdiction over the co-ordinate or superior court.⁴⁸⁸

(v) Contempt in the Face of the Court

Section 9 of Part II of the Proposed Act⁴⁸⁹ provides that contempt in the face of court is committed when a person in the presence of the court engages in any conduct that substantially interferes with or obstructs the continuance of the proceedings. The Bar proposes retention of the common law offence of contempt in the face of court but with some modifications. It is limited in its physical scope when it only confines to the misconducts in the presence of the court.

‘In the presence of the court’ in this context connotes that the act must have been committed in the courtroom during the ongoing trial. However, it does not clearly explain whether there should be a requirement that the judge actually witnesses

⁴⁸⁵ Section 5 (1) of the Proposed Act.

⁴⁸⁶ This proposal seems to respond to the case of *Re Zainur Zakaria* (n. 234) where a lawyer was cited for contempt for filing an application which the Court found to be frivolous and contemptuous.

⁴⁸⁷ One of the grounds for recusal applications is reasonable apprehension of bias on the part of the judge. However, the judges are very sensitive to this allegation as it would question not only the integrity of the judge but also the administration of justice entirely. In *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] MLJU 182, p. 221, Abdul Malik Ishak JCA said:

It is advisable that any counsel who proposes to embark on this perilous course of action must be certain lest he runs foul of the law and be cited for contempt.

See also *In Re Tai Choi Yu* (n. 256).

⁴⁸⁸ Section 5 (2) of the Proposed Act.

⁴⁸⁹ It reads:

It shall be contempt in the face of the court if any person in the presence of the Court shall engage in any conduct that substantially interferes with or obstructs the continuance of the proceedings.

the conduct in question. If the judge actually witnesses what has happened, one of the important rationales for summary procedure is established. This is due to the fact that the act committed in his presence and all the facts are within his personal knowledge. However, if he does not actually witness the alleged misconduct, it will not make the offence lose the character of *in facie* contempt. Accordingly, this new provision appears to restrict misbehaviour to the one occurs in the presence of the court, not necessarily witnessed by the judge, but must *substantially* interfere or obstruct the continuance of the proceedings. This means that the *actus reus* must be of a serious nature to deserve a citation of contempt of court.

(B) *Mens Rea* and Defences

(i) *Mens Rea* and Strict Liability

The Proposed Act introduces strict liability rule to ‘publication or act done which interferes with the due course of any judicial proceedings’. This is when the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded and the proceedings are active. Therefore *mens rea* is not an element to constitute this kind of criminal contempt. This means that the publisher cannot escape liability by arguing that he had no intention of prejudicing on-going legal proceedings.

Intention is necessary to commit any publication or act done which is a falsehood and bring a court into disrepute. The requirement to prove intention also extends to the publication of prejudicial material outside the scope of strict liability. For contempt in the face of the court, *mens rea* is not a necessary ingredient.

(ii) Defences

(a) Defences to Civil Contempt

Section 17 provides a defence for civil contempt. Under Section 17 (1) defence of unintentional disobedience can be raised by the alleged contemnor.⁴⁹⁰ It is to be noted that the statutory definitions of ‘civil contempt’ refer to ‘wilful’ disobedience to any judgment, order etc. Thus, mere disobedience is not sufficient to commit a person as it must be proven that the disobedience was wilful and with intention. Sub-section (2) makes it clear that non-compliance with an order for interrogatories, discovery or production of documents must be dealt with in accordance with the relevant rules relating to civil procedure and not by the law relating to contempt.

As regards breach of undertaking by an officer of the court, Section 17 (4) states that it will be contempt if the undertaking is expressly given to the court by the officer of the court in the discharge of his professional duties and he continues to be in breach without reasonable excuse despite a mandatory order requiring the performance of the undertaking has been obtained.

Furthermore, Section 17 (5) states that failure to attend court at the appointed time for hearing by an advocate should not be subject to contempt of court provided reasonable explanation is tendered for the said non-attendance. The provision also provides that the court can refer the said advocate to the appropriate authority for initiation of disciplinary proceedings.

(b) Innocent Publication or Distribution

The Proposed Act provides a number of defences available to publishers and distributors. Under Section 7 (1)⁴⁹¹ the publisher can raise a defence of innocent

⁴⁹⁰ Section 17 (1) of the Proposed Act reads:

An unintentional disobedience will not warrant an order for committal or fine although in such an instance the contemnor may be ordered to pay the cost of the application.

⁴⁹¹ It reads:

publication by showing that at the time of the publication, he has no knowledge and no reason to believe that the relevant proceedings are active. As regards distributor, Section 7 (2)⁴⁹² provides that he can raise a defence that at the time of the publication after taking all reasonable care he has no knowledge that the publication contains the prejudicial material.

(c) Fair and Accurate Report of Proceedings

In general, all cases brought before the courts are heard in open court. Public trial in open court is essential for fair administration of justice. Reporters are generally present in the courtroom exercising their rights to inform the public of matters of public interest. Therefore, the right to publish fair and accurate reports of proceedings cannot be deprived from the press especially when those proceedings are conducted publicly.

The ‘open justice’ principle is based on public interest consideration. However, it must give way when public interest indicates a degree of privacy. For instance, the names of rape victims, juvenile and children of the disrupted marriage cannot be identified. In addition, Section 6 of the Proposed Act deals with publication of judicial proceedings before a court sitting in chambers or in camera. In general, the publication of information relating to proceedings in private will be contemptuous if it relates to wardship or adoption of an infant and matters relating him, proceedings brought under the Mental Disorders Ordinance 1952, where the information relates to trade secret, and where the court having power under statute to prohibit the publication of the information in relation to the proceedings.

Other than those situations, reporters, publishers and distributors who publish fair and accurate reports of the proceedings may argue that they are not to be held

A person is not guilty under this Part as the publisher of any matter to which this part applies if at the time of the publication having taken all reasonable care, he has no knowledge and has no reason to believe that the relevant proceedings are active.

⁴⁹² It states:

A person is not guilty under this Part as the distributor of a publication containing any such matter if at the time of distribution, having taken all reasonable care, he has no knowledge that it contains such matter and has no reason to believe that it is likely to do so.

liable for contempt of court. Section 8 of the Proposed Act⁴⁹³ provides a defence of the fair and accurate report of proceedings. Hence, the report must be a fair representation of what has taken place in court and not necessarily word-perfect. While reporting the proceedings, care should be taken that what is reported reflects what had actually taken place in court.

(C) Mode of Trial or Procedures

(i) Civil Contempt

As for civil contempt, the Proposed Act adopts the procedure as laid down in the RHC 1980 and SCR 1980 under Order 52 and Order 34, respectively. Therefore, it retains the current procedures in dealing with civil contempt as discussed in the previous chapter.

(ii) Contempt in the Face of the Court

Section 20 of Part V of the Proposed Act is a procedural provision relating to the hearing of contempt committed in the face of the court. The Bar proposes to replace summary power of punishment that is by way of *instanter* with a new procedure. Under the new procedure, an alleged contemnor is tried by some court other than the one which accuses him of contempt unless he chooses to be tried before the same judge before whom the alleged contemptuous conduct occurred.

Section 20 (1)⁴⁹⁴ of the Proposed Act provides that the party who can initiate the proceeding is the judge before whom the alleged act occurred. Apart from the

⁴⁹³ It provides:

- (1) No liability or offence arises under this Part in respect of a fair and accurate report of legal proceedings held in public and published in good faith.
- (2) A publication made as or as part of legitimate discussion in good faith of public affairs or other matters of general public interest held in public is not to be treated as contempt if it only incidentally and unintentionally resulted in a serious interference to particular proceedings.
- (3) No liability or offence arises under this Part if the report, publication or distribution is innocent and is undertaken in good faith.

⁴⁹⁴ Section 20 (1) reads:

When it is alleged, or appears to any court that a person has been guilty of criminal contempt committed in its presence, the court shall immediately:

judge, by virtue of the expression ‘when it is alleged’ under this provision, other parties such as the Attorney General or any aggrieved party who are in the court and witnessed the alleged act committed in the presence of the court can move the court to initiate contempt proceedings.

Therefore, when it appears to the court that the alleged contemnor has been guilty of contempt committed in its presence, the court will immediately inform the alleged contemnor, in writing the alleged contemptuous conduct with which he is going to be charged. This notice must contain the actual words or the particulars of the conduct alleged and also the interpretation given to it by the said judge. The judge will then place the charge together with the statement of facts of the case with the Chief Justice for further action. However, at this stage, the alleged contemnor is given a chance to tender an apology. If he apologises to the court and this is accepted, thereby it concludes the complaint. If not, the court will proceed with the trial. A proviso (iii) to Section 20 (1) further provides that the contempt action or hearing taken against the alleged contemnor should not affect the continuance of the main trial or the proceedings.

The Chief Justice upon receiving the charge and statement of facts will immediately appoint another judge to hear and determine the charge.⁴⁹⁵ However, at this juncture, the alleged contemnor may elect to be tried before the same presiding judge before whom the alleged contemptuous act has been committed.

Once the judge has been appointed, a formal notice containing the charge, the date, place and time of hearing should be served to the alleged contemnor personally. The formal notice should also have a clause that informs the alleged

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- (a) cause such person to be informed in writing of the conduct with which he is to be charged which shall include the actual words or the particulars of the conduct alleged to be contemptuous and the interpretation given to it by the Presiding Officer; and
 - (b) place the charge of contempt to be preferred on the person, together with a statement of facts of the case, with the Chief Justice.

Provided that nothing herein shall preclude:

- (i) the person charged with contempt from electing to be tried before the same Presiding Officer;
- (ii) the person charged with contempt from tendering an apology acceptable to the court and thereby concluding the complaint;
- (iii) the continuance of the trial or the proceedings.

⁴⁹⁵ Section 20 (2) of the Proposed Act.

contemnor of his right to file a defence and right to legal representation. After the service of the notice, the appointed judge should immediately convene a hearing.

The hearing is like normal criminal proceedings whereby the alleged contemnor is given every opportunity to make his defence and to tender evidences to support his case.⁴⁹⁶ The court then will determine the charge and make such order for punishment or discharge him. If there is an adjournment pending the pronouncement of the decision, the alleged contemnor should be allowed to be on bail or bond.⁴⁹⁷

This new procedures depart from the summary powers of courts to deal with contempt committed in their presence. The courts can no longer punish *in facie* contempt instantly, no matter how serious the alleged contemptuous act is. Under this the new provision, the alleged contemnor is afforded an opportunity to consult an advocate before he is dealt with.

(iii) Criminal Contempt in General

Section 21⁴⁹⁸ of the Proposed Act provides for criminal contempt proceedings which are not committed in the face of the court. It allows the court and other parties, namely the Attorney General and the aggrieved party, to initiate the proceedings on the matter as the provision uses the expression of ‘when it is alleged’ and ‘upon its own view’.

⁴⁹⁶ The judge before whom the alleged contemptuous act has been committed is not necessarily to be called as a witness as the statement of facts under subsection (1) (b) may be treated as evidence in the case. Section 20 (5) of the Proposed Act.

⁴⁹⁷ See Section 20 (6) of the Proposed Act.

⁴⁹⁸ Section 21 (1) reads:

When it is alleged, or appears to any Court upon its own view, that a person has been guilty of criminal contempt, the court shall immediately:

- (a) cause such person to be informed in writing of the contempt with which he is charged and this shall include the actual words or particulars of the actual conduct alleged to be contemptuous and the interpretation given to it by the Presiding Officer and afford him every opportunity to make his defence to the charge;
- (b) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge and make such order for the punishment or discharge of such person as may be just.

If it is found that a person has committed an alleged contemptuous act, the court has to serve on the alleged contemnor a charge in writing containing the actual words and particulars of the actual conduct of the alleged contemptuous act. Once the charge is served on him, he is allowed every opportunity to make his defence to the charge. The court will fix for the hearing of the matter. After taking all the evidence, the court may either proceed with the hearing or may adjourn the matter to some other date.⁴⁹⁹

Notwithstanding anything contained in subsection (1), Section 21 (2) clearly enables the alleged contemnor to apply to be tried by another judge. The court then has to place a charge with a statement of facts of the case before the Chief Justice for his direction.

(D) Sanctions and Remedies

The Proposed Act tackles the issue of the maximum punishment that can be imposed. By having the maximum punishment set out in a legislation, it is a controlled power and restrictive in nature in contrast to the present scenario in which the power of court in imposing punishment for contempt of court is arbitrary and unlimited power.

Section 25 states that when a person is found guilty of contempt, the court will impose a punishment of imprisonment for a term, not exceeding fourteen days or with fine not exceeding RM 2,000 or with both. Section 25 (2) prevents the court from imposing a sentence in excess of that specified in the Act. Nevertheless, the sentencing will still ultimately depend on the court's assessment of the gravity of the contumacious conduct on a case by case basis. If the court is satisfied that imposition of a fine will not be sufficient punishment to meet the ends of justice and that the contemnor should be imprisoned, the court may order the contemnor to be detained in a Civil Prison⁵⁰⁰ for a period not exceeding fourteen days.

⁴⁹⁹ If it is adjourned and upon preferring the charge, the court may grant the alleged contemnor a right to bail or bond. Section 21 (3) of the Proposed Act.

⁵⁰⁰ Section 3 of the Proposed Act defines civil prison to mean a place for custody of persons segregated at all times from other convicted criminals.

A proviso to Section 25 (1) states that the contemnor may be discharged or the punishment awarded may be remitted if he tenders his apology to the court. It is further stated in this clause that an apology should not be rejected merely on the ground that it is qualified or conditional if the contemnor makes it *bona fide*. The acceptance of apology is a matter of discretion judging from the word ‘may’ in the provision. The acceptance or rejection of the apology tendered is judged from the conduct of the contemnor. If the apology tendered appeared to be sincere and not just to ward off the punishment, it could be accepted by the court. Thus the clause states that apology should be accepted if it is a sincere apology and the contemnor makes it *bona fide* even if it is qualified or conditional. How the court will decide on the sincerity and *bona fide* depends on the facts of the case. For instance, a belated apology may be evidence of lack of *bona fide* as it should be tendered at the earliest possible stage and it should be tendered unreservedly and unconditionally.⁵⁰¹ However, the clause puts a contrary requirement; even if the apology is with condition or qualified, the court should not reject it once it is tendered *bona fide*.

It has to be borne in mind that the acceptance of apology is a matter of discretion. Apology is not a weapon of defence to purge the guilty of the offence, as ‘apology is intended to be real evidence of contriteness’.⁵⁰²

Section 16 (1) of the Proposed Act expresses that committal order or fine can only be ordered when contempt is of a degree of fault or misconduct and as a last resort i.e. when other remedy that is equally effective in law is not available.

(E) Judges

Among the general issues which go to the heart of the law and practice of contempt of court is the respective role of judges. Contempt is the judge’s strongest power to impose sanctions for acts which disrupt the court’s proceeding and acts which interfere with the administration of justice. However, the concern

⁵⁰¹ *Chung Onn* (n. 347).

⁵⁰² *M.Y. Shareef v Honourable Judges of the High Court of Nagpur*, AIR 1955 SC 19, p. 23.

raised by the Bar in relation to this point is the questionable conduct of the judge during the trial, such as his poor behaviour and any of his actions which gives the impression of misusing the contempt power vested in him. The Proposed Act under Part IV, under the heading of ‘Other Forms of Contempt’ suggests that a Presiding Judge is to be subject to contempt law. Under Section 18 (1), a Presiding Officer may be liable for contempt of his own court or of any other court in the same manner as any other individual is liable. Presiding Officers in this context means Judges, Judicial Commissioners, Judicial Officers, Magistrates, Industrial Court President and Industrial Court Chairman.⁵⁰³

Nevertheless the mode of trial provided under Sub-sections (2), (3) and (4) are not clear. Under these provisions, a complainant will file a formal statement of complaint identifying the matter complained of as constituting contempt with the Chief Justice. The Chief Justice, after receiving the complaint needs to immediately constitute a committee of three Judges, who are at least superior in service to the Presiding Judge complained about. The Committee will inquire into, hear and decide the matter. The proceedings suggested under this provision are more like the proceedings laid down in the Code of Ethics. It appears that the courts are not allowed to initiate *suo motu* proceedings for criminal contempt against any judges complained of misbehaved. Instead it is handled by the ‘Ethics Committee’. This position is slightly different from India even though the idea of introducing this provision was inspired by them. In India, courts initiate *suo motu* proceedings for contempt against any judicial officers alleged of contempt.⁵⁰⁴

(F) Others – Limitation Period and Appeal

Section 23 of the Proposed Act sets the limitation within which proceedings for contempt have to be initiated. This provision introduces a period of limitation. The contempt proceedings by their very nature should be initiated and dealt with as early as possible. It is necessary and desirable that the period of limitation should be specified in respect of actions for contempt. Therefore, it has been laid down in

⁵⁰³ Section 3 of the Proposed Act.

⁵⁰⁴ *Sikander Khan v Ashok Kumar Mathur*, 1991 (3) SLR 236; *Sub-Committee on Judicial Accountability v Justice V. Ramaswami*, 1995 (1) SCC 5 as discussed in Pal (n. 23) pp. 450-451.

Section 23 that the proceedings have to be initiated within six weeks from the date on which the contempt is alleged. If not, it will be barred. For the purpose of computation of the period of six weeks in Section 23, it is suggested that time begins to run from the point at which the contempt is alleged to have been committed, for instance, from the date of the act which is alleged to defeat the order of the court.

Another important feature created under Part VI of the Proposed Act is the right of appeal in all contempt cases. Section 22 (1) provides that an appeal shall lie from any order or decision of a court in the exercise of its jurisdiction to punish for contempt whilst subsection (2) states the courts to which appeals lie as well as the courts from which such appeals lie. Therefore, an appeal will lie:

- (i) to the High Court from an order or decision of any Industrial Court, Magistrates Court or Sessions Courts.
- (ii) to the Court of Appeal from an order or decision of the High Court whether pursuant to subsection (2) (a) or otherwise.
- (iii) to the Federal Court from an order or decision of the Court of Appeal whether pursuant to sub-section (2) (b) or otherwise.

An application for appeal is to be filed within thirty days from the date of the order appealed against.⁵⁰⁵

An appeal shall lie in any case as of right at the instance of the contemnor or in the case of an application for committal or fine, at the instance of the applicant.⁵⁰⁶

This means that Section 22 (2) deals with the question of *locus standi* i.e. the person at whose instance an appeal will lie. Therefore, the person who has been proceeded against for contempt as well as who causes the initiation of the proceedings for contempt can file an appeal under Section 22 (1) of the Proposed Act.

Section 22 (4) lays down the power of the appellate court during the matter is pending appeal. Sub-clause (a) confers power to the appellate court to suspend the execution of the punishment or order appealed from. Sub-clause (b) confers power

⁵⁰⁵ Section 22 (6) of the Proposed Act.

⁵⁰⁶ Section 22 (2) of the Proposed Act.

on the court to release the appellant on bail if he is in custody. As laid down under sub-clause (c) the court has been conferred a discretion to hear the appeal despite the fact that the alleged contemnor has not purged the contempt that is the contumacious act or conduct is still continuing.

Hence, on appeal, the court to which the appeal is brought may reverse or vary the order or decisions made by the court below and make such other order that may be just.⁵⁰⁷

4.2.2 The Response to the Bar Council's Proposal

In the heat of the Anwar Ibrahim's trial that led to the finding of contempt against Zainur and other contempt cases where courts seem very keen in exercising the contempt power, pressure had been exerted towards placing the law of contempt of court on a statutory footing by the Malaysian Bar in particular.⁵⁰⁸ The proposal by the Bar received mixed responses from the authorities.

The judiciary also responded to the Bar Council's proposal. The then Chief Justice, Tun Eusoff Chin, conveyed the message that it is needless to codify contempt laws.⁵⁰⁹ He said that the current position was satisfactory.

As reported in Malaysian newspapers,⁵¹⁰ Datuk Seri Rais Yatim, the then Minister handling the portfolios of law and justice, expressed that he was in favour of enacting a Contempt of Court Act as the current position is far from satisfactory due to uncertainties. In addition, far too many issues had arisen over the use of such powers which are based on the common law. His Deputy commented that the Government and the Attorney General will take the necessary action on the proposal submitted by the Bar Council. Although he was positive about the idea of

⁵⁰⁷ Section 22 (3) of the Proposed Act.

⁵⁰⁸ 'The 53rd AGM of the Malaysian Bar held at the Crown Princess Hotel, Kuala Lumpur' (1999) <http://www.malaysianbar.org.my/malaysian_bars_resolutions/the_53rd_AGM_of_the_malaysian_bar_held_at_the_crown_princess_hotel_kuala_lumpur_saturday_20_march_1999.html> accessed July 2007.

⁵⁰⁹ 'Eusoff: No Need to Codify Contempt Law' *The Star* (25 September 2000).

⁵¹⁰ 'Rais is for Enacting Contempt Law' *New Sunday Times* (24 September 2000); 'Akta Khusus Hina Mahkamah Dikaji (The Specific Act for Contempt of Court is under Deliberation)' *Utusan Malaysia* (10 October 1999).

legislating the law of contempt, he had reservations on the proposal of citation of contempt against the presiding officers. He views that judges enjoy immunity and they are bound by the Code of Ethics when ethical matters are concerned.

The then Prime Minister, Datuk Seri Dr. Mahathir Mohamad, when asked about the update on the matter said that the proposal by the Bar was under deliberation.⁵¹¹ However, to date there is no Bill tabled in Parliament and the government kept silent on this as no explanation was tendered whatsoever.

In 2005, Abdul Malik Ishak J. raised the same concern as the Bar's. He pointed out that there are many areas of contempt of court still unchartered, thus a specific statute which spells out the details of the law is needed.⁵¹²

Ten years have lapsed since the Memorandum was served on the government and there is no positive action on the part of the government. At the same time, it also raises a grave concern on the part of the Bar for not taking pro-active moves in pressing their case.

There are two main arguments for the Bar' inactivity. Firstly, the Bar's approach to contempt matter is rather reactive than pro-active. Much discussion on contempt of court began after the incidence of the removal of Salleh Abbas that led to the citation of contempt against the Secretary to the Bar Council, Manjeet Singh Dhillon. Subsequently, the Malaysian Bar reacted to this by passing a motion of no confidence on the Acting Lord President and a resolution in the EGM to commit him to prison for contempt of court, where it is alleged that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia.⁵¹³ At that juncture, the Bar had not come out with the idea and reform proposal. Only after Zainur Zakaria was sentenced to three months imprisonment for contempt of court in 1999 during Anwar Ibrahim's trial, the Bar proposed to legislate the law of contempt of court.

⁵¹¹ 'Contempt Act: Government Considering a Law based on Bar Council Proposal' *The Star Online* (10 October 1999).

⁵¹² *Samy Vellu* (n. 189).

⁵¹³ *Abdul Hamid bin Omar* (n. 17).

From this scenario, it is noted that the Bar took action when there were high profile cases involving the VVIPs and the cases received a lot of coverage from the main stream media.⁵¹⁴ This is supported with the recent case of Matthias Chang, the ex-political secretary to former Prime Minister Tun Dr. Mahathir Mohamad, who was cited for contempt in the face of the court.⁵¹⁵ This case has 'reopened' the discussion on the need for a written law of contempt of court.⁵¹⁶

Furthermore, the number of reported cases of contempt from 1980 to 2009 in Table 4.1 below shows no significant increase in the number of contempt cases. They are relatively stable except from the year 1998 to 2003. Looking at this, it is noted that the Bar perceives contempt matters as less urgent after 2001.

In 2001, it has been reported that the Office Bearers and the Executive Director on behalf of the Bar Council, paid a courtesy call to the Chief Justice, the Chief Judge of Malaya and the Chief Registrar on 16 January 2001. Amongst the matters raised was the possibility of expediting the enforcement of the proposed Contempt of Court Act to define contempt so that judges do not exercise their discretion liberally.⁵¹⁷ Consequently, on 27 June 2001, the Federal Court allowed the appeal of Zainur against contempt of court and quashed his three-month jail sentence. The Federal Court was of the opinion that the High Court had not followed the proper procedure in finding Zainur guilty of contempt and imposing the subsequent custodial sentence. The conduct of the hearing and the use of summary procedures had deprived Zainur of the opportunity of answering the charge against him. The Bar welcomed the finding in this case.⁵¹⁸

⁵¹⁴ Salleh Abbas was a Lord President and Anwar Ibrahim was a Deputy Prime Minister before they were removed from their office.

⁵¹⁵ See Chapter 3, 3.1.2.2 (ii) (a), pp. 65-66.

⁵¹⁶ Anis Ibrahim, 'Chang Case Highlights Need for Contempt Law' *New Straits Times* (19 April 2010); Faruqi, 'Justice not a Cloistered Virtue' (n. 255); Sen and Lee, (n. 247).

⁵¹⁷ See under the heading of Follow-up Action for Motion 2 in , 'The 53rd AGM of the Malaysian Bar held at the Crown Princess Hotel, Kuala Lumpur' >accessed July 2007.

⁵¹⁸ <http://www.malaysianbar.org.my/malaysian_bars_news/> accessed March 2007.

Table 4.1

Contempt Cases Reported in the Malayan Law Journal
(From 1980 to 2009)

Year	No. of Cases
2009	10
2008	6
2007	8
2006	9
2005	7
2004	7
2003	12
2002	12
2001	18
2000	9
1999	15
1998	12
1997	8
1996	8
1995	10
1994	5
1993	10
1992	3
1991	9
1990	8
1989	9
1988	6
1987	6
1986	7
1985	5
1984	1
1983	4
1982	3
1981	4
1980	2

Secondly, the Bar Council holds office for one year subject to the right of re-election. Thus, the change of the President and the Office Bearers could relate to the first point discussed above. It is argued that there could be no continuation in the agenda, as different Presidents have different ideas, interests and priorities.

4.3 POTENTIAL FOUNDATION FOR REFORM

4.3.1 Contempt of Court and a Chilling-Effect on Freedom of Speech under the Malaysian Domestic Human Rights Context

The freedom of speech and expression bestowed under the Constitution and the independence of the judiciary are the two essential and important constituents of democracy in Malaysia. Reconciling these two competing public interests and maintaining a balance, presents a challenge to any democratic set-up. The Malaysian Court affirmed that reconciliation of these two principles involves the difficulty in deciding cases of contempt of court.⁵¹⁹ In fact, the Bar pointed out that there is a significant tension between freedom of speech and expression and the administration of justice because of the high public interest in maintaining and protecting both principles. The Malaysian law of contempt of court has resulted in a ‘chilling’ of the freedom of speech and expression on matters of public interest.⁵²⁰

The chilling-effect on the freedom of speech is evident by the approaches taken by the courts in justifying contempt sanctions on the ground of protection of greater interests, namely the due administration of justice. For instance, in determining whether comment or criticism amounts to contempt, the court needs to test whether the comment or criticism is within the limit of free speech i.e. within the limit of reasonable courtesy and good faith. The courts were often invited to refer to foreign law as well as international human rights law in interpreting Article 10 of the Constitution in order to determine whether the comment or criticism is within the limit of free speech. However, the courts were reluctant on the basis that the courts should not ‘lose sight of local conditions’.⁵²¹ Hence, in this context, the court opts for the ‘four walls’ doctrine as a governing principle of constitutional interpretation.⁵²² This approach limits the courts in citing,

⁵¹⁹ *Lim Kit Siang* (n. 291) p. 385.

⁵²⁰ *Murray Hiebert* (CA) (n. 267).

⁵²¹ *Manjeet Singh Dhillon* (n. 8).

⁵²² *Government of State of Kelantan* (n. 24).

evaluating and applying foreign decisions and international human rights law in adjudicating civil liberties.

Nevertheless the doctrine does not require an exclusive reliance on domestic legal sources. Rather, it should be permissible for the Malaysian courts to widen the horizon by looking at other constitutions or foreign materials in order to learn from their experiences and to refer to them as inspiration for development in domestic law.

The status of human rights law in Malaysia has been discussed briefly in Chapter 2. The discussion in this part undertakes to examine the status of international law within the Malaysian domestic legal order, given the rejection of the Malaysian courts in applying international human rights law in interpreting its human rights provision. It will be argued that in being confined to the ‘four walls’ doctrine, Malaysian human rights law, particularly the right to freedom of speech, is far below the standard set internationally. One of the reasons is due to Malaysia’s limited involvement in human rights regimes.⁵²³ Malaysia has not incorporated the UDHR in its law nor ratified the ICCPR. Although sources of human rights law such as the UDHR and the ICCPR are not part of Malaysian law, resort may legitimately be had to such law to help the courts to resolve the uncertainty in domestic law. As discussed in Chapter 2, international law, in particular international human rights law, can be incorporated into the domestic law through the judiciary.⁵²⁴

4.3.1.1 Malaysian Courts’ Attitude towards International Case Law and International Human Rights Instruments

The Malaysian constitution, which was based on the Indian model, contained a formulated statement of fundamental rights placed under Part II under the heading of ‘Fundamental Liberties’. The right to freedom of speech is guaranteed under Article 10 of the Constitution. It is interesting to note that the Reid Commission, while preparing the Constitution in 1956, had not made any reference to the

⁵²³ Supra, n. 161.

⁵²⁴ Supra, n. 158.

international documents such as the UDHR, given the fact the UDHR was adopted by the UN General Assembly in 1948. This justifies the reluctance of the courts in citing international human rights law principle when interpreting Article 10 of the Constitution.

The balancing of free speech against competing interests such as protecting the independence of judiciary is an area in which comparative analysis is very much helpful. However, in Malaysia foreign decisions have thus far not been persuasive in the area of free speech and contempt of court. Although the courts do engage with foreign decisions as seen in *Manjeet Singh Dhillon*,⁵²⁵ instead of adopting their reasoning the courts reject them based on the ‘local condition’ argument.

The Supreme Court in *Manjeet Singh Dhillon* considered case law from the USA, Canada, Pakistan and India. The Court, while noting the Indian Constitution, noted that the preservation of common law under Article 19 of the Indian Constitution made Indian decisions ‘persuasive authority’ in Malaysia. However, the American decisions were rejected because the First Amendment of the USA Constitution was couched absolutely and ‘guarantees freedom of speech to the extent that it cannot be even restricted by legislation’. The American test of liability permits more extensive criticism of judges but this test was rejected by the Malaysian court.

Furthermore, whereas *R v Gray*,⁵²⁶ an English decision decided in 1900 was considered useful, the Supreme Court did not treat as authority a Canadian case of *R v Kopyto*⁵²⁷ because it was decided after the Canadian Charter of Rights and Freedoms came into force in 1982. In *Kopyto*, free speech was accorded greater weight in recognition of their constitutionalised status. The Supreme Court rejected *Kopyto* because ‘[T]his reasoning will not apply here in view of Article 10 (2) of the Constitution and Section 3 of the Civil Law Act 1956’. Thio Li-Ann commented that the approach taken by the court was somewhat ‘disconcerting as *Kopyto* represents an attempt to calibrate upwards the value of constitutional

⁵²⁵ *Manjeet Singh Dhillon* (n.8).

⁵²⁶ *R v Gray* (n. 183).

⁵²⁷ *Kopyto* (n. 300).

guarantees of free speech and to recognise the important role free speech plays in promoting democratic debate'.⁵²⁸ Thio further adds that the Malaysian courts assume that the common law offence of scandalising is consistent with free speech guarantee, ignoring the fact that this offence was formulated for immature and uneducated societies, which were phased out in England. Thio quotes *McLeod v St Aubyn*⁵²⁹ where the Privy Council observed that this offence should be retained in 'small colonies, consisting principally of coloured populations' as it may be 'absolutely necessary to preserve in such a community the dignity of and respect for the Court'.⁵³⁰

The Supreme Court in *Manjeet Singh Dhillon*, nevertheless took a view that scandalising the court was still an offence punishable in New Zealand, a country with a common law background. The Court perceived that there was no need to constitutionalise the Malaysian law of contempt because Malaysian 'social conditions' were 'very different from those in England and more alike those in Asian countries within the Commonwealth such as India'.⁵³¹

However, the Court did not elaborate further and concluded that the offence should be continuing until the legislature 'make such power obsolete'.⁵³² The rejection of the American and Canadian approaches which are more protective of free speech and display judicial confidence in being able to withstand criticism suggests that Malaysians were undiscerning and that judicial reputation rests on fragile foundations.

The standard protection of freedom of speech in Malaysia is below the standard guaranteed under the international human rights law i.e. the UDHR and the ICCPR, although HRCA 1999 was passed with a view of promoting human rights in Malaysia. Section 4 (4) HRCA which states *inter alia* that the UDHR should be regarded in matters of human rights as long as it is consistent with the

⁵²⁸ Thio Li-Ann, 'Beyond the "Four Walls" in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore' (2006) 19 Columbia Journal of Asian Law 428.

⁵²⁹ [1899] AC 549.

⁵³⁰ *Ibid.* p. 467.

⁵³¹ *Manjeet Singh Dhillon* (n. 8) p. 180.

⁵³² Thio Li-Ann (n. 528) p. 210.

Constitution. By reading this provision on face value, it can be said that HRCA introduces into domestic law the provisions of the UDHR while redefining fundamental liberties under Part II of the Federal Constitution as ‘human rights’. The UDHR at its inception was not meant to be legally binding. Nevertheless its non-binding statement of aspirations with moral authority was designed to provide a ‘common standard of achievement for all peoples and all nations’.⁵³³ Even though it is a non-binding international human rights bill, the UDHR is acknowledged today as the legitimate aid to the interpretation of the expression ‘human rights and fundamental freedom’ in the Charter of the United Nations as well as in most of other countries’ Constitutions.⁵³⁴

In Malaysia, the introduction of Section 4 (4) HRCA leaves questions of the application and the status of UDHR in Malaysia- what if a provision of the UDHR is in conflict with the Constitution, and will the UDHR to be ignored? Where some particular matter covered by the UDHR was not specifically dealt with in the Constitution, should the provisions of the UDHR be given its full scope?⁵³⁵ In *Mohamad Ezam*⁵³⁶ the Federal Court was invited to determine the extent and scope of Article 5 (3)⁵³⁷ of the Constitution with regard to the international standard under the UDHR.⁵³⁸ The appellant argued that the international standards would be of persuasive value and assistance when defining the scope of Article 5 (3) of the Constitution. He also argued that the approach taken by the international communities and reliance on UN documents on the subject of legal representation has already received statutory recognition in Malaysia by the passing of the Internal Security Act (ISA).⁵³⁹ This argument was rebutted by the respondent’s counsel by stating that reference to international standards set by the UDHR and

⁵³³ See the Preamble of the UDHR. For more details, see Nihal Jayawickrama, *The Judicial Application of Human Rights Law National, Regional and International Jurisprudence* (Cambridge University Press, Cambridge 2002) p. 25.

⁵³⁴ Several national constitutions such as Cameroon and Senegal were enacted after the UDHR. *Ibid.* p. 39.

⁵³⁵ Lobo, (n.172).

⁵³⁶ *Mohammad Ezam* (n. 25).

⁵³⁷ The provision states that where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

⁵³⁸ Two documents adopted by the UN General Assembly in 1977 and 1988 as forming part of the international standard relating to the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment were referred by the Appellant counsel.

⁵³⁹ *Mohamad Ezam* (n. 25) p. 384.

several other UN documents on the said issue cannot be accepted as such documents are not legally binding on the Malaysian courts.⁵⁴⁰

The Federal Court in this context had to determine the impact of the UDHR by virtue of Section 4 (4) HRCA on the domestic law. The Court ruled that the position of the UDHR is not changed. It is a non-legally binding instrument which is only declaratory in nature and does not have the force of law or binding on member states. The Court further said that the UDHR is a resolution of the General Assembly of the UN and not a convention subject to the usual ratification and accession requirements for treaties. In the opinion of the Court, if the UDHR was intended to be more than declaratory principles, the UN could have embodied them in a convention or a treaty which Member States can ratify and accede to. Only then will those principles have the force of law. In the case at point, the Federal Court ruled that since the written law⁵⁴¹ provides the rules for the subject matter, there is no necessity to resort to the international rules.

Siti Norma Yaakob FCJ construed the words 'regard shall be had' to the international standards contained in the UDHR in Section 4 (4) HRCA as merely being 'an invitation to look at the 1948 Declaration if one was disposed to do so and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration'.⁵⁴² This restrictive reading was supported further by the qualifying statutory provision that the UDHR should be considered 'subject to the extent it was not inconsistent with the Constitution'.⁵⁴³

⁵⁴⁰ The submission relied on *Merdeka University Berhad v Government of Malaysia* [1981] 1 CLJ 175 where the declaration was described as a non legal binding instrument as some of its provisions depart from existing and generally accepted rules.

⁵⁴¹ The ISA 1960 is a preventive detention law in force in Malaysia. Section 73 of the ISA states a police officer may, without warrant, arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention and that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof. The Federal Court in *Mohamad Ezam* ruled that it is common ground that the appellants were denied communication with their solicitors and family members during the whole period of their initial detention under s 73(1) ISA.

⁵⁴² *Mohamad Ezam* (n. 25) p. 514.

⁵⁴³ *Ibid.*

The Malaysian courts have demonstrated a dismissive attitude towards transnational sources on the basis of sufficiency of domestic law and sources to resolve the problem at hand without examining foreign sources in any significant detail. This is evident in *Mohamad Ezam* as well as *Merdeka University*⁵⁴⁴ whereby the Court in ignoring the UDHR declared ‘...in any event the pertinent provisions for consideration are those contained in our municipal legislation’.⁵⁴⁵ The judges considered international standards superfluous because in their view, such international standards were of limited persuasive value and assistance as Malaysian laws are sufficient to deal with the matter.⁵⁴⁶

Adherence to the ‘four walls’ of the constitutional text suggests a lack of receptivity towards foreign law or international law. Indeed, arguments based on the UDHR have been hastily dismissed. This is also observed by Shamrahayu A. Aziz in her examination of the application of International Human Rights Instruments i.e. the UDHR in the context of freedom of religion.⁵⁴⁷ According to her, the objectives of the UDHR do not create ‘hard law’ obligations on the Malaysian judiciary to adopt the International Instruments in interpreting the provisions on fundamental liberties. The status of the UDHR is a mere declaration. She argues that to apply international instruments such as the UDHR in defining the right to freedom of religion in Malaysia has no strong basis, as the documents are not binding on Malaysia. She explains that for the International Human Rights Instruments to be legally enforced in Malaysia it is depending upon legislative implementation. The Constitution does not impose a duty on the national court to take cognisance of the International Human Rights Instruments in any of its provisions.⁵⁴⁸ She highlights that the international laws on human rights are not law of the country and the Malaysian judiciary should not assume the parliament’s power to make law.⁵⁴⁹ For the international law and instruments to have legal force in Malaysia, they have to be ratified, transformed or incorporated in a statute or an Act of Parliament.

⁵⁴⁴ *Merdeka University Berhad* (n. 540).

⁵⁴⁵ *Ibid*, p.366.

⁵⁴⁶ *Mohamad Ezam* (n. 25) p. 513.

⁵⁴⁷ Shamrahayu A. Aziz, 'Apostasy and Religious Freedom: A Response to Thio Li-Ann' (2007) 2 *Malayan Law Journal* i.

⁵⁴⁸ Abdul Ghafur Hamid (n. 153) p. 67.

⁵⁴⁹ See Aziz, 'Apostasy and Religious Freedom: A Response to Thio Li-Ann' (n. 547).

The point highlighted by Shamrahayu A. Aziz is that for the international human rights instruments to have a legal force in Malaysia, they have to be ratified and the Parliament have to transformed them in a statute, is taken. Article 74(1) of the Constitution allows Parliament to make laws with respect to any matters enumerated in the 'Federal List' or the 'Concurrent List'. The Federal List in the Ninth Schedule includes:

1. External Affairs, including-
 - (a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;
 - (b) Implementation of treaties, agreements and convention with other countries...

From the wording of Article 74, read together with the Federal List, it is concluded that Parliament has the exclusive power to make laws relating to external affairs and that it has power to implement international treaties and make them operative domestically. Furthermore, Article 39 of the Constitution, in respect of the power of the executive, provides that the executive authority is vested in the King and exercisable by him or by the Cabinet or any Minister authorised by the Cabinet. Article 80 (1) of the Constitution extends the executive authority to all matters with respect to which Parliament may make law.⁵⁵⁰ Therefore, in terms of external affairs, the executive authority extends to the making or conclusion of the treaty, agreement and convention. It can be concluded that the ratification, the making of the conclusion of treaties or conventions and treaty-making are vested in the executive authority of the Federation.⁵⁵¹

Freedom of speech and expression are specially promoted in international instruments on human rights. Its application in the context of free speech, however, as pointed out by Shamrahayu A. Aziz, lies at the core of the country's own social and moral values. She refers to *Otto-Preminger-Institut v Austria*⁵⁵² where the ECtHR decided that it was up to the individual states to adopt and to apply any limitations to freedom of expression on the grounds legitimately

⁵⁵⁰ See Harding, *Law, Government and the Constitution in Malaysia* (n. 39) p. 107.

⁵⁵¹ See Abdul Ghafur Hamid, 'Treaty-Making Power in Federal States with Special reference to the Malaysian Position' (2003) 30 *Journal of Malaysian and Comparative Law* 65, pp. 65-88.

⁵⁵² (1995) 19 EHRR 13470/87.

prescribed by the ECHR. She concludes that the decision implies that the individual states may interpret the rights under the international documents according to the strategies to achieve basic human rights in their communities.

Nevertheless, it is argued that Shamrahayu A. Aziz's argument lingers around the area of freedom of speech and freedom of religion, and also the issue of moral considerations as one of the variables affecting the margin of appreciation.⁵⁵³ The ECtHR in *Otto-Preminger-Institut v Austria* allowed national authorities a wider margin of appreciation in matters involving the assessment of morals. This is due to the fact that there is no uniform notion of morality as the standard requirements of morals vary from one country to another. The national authorities should have a wide margin of appreciation in assessing what was necessary to protect religious feeling. However, the ECtHR has taken a different stance in relatively recent case of *Vereinigung Bildender Künstler v Austria*,⁵⁵⁴ disfavoured a broad margin of appreciation. The close scrutiny of the merits of the case led to the conclusion that the injunction prohibiting the applicant from exhibiting and publishing the painting was disproportionate to the aim pursued i.e. 'protection of the rights of others' and therefore not necessary in a democratic society.⁵⁵⁵ Furthermore, in the context of freedom of speech and contempt of court, the ECtHR has to draw a reasonable balance between the interests of freedom of expression and the protection of judicial authority. In doing so, the ECtHR considers that, in contrast

⁵⁵³ The term 'margin of appreciation' is used to indicate the measure of discretion allowed the Member States in the manner in which they implement the ECHR's standards, taking into account their own particular national circumstances and conditions. The 'margin of appreciation' needs to be 'balanced up' with the 'principle of proportionality', which is conceived to restrain the power of State authorities to interfere with the rights of individual persons. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Hart Publishing, Oxford 2002) pp. 1-2.

⁵⁵⁴ (2008) 47 E.H.R.R. 5. In this case, Mr. Meischberger brought proceedings against the applicant, seeking an injunction prohibiting the exhibition and publication of the painting. The painting showed a collage of various public figures, including Mr. Meischberger, naked and involved in sexual activities. The Austrian Court of Appeal issued an injunction against the applicant. The applicant brought the case to the ECtHR, after their appeal at national level was unsuccessful, claiming that the decisions forbidding it to continue exhibiting the painting had violated its right to freedom of speech under Article 10 of the ECHR. See also *Giniewski v France* (2007) 45 E.H.R.R. 23.

⁵⁵⁵ The painting was a satire, a form of artistic expression aimed to provoke and agitate. The painting had represented a caricature of the persons concerned but not reflects reality. It had not addressed details of Mr. Meischberger's private life but rather his public standing as a politician. Moreover, he had been one of the less well-known people in the painting and has retired from politics. Apart from this, the injunction had not been limited in time and space, thus preventing the applicant from displaying the painting in any future exhibition.

to morals, the notion of judicial authority is more objective and capable of uniform standard, thus disfavouring a broad margin of appreciation. The scope of the margin is further circumscribed by freedom of press. The interference with the freedom of expression by curbing media freedom to comment and publish on a matter of public concern, must answer to a pressing social need. It is established that if the interference strongly affected a particular trial, the margin of appreciation doctrine may not have an important role, and the interference may be found justified.⁵⁵⁶ Therefore, it is noted that, in the area of freedom of speech and contempt of court, in the context of the ECHR, the national authorities are not given a wider margin of appreciation to determine this right according to the strategies to achieve basic human rights in their communities.

In Malaysia the protection of freedom of speech and expression remains bleak in reality.⁵⁵⁷ There is a need to strive to be on par with the other countries especially in the age of globalisation. The international law on human rights is becoming increasingly relevant, especially in avoiding the recurring violation of fundamental liberties.

In general, for an international treaty or covenant to have its effect in Malaysia, it needs ratification, as treaties and conventions do not automatically become part of the law of Malaysia. To implement a treaty or convention in Malaysia, Parliament has to pass legislation implementing that treaty or convention. For example, Malaysia ratified the Convention on the Rights of the Child and it is implemented in Malaysia by the enactment of Child Act 2001.⁵⁵⁸ Therefore, any person who claims that his rights under the Convention have been violated may invoke the Malaysian courts the relevant provision in the Child Act 2001. That shows the application of a treaty-based norm which is based on a dualist approach whereby the reception of international treaty is not automatic but by a passing on an Act of

⁵⁵⁶ See *Sunday Times v UK* Series A No. 30, (1979) 2 EHRR 245; *Worm v Austria* (1997) 25 EHRR 557; *News Verlags GmbH & CoKG v Austria* (2001) 31 EHRR 8.

⁵⁵⁷ The right to expression and publication remained under strain in Malaysia as the Sedition Act 1948 and contempt threats were used to charge politician, editors and journalists. See 'Annual Human Rights Report 2000' (Human Rights in Asia, The Asian forum for Human Rights and Development (FORUM-ASIA), Bangkok 2001); 'World Report 2009' (Human Rights Watch, 2009) available at: <http://www.hrw.org/world-report-2009>.

⁵⁵⁸ See Chapter 2, 2.3.1, pp. 47.

Parliament. That is also the argument forwarded by Shamrahayu A. Aziz on the application of international human rights law in Malaysia. However, this raises a question relating to the Malaysian courts' duty in interpretation of law. Can the free speech provisions of the UDHR and the ICCPR be enforced through the courts taking into consideration that these two international instruments have no binding effect in Malaysia? The courts should shift in their judicial approach of relying on 'four walls' doctrine to a pragmatic approach and the sophisticated handling of international law in the domestic courts. The argument is that international norms which are customary norms and non-binding standards may serve the Malaysian courts as one of the analogies in interpreting the Constitution and relevant provision of free speech.

4.3.1.2 International Free Speech Norms: the UDHR and the ICCPR

The aim of international human rights is to afford legal protection to every human being. This is to affirm that all individuals have rights which should not be denied by society or State. Pursuant to a mandate in the UN Charter, the UN Economic and Social Council created the Commission on Human Rights in 1946 which then proceeded to introduce the UDHR two years later. As mentioned earlier, the UDHR is a document containing principles that many scholars now consider as customary international law.⁵⁵⁹ It contains thirty articles and the right to freedom of expression is enshrined in Article 19 as follows:

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

The UDHR, while not a treaty itself, is not formally legally binding.⁵⁶⁰ As the UDHR does not contain any enforcement or interpretive mechanisms and it is not sufficiently specific to bind nations, the UN Human Rights Commission created the ICCPR. The ICCPR is a comprehensive accord embodying in more detail

⁵⁵⁹ Jayawickrama (n. 533); Abdul Ghafur Hamid, *Public International Law. A Practical Approach*. (n. 153).

⁵⁶⁰ A. Cassese, *International Law* (2nd edn Oxford University Press, 2005) p. 381.

many rights enumerated in the UDHR. The ICCPR took effect in 1976, ten years following its adoption in 1966.⁵⁶¹

Under Article 19 ICCPR, individuals have the right to hold and express opinions of all kind. The provision states:

- (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 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.

The right to freedom of expression is not absolute as it may be restricted. However, any limitation must remain within strictly defined parameters. The permissible restrictions on freedom of speech are expressed in Article 19 (3) ICCPR:

The exercise of the rights provided for in paragraph 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 of public order (ordre public), or of public health or morals.

Under the ICCPR, restrictions must meet a strict three-part test as laid down in *Mukong v Cameroon*.⁵⁶² First, the interference must be provided for by law. This requirement will be fulfilled only when the law is accessible and formulated with sufficient precision to enable the citizen to regulate his conduct. Second, the interference must pursue one of the legitimate aims listed in Article 19 (3). Third, the restrictions must be necessary for the restriction, to secure one of those aims. Thus, the crux of the issue is whether the restrictions are ‘necessary in a democratic society’.

⁵⁶¹ For more, see Abdul Ghafur Hamid, *Public International Law. A Practical Approach* (n. 153) p.346.

⁵⁶² *Mukong v. Cameroon*, Communication No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994, available at: <http://www.unhcr.org/refworld/docid/4ae9acc1d.html>.

Mukong was a journalist and also a long-time opponent of the one-party system in Cameroon. He had publicly advocated the introduction of multi-party democracy and worked towards establishing a new political party in Cameroon. He wrote several books but unfortunately, as he contended, these never reached the public as they were either banned or prohibited from circulation.⁵⁶³ He brought his case to the Human Rights Committee⁵⁶⁴ as he claimed to be a victim of violations by Cameroon of, among others, Article 19 ICCPR.

As to the issue of freedom of expression, Mukong claimed a violation of his right to freedom of expression and opinion as he was persecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the State party's government. The State contended that the restrictions imposed were justified under Article 19 (3) ICCPR on grounds of national security and/or public order. The State argued that Mukong's right to this freedom was exercised without regard to the country's political scenario which was in the midst of struggling for unity. In considering this issue, the Committee laid down the three-part test. The Committee was satisfied with the State's justifications, which had fulfilled the first two conditions. However, the Committee had to consider whether the measures taken against Mukong were necessary for the safeguarding of national security and/or public order. The Committee found that it was not necessary for the State to arrest and detain him in order to safeguard an alleged vulnerable state of national unity. Safeguarding and strengthening national unity under difficult political situations cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democracy tenets and human rights.⁵⁶⁵ The Committee concluded that there had been a violation of Article 19 ICCPR.

Although many nations have ratified the ICCPR, some have not enforced it. Many countries have also failed to sign the First Optional Protocol to the ICCPR which provides an international complaint process for individuals who have exhausted

⁵⁶³ There are other facts beyond this point as he was then arrested and detained in custody after he gave an interview to the BBC condemning the President of Cameroon and the Government. He claimed that he was subjected to cruel and inhuman treatment.

⁵⁶⁴ The Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by its State parties. See <<http://www2.ohchr.org/english/bodies/hrc/>> accessed November 2009.

⁵⁶⁵ *Mukong v. Cameroon* (n. 562).

domestic remedies.⁵⁶⁶ When a state ratifies or accedes to the ICCPR, it undertakes three domestic obligations and at least one international obligation⁵⁶⁷ – to respect and to ensure the recognised rights,⁵⁶⁸ to give effect to the recognised rights,⁵⁶⁹ to provide an effective remedy⁵⁷⁰ and to report periodically to the Human Rights Committee.⁵⁷¹

Parallel to international development, there also developed a body of regional human rights law,⁵⁷² for example the ECHR, a regional treaty to protect human rights and fundamental liberties in Europe. It was drafted in 1950 and entered into force on 3 September 1953. All Council of Europe Member States are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.⁵⁷³ The ECHR established the ECtHR. This allows any victim of the violation of human rights under the ECHR by a Member State to bring his case to the ECtHR.

The ECHR protects the right to freedom of expression as provided under Article 10:

- (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 authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

⁵⁶⁶ The First Optional Protocol enables a state to recognise the competences of the Human Rights Committee to receive and consider communications from individuals after all remedies at domestic courts have been exhausted. Jayawickrama (n. 533) p.53.

⁵⁶⁷ Ibid. p.46.

⁵⁶⁸ The state complies with this obligation by not violating them.

⁵⁶⁹ To take necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such legislative or other measures as may be necessary to give effect to these rights and freedoms.

⁵⁷⁰ To ensure that any person whose rights or freedoms are violated be provided with an effective remedy.

⁵⁷¹ In addition to its domestic obligation, a state party to the ICCPR is required to submit to the Secretary General of the UN periodic reports on the measures adopted to give effects to the recognised rights and the progress made on the enjoyment of those rights. These reports are examined by the Human Rights Committee.

⁵⁷² The ECHR, American Convention on Human Rights, African Charter on Human and Peoples' Rights.

⁵⁷³ Article 64 ECHR provides that the State, when signing the Convention or when depositing its instrument for ratification, may make reservation in respect of any particular provision of the Convention to the extent to the extent that any law then in force in its territory is not in conformity with the provision.

- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, 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.

The right to freedom of expression is however subject to certain restrictions as provided for under Article 10 (2). Contempt of court was one of the restrictions of freedom of expression. However in *Kyprianou v Cyprus*,⁵⁷⁴ the Grand Chamber has to determine whether the citation of contempt of court against the appellant had deprived him from his right to freedom of expression.

The Court applied the three-part test in determining whether Mr. Kyprianou's right to freedom of speech under Article 10 ECHR had been violated after he was cited for contempt of court and a five-day imprisonment term was imposed on him.⁵⁷⁵ The Court has to determine whether the conviction by the national court amounts to interference and whether the interference was justified. First, the Court has to determine whether the conviction and sentence were 'prescribed by law'. Secondly, whether the interference pursued the legitimate aim of maintaining the 'authority of the judiciary'. Thirdly, the Court has to determine whether the interference with the applicant's freedom of expression was 'necessary in a democratic society'.

The Court agreed that the conviction and sentence were prescribed by law under Sections 44 (1) and (2) of the Courts of Justice Law 1960 and Article 162 of the

⁵⁷⁴ 15 December 2005, (Application No. 72797/01). Cyprus became a member of the Council of Europe on 24 May 1961 and ratified the ECHR on 6 October 1962. See <<http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en>. > accessed March 2010.

⁵⁷⁵ The applicant who was a defence counsel was found in contempt of court by the same judges before whom the contempt had taken place, which explains the judges' use of emphatic language when convicting him. The applicant while conducting cross-examination of a prosecution witness alleged that he was interrupted and sought leave to withdraw. However, his application was refused. He alleged that the judges were talking to each other and passed each other notes or *ravasakia* i.e. short and secret letters/notes, or love letters, or messages with unpleasant contents. The judges replied that they were 'deeply insulted with the accusation' and decided to take immediate action on his allegation, otherwise justice will suffer disastrous blow. The judges offered him the option of either maintaining what he said or giving reasons why the sentence should not be imposed on him or retraction. He did neither. The court then proceeded to cite him for contempt and imposed five-day term of imprisonment.

Cyprus Constitution. In determining the second and third ingredients, the Court basically has to strike a balance between the need to protect the authority of the judiciary and the need to protect the applicant's freedom of expression. In doing so, the Court looked at the 'authority and impartiality of the judiciary' as stated in Article 10 (2) ECHR.

The 'authority of the judiciary' includes courts as the proper forum for the settlement of legal dispute and for the determination of one's guilt or innocence. At this point, what is at stake is the confidence which the court must inspire in the accused and also the public at large. Lawyers are at the central position in the administration of justice, being intermediaries between public and court. Thus, as a lawyer, the applicant's conduct must contribute to the proper administration of justice and maintain public confidence therein. There are restrictions to his conduct and Article 10 provides that lawyers' comments should not overstep the boundary. One of the restrictions to the lawyers' right to freedom of expression is the authority of the judiciary. However, on the lawyers' part, while defending their client in court, particularly in the context of adversarial criminal trials, they can find themselves in a delicate situation - whether to object or complain about the conduct of the court while keeping in mind their clients' best interest. The Court when considering the issue of the custodial sentence perceived that it gave chilling effect to the applicant's freedom of expression. He would feel constrained in conducting his case and this would cause possible detriment to the clients' case.

Therefore, the Court found that the sentence imposed by the national court was a harsh punishment, considering that it was enforced immediately while the client's case i.e. a charge of murder was ongoing. The penalty was disproportionately severe on the applicant and was capable of having a 'chilling effect' on his performance of his duties as a defence counsel. The procedural unfairness in the summary proceedings for contempt was also lack of proportionality. The Court considered that the national court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression and held that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant.

Although ECHR is a regional human rights law, there are attempts by non-European lawyers to argue cases decided by the ECtHR before their own national court.⁵⁷⁶ This is due to the reason that the ECHR is perceived as ‘the most sophisticated of all contemporary instruments for the international protection of human rights’.⁵⁷⁷

4.3.1.3 Rethinking the Malaysian Courts’ Attitude towards International Human Rights Law and Foreign Law in an Age of Globalisation

Freedom of speech and expression under Article 10 (1) (a) of the Constitution is not an absolute right, as Article 10 (2) provides for its restriction i.e. ‘such restrictions as it [Parliament] deems necessary or expedient in the interests of the security of the Federation or any other 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’. The Malaysian Parliament is, therefore, the sole judge of the question whether it was necessary to impose restrictions to protect or promote any of the specified interests. The ISA 1960, for instance, was passed when the Parliament deemed it was necessary or expedient in the interest of security of the Federation. Nevertheless, as to contempt of court, Parliament left the matter for the courts to decide.

The courts adopt the ‘four walls’ doctrine in interpreting Article 10 of the Constitution. The court interprets the provision based on the texts and ‘not within light of the analogies drawn from other countries such as Great Britain, the United States of America or Australia’.⁵⁷⁸ As seen in *Manjeet Singh Dhillon*⁵⁷⁹ as discussed above, the tendency to dismiss foreign cases as irrelevant under the

⁵⁷⁶ In *Murray Hiebert (CA)* (n. 267); *AG v Times Newspapers Ltd* (n. 186) or Thalidomide case was cited before the Court. In *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan* [2004] 5 MLJ 193, the Court declined to apply *Director of Public Prosecutors of Jamaica v Mollison* (2003) 2 W.L.R. 1160, a Privy Council decision, on the ground that *Mollison* was heavily influenced by the ECHR.

⁵⁷⁷ John P. Humphrey, ‘The International Law of Human Rights in the Middle Twentieth Century’ in Maarten Bos (ed) *The Present State of International Law and Other Essays* (Kluwer, Deventer 1973).

⁵⁷⁸ *Government of State of Kelantan* (n. 24).

⁵⁷⁹ *Manjeet Singh Dhillon* (n. 8).

‘four walls’ doctrine is on the basis of differences in wording between the foreign bill of rights and the domestic constitution. The dismissal is often supported by a declaration that foreign law is inapplicable locally because conditions in these jurisdictions differ.

Often the provision or the bill of rights embodies broad statement of principle: foreign law can shed some light on the texts. As observed in Malaysia, the courts have referred foreign case law, especially Indian cases, due to the fact that Malaysian Constitution is modelled on Indian. Victor Ramraj terms this as ‘genealogical interpretation’ because the interpretation is based on the notion that there exists a relationship of genealogy and history which ties these two Constitutions together.⁵⁸⁰ Choudhry suggests ‘dialogical interpretation’ in interpreting the bill of rights.⁵⁸¹ Under this mode, a court engages in a kind of dialogue with foreign jurisprudence in order to better understand its legal system and jurisprudence. The court examines foreign case law and doctrine, not so much to gain an accurate picture of the state of the law in other jurisdictions, but to understand the underlying principle adopted by such foreign law. Here, the domestic court, in analysing the foreign laws, must ask why those foreign courts have reasoned in a certain way. Then the national court will certainly ask itself why it reasons the way it does. Therefore, to accept or reject the foreign laws referred to the court, it must be supported by certain reasons. It is suggested that the ‘four walls’ doctrine does not reject foreign material *in toto* because genealogical and dialogical interpretations allow judges to use foreign materials as source of inspiration when considering how bill of rights jurisprudence should be developed.

We have seen that the Malaysian courts have declined to consider foreign legal materials on the basis of differing local conditions in Malaysia and the foreign countries without explaining how the conditions are different and why such differences are relevant.⁵⁸² Thio Li-Ann has pointed that ‘[T]his perfunctory

⁵⁸⁰ Victor V. Ramraj, ‘Comparative Constitutional Law in Singapore’ (2002) 6 Singapore Journal of International Comparative Law 302, pp.309-310.

⁵⁸¹ Sujit Choudhry, ‘Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1998-1999) 74 Indiana Law Journal 819, p. 836.

⁵⁸² *Manjeet Singh Dhillon* (n. 8); *Arthur Lee Meng Kuang* (n. 1).

waving away of foreign cases on the basis of 'we're different' is undesirable. A focused elaboration of the different social conditions of these countries would aid in assessing their relevance to the matter at hand'.⁵⁸³ A key reason for referring to foreign jurisprudence is a perception that there may be a doctrine or mode of analysis originating in a foreign jurisdiction that is suitable for domestic application. However, the foreign jurisprudence may not be suitable if conditions between the foreign and domestic jurisdictions differ to such an extent that the foreign doctrine might operate detrimentally.⁵⁸⁴

Ramraj however, argues that whatever the peculiarities of local conditions, the courts are free to look elsewhere for inspirational principles to apply in a case at hand. In doing so, he says that the courts might well realise that not all local conditions are as special and distinct as they may initially seem.⁵⁸⁵ Jack Tsen-Ta Lee elaborates that the existence of differing social and other conditions in the domestic and foreign jurisdictions does not impair the use of foreign materials. Once a norm is identified, if the local condition is so peculiar as to warrant departure from a common normative standard, then the court is duty-bound to 'show clearly what these conditions are and why they justify departure'. If it is justifiable to refer to foreign materials, then the court may use it as a 'catalyst for evolution within the domestic legal system'.⁵⁸⁶

Therefore, it can be concluded that referring to foreign material in interpreting domestic law gives some benefits. Valuable insights into how other jurisdictions have framed the issue at hand and developed solutions can be gained. Furthermore, a comparative approach ensures that a judgment concerning the fundamental liberties of individuals is made with an eye to evolving national and international standard.⁵⁸⁷

⁵⁸³ Thio Li-Ann, 'An 'i' for an 'I'? Singapore's Communitarian Model of Constitutional Adjudication' (1997) 27 Hong Kong Law Journal 152, p.176.

⁵⁸⁴ Kreimer cautioned on a problem of translation. Seth F. Kreimer, 'Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing' (1999) 1 University of Pennsylvania Journal of Constitutional Law 640, pp. 646-647.

⁵⁸⁵ Ramraj (n. 580) pp. 331-332.

⁵⁸⁶ Jack Tsen-Ta Lee, 'Interpreting Bills of Rights: The Value of a Comparative Approach' (2007) 5(1) International Journal of Constitutional Law 122, p. 143.

⁵⁸⁷ Ibid. pp.150-151.

From the discussion above, there is a need to call for judicial activism in interpreting fundamental rights in the Constitution so as to expand its scope by incorporating human rights and foreign law. Gopal Sri Ram, a Court of Appeal Judge rejected a 'pedantic' approach towards reading the Constitution. Instead he advocates referring the Constitution as a 'living piece of legislation' which is capable of adapting to changing circumstances. He suggests reading Part II of the Constitution 'prismatically'⁵⁸⁸ to discern implied rights from the text in order to ensure citizens obtain the full benefit and value of those rights. He highlights that fundamental liberties provisions should be interpreted as human rights. He pointed out that Section 4 (4) HRCA gives scope for the application of international law as it states that regard shall be had to the UDHR to the extent that it is not inconsistent with the Constitution. When viewed as human rights, he noted that judges are free to interpret the constitutional freedoms using international human rights instruments as external aids of interpretation.⁵⁸⁹

Previously, when the Privy Council was the final appellate court in Malaysia, it was open to foreign law as it dealt with appeals from jurisdictions throughout the Commonwealth. The Privy Council decisions had precedential weights in this context. Empirically, there has been a pool of foreign cases in the Malaysian courts and the courts have some idea in dealing with international and foreign laws as a basis of interpretation. The departure from the Privy Council in fact gives opportunity for the courts to develop the national law with the exposure of the foreign law in expanding the scope in interpretation. In fact, the courts should be more critical and evaluative rather than confining themselves to the 'four walls'.

Even though in the area of free speech the courts seem reluctant to follow rationales from foreign decisions, in the area concerning the rights of indigenous peoples the courts resort to foreign decisions and international law. The concept of native title was established in the Malaysian law in the case of *Adong bin Kuwau v*

⁵⁸⁸ He explains that prismatic rule of interpretation enables a court to identify through the process of derivation, the rights and liberties implied within concepts expressly provided in the Constitution. Gopal Sri Ram, 'Human Rights: Incorporating International Law into the Present System' (Addressed at the Constitutionalism, Human Rights and Good Governance Kuala Lumpur, 2003) <<http://www.mlj.com.my/free/articles/gopalsriram.htm>> accessed July 2007.

⁵⁸⁹ Ibid.

Kerajaan Negeri Johor.⁵⁹⁰ This concept was followed in *Nor anak Nyawai v Borneo Pulp Plantation*.⁵⁹¹ *Sagong bin Tasi v Kerajaan Negeri Selangor*⁵⁹² is a case involving the taking of lands occupied by *Temuans*, an aboriginal tribe, in conjunction with the building of the Kuala Lumpur International Airport. These decisions relied heavily on the reasoning in foreign decisions from the USA, Canada and Australia with respect to the issue of native title and property rights, and certain international law instruments. In *Adong bin Kuwau*,⁵⁹³ the Court stated that since this case dealt with a relatively novel issue in Malaysia, the court had to turn to various sources including cases, articles and writing both in and outside Malaysia.⁵⁹⁴ The Court took judicial notice of the worldwide trend towards the recognition of native peoples' rights in the aftermath of the Second World War in countries which practice the Torrens land law system. Under the Torrens system, titles are issued pursuant to statutory powers. Specifically, in Canada, New Zealand and Australia, the courts had greatly expounded on native rights over their lands.⁵⁹⁵

By looking at this scenario, it is therefore suggested that in the area of free speech and contempt of court, the Malaysian courts should give consideration to the relevance of the UDHR to domestic law.⁵⁹⁶ This is because Malaysia, as a member state of the UN, is bound by the UN Charter to respect the standards laid down in the UDHR. Apart from this, Malaysia has declared its support of the UDHR as seen in Section 4 (4) HRCA, this may be taken as evidence of government policy such that courts are presumptively to act in compliance with international obligation or foreign policy principles. The UDHR has attained the status of customary international law (CIL)⁵⁹⁷ and the rights which carry the status

⁵⁹⁰ [1997] 1 MLJ 418.

⁵⁹¹ [2001] 6 MLJ 241.

⁵⁹² [2002] 2 MLJ 591.

⁵⁹³ *Adong bin Kuwau* (n. 590).

⁵⁹⁴ *Ibid.* p.158.

⁵⁹⁵ See also Yogeswaran Subramaniam, 'The United Nations Declaration on the Rights of Indigenous Peoples: Additional Enforceable Land Rights for the Orang Asli?' (2008) 2 *Malayan Law Journal* 75.

⁵⁹⁶ The UDHR was 'clumsily' rejected by the Malaysian courts in *Merdeka University* (n. 540) and *Mohamad Ezam* (n. 25) without looking at it in detail.

⁵⁹⁷ Article 38 (1) (b) of the Statute of the International Court of Justice refers to customary international law as 'international custom, as evidence in a general practice accepted as law.' CIL represents a combination of state practice and the acceptance of such practice as law (*opinio juris*). The UDHR is not a binding treaty and its principles are considered as inspirations but they can

of CIL may form part of the background against which the interpretation takes place.⁵⁹⁸ In Malaysia, an established rule of CIL should be part and parcel of the Malaysian law to the extent that they are not contrary to the statutes and public policy. The CIL is applicable as long as Malaysia has not persistently objected to it. In Malaysia, the courts appear to have applied CIL through the medium of English common law by virtue of Section 3 CLA 1956. The courts applied CIL as part and parcel of common law.

In a globalising world where international human rights law is an instrument of transnational judicial conversations between judges across borders, the invocation of international instruments in domestic courts is instructive to show that domestic courts take initiative to enforce international law. The judges have to be more open and receptive to use international and foreign law as tool of interpretation. They should not confine themselves within the 'four walls'. It is noticed that the legal culture of resistance towards international law is slowly eroding in some areas of civil liberties. The Malaysian courts in novel cases referred and applied foreign decisions into Malaysian case as seen in *Adong bin Kawau*. This shows that the courts can apply foreign materials if they wish to. When the courts refer to comparative materials to interpret the bill of rights, it actually helps the courts to better understand, recognise and shape the national identity of the country. The courts use the material as a source of inspiration.

It is worth sharing an analogy put forward by Jack Tsen-Ta Lee in his article. He wrote 'imagine the judge as a herbalist who seeks a cure for a constitutional ailment. To increase the chances of finding the right treatment for the patient, the sensible herbalist will gather a selection of herbs from a variety of locations. It is only prudent to scrutinise all the plants to determine whether or not there are any noxious weeds among them. However, once he has ascertained that a plant can

develop into binding norms over time if they become accepted customary law. In fact, the UDHR has received the status of CIL and the principles are applicable without the need for ratification or accession by states in contrast to the legally binding treaties such as the ICCPR. See Javaid Rehman, *International Human Rights Law* (2nd edn Pearson Education Ltd, Essex 2010) pp. 22-23; Hurst Hannum, 'The UDHR in National and International Law' (1999) 3 *Health and Human Rights* 144, pp. 147-149.

⁵⁹⁸ Jayawickrama (n. 533); Abdul Ghafur Hamid, *Public International Law. A Practical Approach*. (n. 153).

indeed provide efficacious cure, he would be foolish to reject it to his patient's detriment merely because it was not found in his own garden'.⁵⁹⁹

4.3.2 Contempt in Some Selected Common Law Jurisdictions and International Criminal Tribunals

The common law concept of contempt of court has also been 'imported' by other jurisdictions such as the USA, Canada, Australia, New Zealand and India. Although these countries share the same origin of contempt law as it originated in England, later on, throughout their legal journey, some changes and developments have been made to some of these jurisdictions. In fact, there have been movements for reform in these countries. India chose to place its contempt law in a statute which now is found in CCA 1971. In the UK, part of its contempt law has been placed in a statute while the rest is still left to be dealt with by common law. The UK CCA 1981 covers publication under the regime of strict liability. Countries like Canada, Australia and New Zealand had once come out with the reform proposals but they have not been carried out. Hence, in these countries, their contempt law is mainly based on common law.

The study of the law of contempt in Malaysia has shown among others that the judges play an important role in the final analysis of the law of contempt. Since the Malaysian law of contempt is based on common law principle, the counsels often invited the courts to look at cases and developments in contempt law in its counterparts. However, as discussed in the preceding part, the reluctance is due to the 'suitability of local conditions'.

Under this part, the development of contempt law in the abovementioned jurisdictions will be evaluated in responding to the main areas of concern in Malaysian law of contempt of court. In addition to the practice of contempt law in these sovereign states, it will also examine how an international criminal tribunal, in particular the ICTY, which possesses international legal personality, deals with contempt cases. The case study is made only to the ICTY considering quite significant contempt cases delivered by this tribunal.

⁵⁹⁹ Lee, 'Interpreting Bills of Rights: The Value of a Comparative Approach' (n. 586) p. 152.

The discussion on the main areas of concern of the law of contempt in Malaysia is discussed by looking at these selected jurisdictions separately. However, where there is common ground, such jurisdictions are discussed concurrently.

4.3.2.1 The Background

(i) England

The law of contempt of court has established its roots in England since time immemorial.⁶⁰⁰ From its ancient origins, contempt of court has developed over the years as a creation of courts. The power is inherent in superior courts.⁶⁰¹ However, in 1971, the Phillimore Committee was established under the chairmanship of Lord Justice Phillimore to consider whether any changes were required in the law relating to contempt of court. The Phillimore Report⁶⁰² was reported in December 1974 but only in 1980 was the Contempt of Court Bill tabled in Parliament. This took place in the aftermath of the adverse decision of the ECtHR in the *Sunday Times* case.⁶⁰³ The Bill was tabled with an intention to bring the UK law into line with the decision of the ECtHR, and so as to repair the breach of the Convention. As a result, the CCA 1981 was passed at least partly in response to the decision of the ECtHR in *Sunday Times* case. In England at present, the law of contempt of court relating to publications interfering with the due course of justice, in particular legal proceedings, is covered by the Act which attracts the strict liability notion.⁶⁰⁴ The rest of contempt laws are still under the common law regime.⁶⁰⁵

⁶⁰⁰ For more on the historical background of contempt in England, see John Fox, *The History of Contempt of Court* (Oxford University Press, 1927); Arlidge, Eady and Smith (n.19).

⁶⁰¹ *Ahnee v DPP* [1999] 2 WLR 1305, p. 1313.

⁶⁰² For comments on the report, see Gordon Borrie, 'The Phillimore Report' (1975) *Criminal Law Report* 123.

⁶⁰³ *Sunday Times* case (n. 556). The ECtHR ruled on the decision of the House of Lord in *AG v Times Newspapers Ltd* (n. 186) where the ECtHR maintained that under Article 10 of the ECHR there is a legitimate need to maintain impartiality and authority of the judiciary. However, the injunction against *Sunday Times* was not necessary and failed to take into account the legitimate public interest in the thalidomide compensation controversy.

⁶⁰⁴ See Sections 1 and 2 CCA 1981.

⁶⁰⁵ Civil contempt is largely unaffected by the Act except as to the penalties which may be imposed. Substantial parts of criminal contempt fall outside its scope, including contempt through scandalising the court and contempt in the face of the court. See Section 14 CCA 1981.

Hence, the sources of contempt law in England are the CCA 1981 and the common law in those areas where the Act does not operate. Apart from these, the exercise of contempt power is to some extent affected by the ECHR.

Section 3 (1) HRA requires that the UK legislation ‘so far as it is possible’ is to be read and given effect in a way which is compatible with Convention rights.⁶⁰⁶ However, it has been accepted by the domestic courts that all statutes should be interpreted compatibly with Convention rights, regardless of whether they regulate behaviour of public authorities or private persons.⁶⁰⁷ If the higher court i.e. High Court upwards, is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility.⁶⁰⁸ The legislation may, later on, be amended to remove the incompatibility.⁶⁰⁹

Section 2 (1) HRA further requires the English courts and tribunals ‘to take into account’ amongst others ‘any judgments, decision declaration, or advisory opinion of the ECtHR’ where it is relevant ‘in determining a question which has arisen in connection with a Convention right’. Section 2 (1) HRA literally means that the ECtHR judgments, decisions and advisory opinion are not formally binding as precedent upon the English courts, indeed they are to be considered alongside relevant decisions from other jurisdictions. On its face, the English courts are not bound to apply the ECtHR’s case law in domestic law at all. Nevertheless, in *Regina (Ullah) v Special Adjudicator*,⁶¹⁰ the House of Lords held that ‘the English court was obliged to take into account of the case law of the ECtHR and should, save in special circumstances, follow its clear and constant jurisprudence; and that further, since the correct interpretation of the Convention could only be authoritatively expounded by the European Court, the domestic court should not without strong reason dilute or weaken the effect of its case law’.⁶¹¹

⁶⁰⁶ The Convention rights are defined in Section 1 (1) HRA to include amongst others the rights and fundamental freedoms set out in Articles 6 and 10 i.e. the right to a fair trial and to freedom of expression.

⁶⁰⁷ See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford 2006) p. 124.

⁶⁰⁸ Section 4 (2) HRA.

⁶⁰⁹ Section 10 (2) HRA.

⁶¹⁰ [2004] 2 A.C. 323.

⁶¹¹ *Ibid.*, pp. 324, 350-351.

As for common law contempt, the interpretative requirements of Section 3 HRA do not apply but Section 2 remains applicable due to Section 6 HRA⁶¹² which means that relevant decisions of the ECtHR must be taken into account.

(ii) Canada

In Canada, contempt of court is the only remaining common law offence.⁶¹³ The other criminal offences are found within the Criminal Code.⁶¹⁴ The common law and the English law still has significant impact on the development of the law of contempt in Canada. Clearly the historical link between the two countries played an important role in this matter and also the proviso to Section 9 of the Code which made contempt of court an exception to the rule preventing a conviction for an offence under the common law. As far as the law of contempt is concerned, the English common law is acceptable authority and English cases may be cited in Canadian courts.

In 1977 and 1982, there were calls to reform the common law contempt in Canada. The Canadian Law Commission recommended an amendment to Section 9 of the Criminal Code, abolishing the common law power of judges to punish for contempt.⁶¹⁵ The Commission suggested that contempt of court would only be dealt with by the Criminal Code. However, the Bill was not passed into law and the continuance of the inherent power to deal with contempt of court is still guaranteed to the courts.

⁶¹² Section 6(1) HRA states that it is unlawful for a 'public authority' to act in a way which is incompatible with a Convention right. The 'public authority', as defined by Article 6(3) HRA, includes 'a court or tribunal, and any person certain of whose functions are functions of a public nature'. Therefore, a court or a tribunal, as a standard public authority is obliged to act in accordance with Convention rights. As explained by Fenwick and Phillipson, in relation to all areas of criminal liability affecting the media, such as contempt of court, both the courts and the prosecuting authorities are public authorities, they will be bound to act compatibly with relevant Convention rights in prosecuting and trying these cases. Even in cases involving private individuals, the courts as public authorities are still bound to apply Convention standards in giving judgment in those cases. For more, see Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n. 607) pp. 112-122.

⁶¹³ *Kopyto* (n. 300); Linda Fuerst, 'Contempt of Court' (1984) 16 *Ottawa Law Review* 316, p. 316.

⁶¹⁴ Section 9 of the Criminal Code provides that no person shall be convicted of an offence at common law, an offence under British statute, or an offence under any statute of a province or territory before it became province of Canada, except for the offence of contempt of court.

⁶¹⁵ Fuerst (n. 613) p. 316.

The significant event had taken place in 1982 when the Canadian Charter of Rights and Freedoms of 1982 was implemented. The Charter guarantees the individual's right to freedom of expression⁶¹⁶ 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁶¹⁷ The Charter also protects a person's legal rights in criminal and penal matters.⁶¹⁸ In *R v Cohn*,⁶¹⁹ the availability of the Charter rights in contempt proceeding was mentioned. Goodman JA said:

...it is a matter of the common law continuing to evolve as it has done for centuries but henceforth, in Canada, it must evolve within the framework provided by the Charter to safeguard individual rights. Each case will have to be decided on its own particular facts after applying the proper legal principles.⁶²⁰

Therefore, the Charter plays a vital role in the development of the law of contempt in Canada.

(iii) The USA

The English law of contempt had far-reaching influence on the law of contempt in the USA. In the USA, the power to punish for contempt has been consistently viewed as a necessary and integral part of the independence of the judiciary and therefore has been deemed 'inherent' in all courts.⁶²¹

Historically, the American courts punished contempt *in facie* and out of court contempt summarily. This is evident in *Respublica*⁶²² which was influenced by an

⁶¹⁶ Section 2 of the Charter provides:

Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

⁶¹⁷ Section 1 of the Charter.

⁶¹⁸ Section 11 of the Charter provides safeguards to individual rights. A person charged with an offence, has, amongst others, the right to be informed without unreasonable delay of the specific offence, to be tried within the reasonable time, to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal and also right to reasonable bail.

⁶¹⁹ *R v Cohn* (1984) 13 DLR (4th) 680 (Ont. C.A.).

⁶²⁰ *Ibid.* p. 706.

⁶²¹ *Ex parte Robinson*, 86 US (19 Wall) 505 (1873) p. 510 where the Court stated that the moment the courts in the USA came into existence, they possessed the contempt power.

⁶²² 1 U.S. (1 Dall.) 319 (1788).

English case of *Almon*⁶²³ in which bookseller John Almon was held in contempt for publishing a 'libel' on the Chief Justice, Lord Mansfield. The judgment in *Almon* which was referred by Blackstone in his Commentaries in the year 1765 was responsible for the initial introduction of summary contempt process into the USA.⁶²⁴ In 1789, the contempt power inherent under common law received statutory recognition. Judiciary Act 1789⁶²⁵ recognised such inherent power by noting that 'all the said courts of the United States shall have power to...punish by fine or imprisonment, at the discretion of said courts, all contempt of authority in any cause or hearing before the same...' This Act conferred power on all courts to punish by fine or imprisonment, at the courts' discretion without stating the manner or the procedure to be adopted before punishment could be imposed.⁶²⁶ The impeachment trial of Judge James Peck (1826-1831) had a remarkable and far-reaching effect on the law of contempt in the USA. Judge Peck was survived impeachment for summarily imprisoning⁶²⁷ lawyer Lawless for the indirect contempt of writing an article that criticised Judge Peck's decision while the case was still pending.⁶²⁸

A day after Judge Peck's acquittal, Congress set in motion the process to change the law. In 1831, Congress enacted legislation to limit the scope of the federal summary contempt power to acts committed 'in the presence of the court or so near thereto as to obstruct the administration of justice'.⁶²⁹ The aim of the Act was to prevent misbehaviour in the presence of the court or so near thereto as to obstruct the administration of justice. Secondly, it aimed to preserve the discipline amongst the officers of the courts, to enforce obedience to the process and orders

⁶²³ *Wilmot's Notes* (1765) 243, 97 ER 94 in Arlidge, Eady and Smith (n. 19) p. 17.

⁶²⁴ William F Chinnock and Mark P Painter, 'The Law of Contempt of Court in Ohio' (2002-2003) 34 University of Toledo Law Review 309, p.313.

⁶²⁵ Judiciary Act of 1789, 1 Stat. 73, 83.

⁶²⁶ Joel M. Androphy and Keith A. Byers, 'Federal Contempt of Court' (1998) 61 Texas Bar Journal, p. 18.

⁶²⁷ In addition to the imprisonment, Lawless was ordered to be suspended from practicing as an attorney in the judge's court for 18 months.

⁶²⁸ At the impeachment proceeding, it was argued on behalf of Judge Peck that the power to punish contempt summarily is inherent in the courts as a necessary part of their institution and existence, and it was claimed that he had, in good faith, punished Lawless for his contempt and in doing so, followed common law precedents. He survived impeachment by only a single vote of Congress. Chinnock and Painter (n. 624) p. 313. For more, see Walter Nelles and Carol Weiss King, 'Contempt by Publication in the United States' (1928) 28 Columbia Law Review 401; Goldfarb (n. 22).

⁶²⁹ Nelles and King (n. 628) p. 430.

of the courts, and to state that the power of the courts to exercise a summary jurisdiction in contempt extended to the matters specified therein and no other.⁶³⁰ The effect was that summary procedure was no longer available for contempt out of court. It was only available in certain contempt in the face of court. It set specific limits on the exercise of the contempt power by the federal courts. This explicit authority to cite an individual for contempt as in the Act of 1831, is now placed in Section 401, Title 18, U.S. Code (18 U.S.C.).

By virtue of Section 401, 18 U.S.C., the federal courts⁶³¹ have broad powers to punish acts of criminal contempt which have been restricted to three types of misbehaviour. Section 401, 18 U.S.C. states:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as

- (1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehaviour of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writs, process, order, rule, decree or command.

In addition, Rule 42 of the Federal Rules of Criminal Procedures provides for procedural guideline for criminal contempt. Rule 42 (a)⁶³² deals with indirect

⁶³⁰ Section 1 of the Act of 1831 states:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the power of the several courts of the United States to issue attachments for contempt of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said court, or so near thereto to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said court.

⁶³¹ For the discussion of contempt in the USA, major reference is made to the federal law. In the USA, there is no single 'court system' as every state has its own court system to handle cases that involves disputes or crimes within the state. Federal Government also has a court system to handle cases that involve disputes governing the federal law and the Constitution. The Federal Courts consist of Supreme Court as the highest court in the federal system, followed by Courts of Appeal as intermediate level in the federal system. The lowest level in the federal system is District Courts. See <http://www.uscourts.gov/FederalCourts.aspx>.

⁶³² Rule 42 (a) of the Federal Rules of Criminal Procedures states:

Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) Notice.

The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

contempt by way of ‘Disposition After Notice’ and Rule 42 (b)⁶³³ confers the courts summary contempt power to ‘punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies’.

Nonetheless, the Supreme Court’s ruling in *Chambers v Nasco, Inc.*,⁶³⁴ shows that the court relied on its inherent power in imposing sanctions. In this case, the District Court imposed sanctions against Chambers in the form of attorney’s fees and expenses totaling almost \$ 1 million. The District Court declined to impose sanction under the Federal Rule of Civil Procedure and 28 U.S.C. 1927 because both statutes only apply to attorneys who unreasonably and intentionally delay proceedings and would not reach Chambers as the statutes were not broad enough to reach ‘act which degrade the judicial system’.⁶³⁵ On appeal, the Supreme Court held that the District Court had properly invoked its inherent power in assessing a sanction.

The Supreme Court viewed that even though there are provisions for a range of sanctions in punishing contempt of its authority, among others, as in Section 40, 18 U.S.C.,⁶³⁶ the federal courts may ignore these provisions and exercise inherent

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) Appointing a Prosecutor.

The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) Trial and Disposition.

A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

⁶³³ Rule 42 (a) of the Federal Rules of Criminal Procedures states:

Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. S. 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

⁶³⁴ 501 U.S. 32 (1991).

⁶³⁵ Chambers were alleged with attempting to deprive the court of jurisdiction by acts of fraud performed outside the confines of the court, these were: filing false and frivolous pleadings and attempting by other tactics to delay, oppress and harass in order to reduce Nasco to exhausted compliance.

⁶³⁶ *Chambers v Nasco* (n. 634) p. 62.

power to sanction bad faith misconduct even if procedural rules exist which sanction the same conduct. The Court reasoned the shifting from using the expressing provisions to the exercising inherent power on two points. Firstly, if there is no statute or rules to cover the sanctionable conduct, courts may rely on inherent power. At another, courts may invoke inherent authority whenever conducts sanctionable under rules was intertwined within conduct that only inherent power could address. By allowing courts to ignore express rules and statutes, the Court treated inherent powers as the norm and textual bases of authority as the exception.⁶³⁷

Thus, as noted in *Chambers v Nasco*, inherent powers may be limited by statutes or rules but with respect to contempt, the Court asserts both the power to act in areas not covered by statutes and rules, and the power to act when Congress has not shown its intention to limit the court, then the court could utilise its inherent powers.

Furthermore, the Bill of Rights protects certain rights and freedoms and can be applied by the court to strike down incompatible laws. It does not cover all rights and freedoms as set out in the ICCPR which the USA ratified with a number of reservations in 1992.⁶³⁸ The freedom of expression is protected under the First Amendment.

(iv) Australia

The historical connection between England and Australia has meant that a good deal of the laws of these countries have emanated from England. The law of contempt is no exception. In Australia, from the moment the British took possession for the British Crown, she became the subject to the laws of England. Thus, in Australia, the Court Act 1828 provided that all laws and Statutes in force in England on 25th July 1828 should be applied to the administration of justice in the New South Wales, the first British colony established in Australia. The legal system at that time was based on the English legal system. Even though some

⁶³⁷ Ibid. pp.62-67.

⁶³⁸ Evatt (n. 155) p.289.

states⁶³⁹ in Australia codified their law and departed from the common law as a source of reference, exceptions were made to the rule that they preserved the common law offence of contempt of court.⁶⁴⁰

In 1987, the Australian Law Reform Commission recommended that the law of contempt should be in statutory form.⁶⁴¹ The proposed Australian legislation would abolish the common law of contempt.⁶⁴² However, until today Australia has non-statutory contempt powers. The law of contempt of court in Australia is mainly common law and the source of contempt powers of the Australian courts resides in the common law. The Australian courts of record have an inherent jurisdiction to punish contempt of court.

In Australia, there is no provision in its Constitution that explicitly guarantees freedom of speech and of the press. Australia inherited the traditional English view that freedom of speech was best protected by the common law. There have been unsuccessful attempts to incorporate a guarantee of free speech, along with other human rights into the Australian Constitution. There is also no bill of rights legislated despite Australian ratification to the ICCPR and acceded to its First Optional Protocol in 1991.⁶⁴³

(v) New Zealand

The position in New Zealand is quite similar to Australia. New Zealand became a British colony upon British settlement. The courts and concepts of English law were adopted thus to include the judge-made concept of contempt of court and the procedures to be adopted for committal for contempt. Hence, the law of contempt in New Zealand has been built up from the English common law, which remains the main source of the summary jurisdiction in the New Zealand courts. In New

⁶³⁹ Queensland, Western Australia and Tasmania.

⁶⁴⁰ Section 10 Criminal Code Act 1924 (Tasmania) states:

Nothing in this Act shall affect the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court'; but no person shall be punished and also punished under the provisions of the Code for the same act or omission.

⁶⁴¹ Walker (n. 477).

⁶⁴² Law Reform Commission, *Contempt Report* No. 35, at paras. 44 and 267.

⁶⁴³ Most of Covenant rights and freedoms have no guarantee against legislative encroachment by either State or Federal Parliaments. Evatt (n. 155) p.293.

Zealand the common law is still relied on. Contempt is the only non-statutory offence that remains punishable by the courts in New Zealand.⁶⁴⁴

In New Zealand, freedom of expression is guaranteed under Article 14 of the New Zealand Bill of Rights Act 1990. This Act is based on the ICCPR but not all Covenant rights were incorporated into this Bill of Rights Act.

(vi) India

The Indian legal system was heavily influenced by English idea, but the influence of religious personal law⁶⁴⁵ is not ignored. English law would only be applied in so far as applicable to Indian conditions and inhabitants. English law was applied to fill in the lacuna in the Indian law. Consequently, much of the English common law and equity found its way into Indian law. The principle of contempt of court was one of them. Even after independence in 1947, English law still received a favourable reception.

However, in order to establish uniformity in the law, define the limits and powers of certain courts and regulate their procedures, the Contempt of Court Acts were passed in 1926, 1952 and 1971.⁶⁴⁶ It is the 1971 Act that presently regulates the law of contempt in India. The power to punish for contempt has been clearly vested in the courts of record thus barring the inherent powers to punish for contempt of court. All areas of contempt of court are codified into the CCA 1971.

In India, the right to freedom of speech and expression is guaranteed under Article 19 of the Constitution.

⁶⁴⁴ Section 9 of the Crimes Act 1961.

⁶⁴⁵ Hindu, Islamic and Burmese Buddhist laws.

⁶⁴⁶ The 1926 Act was repealed by the 1952 Act, and the 1952 Act was repealed by the 1971 Act.

(vii) The ICTY⁶⁴⁷

The ICTY was established by the UN Security Council as an ad hoc tribunal for the former Yugoslavia in 1993 to address atrocities committed in the former Yugoslavia. It has jurisdiction over four clusters of crime committed on the territory of the former Yugoslavia since 1991, namely, grave breaches of the 1949 Geneva Conventions, violations of laws or customs of war, genocide and crime against humanity. It tries only individuals, not organisations or governments.⁶⁴⁸

The ICTY, like any criminal court needs to preserve the integrity of its proceedings and ensure a due administration of justice. Therefore, it is important that the offences against the administration of justice such as contempt are addressed.⁶⁴⁹

⁶⁴⁷ At present, there is an independent and permanent International Criminal Court (ICC) established on 17 July 1998 and is governed by the Rome Statute of International Criminal Court, to prosecute and try persons accused for genocide, crimes against humanity, war crime and aggression. ICC is a permanent treaty based international criminal court established when 120 states adopted Rome Statute to establish the same. As of 24 March 2010, there are 111 state parties to the Rome Statutes of International Criminal Court. The ICC functions as a jurisdiction of last resort, able to hear cases only if no state is able to or willing to provide a forum for a particular case. For more details on the ICC, see Leila Nadya Sadat, 'The Legacy of the ICTY: The International Criminal Court' (2002-2003) 37 *New England Law Review* 1073; Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Hart Publishing, 2008); Alexander Zahar and Goran Sluiter, *International Criminal Law* (Oxford University Press, Oxford 2008); <<http://www.icc-cpi.int/Menu/ASP/states+parties/>> accessed March 2010.

⁶⁴⁸ The UN Security Council also established another ad hoc tribunal for Rwanda in 1994 known as the International Criminal Tribunal for Rwanda (ICTR) in order to judge people responsible for the Rwandan genocide and other serious violations of the international law in Rwanda or by Rwandan citizens in nearby states, between 1 January and 31 December 1994. Apart from ICTY and ICTR, there are also Special Courts set up jointly by the government of the States Members of the UN and the UN such as the Special Court for Sierra Leone which is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996; the Special Tribunal for Lebanon, the Special Tribunal for Cambodia, Ad Hoc Court for East Timor and the Iraq Tribunal. Consequently, the ICC was established and considered as an international organisation which is governed by a treaty that is the Rome Statute of International Criminal Court. The idea of having a permanent international criminal court is to ensure stability and consistency in international criminal jurisdiction. For details, see Zahar and Sluiter (n. 647) pp. 4-35; Triffterer (n. 647). As mentioned earlier, only the practice of contempt in the ICTY will be examined due to quite significant numbers of contempt cases decided by that Tribunal.

⁶⁴⁹ The ICC under Article 70 of the Rome Statute has jurisdiction to deal with offences against the administration of justice. Article 70 (1) provides:

The Court shall have jurisdiction over the following offences against its administration of justice when committed *intentionally*:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection or evidence;

Article 15 of the ICTY Statute bestows its judges to create ‘rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters’.⁶⁵⁰ The ICTY has adopted provisions in their Rules of Procedure and Evidence (RPE) that deal with the punishment of contempt and false testimony. Rule 77 and 77bis of the RPE deal with contempt and Rule 91 of the RPE is for false testimony.

Rule 77bis deals with the procedure for fines and the possibility of imprisonment for non-payment of such fines. Rule 77 states that penalties of up to seven years’ imprisonment and/or fines not exceeding 100 000 euros may be imposed in cases of witnesses refusing to answer questions, unauthorised disclosure of information ordered to be confidential by a chamber, failure to comply an attendance order or to produce documents, interfering with witnesses and interfering with persons to prevent them from obeying court orders.

The Tribunal may also exercise its inherent power to hold contempt persons who knowingly and wilfully interfere with its administration of justice as expressly stated in Rule 77 (A). The Tribunal asserts that it can invoke its inherent contempt power to punish and impose sanction on the contemnor. Goran Sluiter observes that the case law of the Tribunal offers examples where the statutory jurisdiction has been expanded.⁶⁵¹ Sluiter views that the Appeal Chamber in *Blaskic*⁶⁵² has confirmed the Trial Chamber’s finding that an inherent power exists to hold

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- (d) Impeding, intimidating or corruptly influencing an official of the Court, for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - (e) Retaliating against an official of the court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

The ICTR can deal with contempt of the Tribunal under Rule 77 RPE which are of the same wordings of the ICTY’s RPE.

⁶⁵⁰ ‘Statute of the International Criminal Tribunal for the former Yugoslavia’, U.N. Doc. S/RES/827 (1993). Also ‘Rules of Procedure and Evidence (ICTY)’, Rule 24 (ii). Both documents can be found at <http://www.un.org/icty/legaldoc-e/basic/statut/statuteindex.htm>; http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf respectively.

⁶⁵¹ Goran Sluiter, ‘The ICTY and Offences against the Administration of Justice’ (2004) 2 *Journal of International Criminal Justice* 631, p.632.

⁶⁵² Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaskic* (IT-95-14-AR108bis). Appeals Chamber, 29 October 1997, para.59.

individuals in contempt of the Tribunal when they fail to comply with subpoena.⁶⁵³ In addition, Rules 77 (C) and (D) deal with procedural aspect of contempt.

Human rights are applicable in the legal framework of the ICTY in a number of ways. The direct application of human rights law constitutes the rights explicitly set out in the Statutes and the RPE. For example, the rights of the accused contain in Article 21 of the ICTY Statute derives their language almost directly from Article 14 of the ICCPR.⁶⁵⁴ The human rights law enters the ICTY as part of CIL or general principles of law. Nevertheless, in practice, the ICTY is inconsistent in taking human rights treaty law into account. The reluctance of the ICTY in considering human right treaty is seen in *Prosecutor v Tadic*.⁶⁵⁵ The Tribunal held that ‘the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance...the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies...’⁶⁵⁶ However, in some other cases the Tribunal had ample regard to the ICCPR and the case law of the ECtHR.⁶⁵⁷

Although the ICTY is considered an important tool to improve the protection of human rights, the Tribunal may potentially violate human rights itself, in term of the rights to a fair trial. In the area of freedom of expression, the ICTY has

⁶⁵³ Sluiter, 'The ICTY and Offences against the Administration of Justice' (n. 651) p.633. For more detail on inherent power of the Tribunal, see Michael Bohlander, 'International Criminal Tribunals and Their Power to Punish Contempt and False Testimony' (2001) 12 Criminal Law Forum 91; Louise Symons, 'The Inherent Power of the ICTY and ICTR ' (2003) 3 International Criminal Law Review 369.

⁶⁵⁴ Goran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights' (2002-2003) 37 New England Law Review 935, p. 935.

⁶⁵⁵ Case No. IT-94-1-T, T. Ch. II, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

⁶⁵⁶ *Tadic* (n. 655) paras. 27-28.

⁶⁵⁷ See *Prosecutor v Delalic and others*, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, paras. 50-51; *Prosecutor v Blaskic*, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia to review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59.

curtailed this right when a newspaper was ordered not to publish names of protected witness.⁶⁵⁸

4.3.2.2 Definition and Classification of Contempt

(i) England

In a common law jurisdiction, contempt of court is continuously evolving court-made law and can be difficult to state with precision. Under the common law, contempt falls into civil and criminal. There are at least three categories of common law criminal contempt i.e. contempt in the face of court, contempt by scandalising a court or a judge and contempt by *sub judice* comments.

Classifying contempt into civil and criminal has become progressively less important in some of the jurisdictions. The classification has been described as ‘unhelpful and almost meaningless’.⁶⁵⁹ According to Salmon LJ., the classification tends to mislead because the standard of proof is the same as criminal standard, and both civil and criminal have a common right of appeal.⁶⁶⁰ In order to remedy the matter, Sir John Donaldson MR suggested a reclassification as (1) conduct involving breach, or assisting in the breach, of a court, or (2) any other conduct involving an interference with the due administration of justice, either in a particular case or more generally as a continuing process.⁶⁶¹ Nonetheless, the distinction is still significant to determine procedure to be applied and sanction to be imposed. In England, albeit the suggestions advanced on possibility to reclassify or to abolish distinction forwarded by the Phillimore Committee, Contempt of Court Act 1981 did not adopt that recommendation.⁶⁶² As noted by Arlidge *et al*⁶⁶³ the two categories are still overlapping although the distinction between the two continues to be made. England maintains the categories of common law contempt but introduces strict liability rule to ‘publication which

⁶⁵⁸ See *Prosecutor v Mrksic and others*, Case No. IT-95-13a-PT, Decision on Prosecution Motion for an Order for Publication of Newspaper Advertisement and an Order for Service of Documents, 19 December 1997.

⁶⁵⁹ *Jennison v Baker* (n. 206) p. 61.

⁶⁶⁰ *AG v Newspapers Publishing Plc* [1988] Ch 333, p. 362.

⁶⁶¹ *Ibid.* p. 364.

⁶⁶² Report of the Committee on Contempt of Court (1974) pp. 72-73.

⁶⁶³ Arlidge, Eady and Smith (n. 19) p. 122.

create a substantial risk that the course of justice in a particular proceedings will be seriously impeded or prejudiced regardless of intent to do so'. In England, contempt of court can be broadly categorised as:

- (1) Civil contempt
- (2) Criminal contempt
 - (a) Contempt in the face of the court
 - (b) Contempt committed outside the court, such as:
 - (i) Publication which create a substantial risk that the course of justice in a particular proceedings will be seriously impeded or prejudiced regardless of intent to do so
 - (ii) Publication which are intended to interfere with or impede the administration of justice
 - (iii) Publication in breach of restrictions on reporting of proceedings in court
 - (iv) Acts which scandalise or otherwise lower of the authority of the courts
 - (v) Acts which interfere with or obstruct persons having duties to exercise in a court of justice
 - (vi) Acts in abuse of process of court.

(ii) **Australia, New Zealand and Canada**

In Australia, New Zealand and Canada, contempt law is based on common law. Therefore the types of contempt generally correspond to common law contempt of court. As to the distinction between civil and criminal contempt, an **Australian** Court in *Witham v Holloway*⁶⁶⁴ had discussed the distinction between the two branches of contempt and opined that the basis for the distinction that is 'coercive and punitive' is not a good distinction as both are still punishment. The Court was in opinion that the distinction is illusory and it should be abolished.⁶⁶⁵ Although the Court portrayed a strong indication to abolish the distinction, that was not the case. The distinction between civil and criminal contempt survives. In *Hearne v Street*,⁶⁶⁶ Kirby J gave the following guidance on how to distinguish the two:

⁶⁶⁴ (1995) 183 CLR 525.

⁶⁶⁵ See also *Hinch v AG* [1988] LRC (Crim) 476, p. 503.

⁶⁶⁶ (2008) 235 CLR 125.

...the traditional question must be confronted: were the contempt proceedings here essentially punitive (in which they will be classified as 'criminal') or were they remedial or coercive (in which case they will be classified as 'civil')?

The same position is evident in **New Zealand**. In *Siemer v Solicitor General*⁶⁶⁷ it was concluded that there is still a distinction in New Zealand law between civil and criminal contempt.

In **Canada**, the court in *Poje v Attorney General of British Columbia*⁶⁶⁸ decided that contempt through non-compliance with a court order may be criminal in nature where the disobedience is contumacious and openly defiant. This position has been confirmed by the Canadian Supreme Court in *United Nurses of Alberta v Attorney General for Alberta*⁶⁶⁹ in which the Courts held that civil contempt is converted to criminal because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt. However, the distinction between civil and criminal contempt still endures in Canada.⁶⁷⁰

Australia⁶⁷¹ and **Canada**⁶⁷² had proposed to codify their contempt law in order to overcome the uncertainties but the recommendations had not been taken up by the governments.

(iii) The USA

In the USA, its Supreme Court struggled with the distinction between civil and criminal contempt as early as 1911 in *Gompers v Buck's Stove & Range Co.*⁶⁷³ In

⁶⁶⁷ [2009] 5 LRC 97.

⁶⁶⁸ [1953] 2 DLR 785.

⁶⁶⁹ (1992) 89 DLR (4th) 609.

⁶⁷⁰ *Videotron Ltee v Industries Microlec Produits Electroniques Inc* [1992] 2 SCR 1065

⁶⁷¹ The New South Wales Reform Commission published a Report [100] on contempt by publication in 2003. Among the suggestions are to reformulate the 'tendency' test for *sub judice* contempt, procedures and penalties in *sub judice* contempt. In 2001, Law reform Commission of Western Australia came out with a Discussion Paper on Contempt in the Face of Court, Project No. 93(1) to review on the existing law on contempt in the face of court. The Commission recommended for a reform.

⁶⁷² Law Reform Commission of Canada, Contempt of Court (1982), Report 17 proposed for the law of contempt to be codified. The Commission proposed among others, to define contempt and its classification and to adopt proceedings in contempt by way of indictment.

Gompers, in drawing a distinction between civil and criminal contempt, the court focused on the ‘character and purpose’ of sanction imposed.⁶⁷⁴ The court reasoned that a contempt sanction is civil in nature if it is remedial and intended to benefit the complainant. It is remedial by coercing the defendant to do what he had refused to do. In contrast with the purpose of a civil contempt sanction, the purpose of a criminal sanction is to punish the contemnor and vindicate the authority of the court. Criminal contempt is punitive in character.

Despite the original distinction between criminal and civil contempt offered by the Supreme Court, distinguishing the two still poses a considerable challenge. The Supreme Court in *International Union, United Mine Workers v Bagwell*⁶⁷⁵ once again considered the distinction between civil and criminal contempt. The Court approved the use of fines as a method of coercing compliance with courts orders. With that, the lower courts used this as an opportunity to punish future acts of contempt with prospectively affixed sanctions but without procedural requirements of a criminal contempt proceeding.⁶⁷⁶ However, the fine line between coercion and punishment will always give rise to the possibility that a civil or coercive contempt sanction might evolve into a criminal sanction.

Besides classifying a contemptuous act on the basis of the criminal and civil distinctions, a contemptuous act also can be classified as being either direct or indirect.⁶⁷⁷ The distinction between direct and indirect contempt revolves around where the contempt occurred. For instance, direct contempt occurs when a contemptuous act is committed in the physical presence of the judge, or within an integral part of the court, while the court is performing any of its judicial function.⁶⁷⁸ Indirect contempt, on the other hand is usually associated with the refusal of a party to comply with a lawful court order, injunction, or decree which imposes a duty of action or forbearance.⁶⁷⁹ Labelling contempt as direct and indirect is important as distinction controls the manner in which the court may

⁶⁷³ 221 U.S.418 (1911).

⁶⁷⁴ Ibid. p. 441.

⁶⁷⁵ 330 U.S. 258.

⁶⁷⁶ Androphy and Byers (n. 626) p. 20.

⁶⁷⁷ Indirect contempt is also referred as constructive contempt.

⁶⁷⁸ *Nye v United States*, 313 U.S. 33, 50-52 (1941).

⁶⁷⁹ Androphy and Byers (n. 626) p. 18.

dispose of the matter. Direct contempt justifies the use of summary process. Additionally, Section 401, 18 U.S.C. grants the Federal Court to punish acts of criminal contempt and Rule 42 of the Federal Rules of Criminal Procedures provides for its procedural guideline.

The power to punish acts of contempt in the USA is inherent in the court. The courts have inherent power in sanctioning a person for contempt if the courts perceive the person's conduct interferes with administration of justice and the courts also have inherent power in imposing any appropriate penalties.⁶⁸⁰

(iv) India

India has placed its contempt law in the CCA 1971. The Act defines contempt as civil or criminal contempt. The Act attempts to give clear definition by providing the criteria of what may amount to civil and criminal contempt. Civil is defined as meaning wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. On the other hand, criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which:

- (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
- (ii) prejudices, or interferes, or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

(v) The ICTY

As mentioned above, the ICTY has provisions to deal with contempt of the Tribunal under their Rule 77 RPE. Rule 77 (A) RPE allows the Tribunal in exercising its inherent power to hold in contempt those who knowingly and

⁶⁸⁰ *Chambers v Nasco* (n. 634).

wilfully interfere with its administration of justice. They are including any person who:

- (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
- (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
- (ii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
- (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
- (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

Rule 77 not only provides for the ‘offence’ of contempt, it also provides for the procedure and penalty as stated in Rule 77 (C) and (G) respectively.

(a) Civil Contempt

Civil contempt is a less ‘controversial’ area of contempt compared to criminal contempt. In most of these jurisdictions, civil contempt involves disobedience to process. It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order or to disobey a judgment or order requiring a person to abstain from doing a specified act. It is also a civil contempt to act in breach of undertaking given to the court by a person.

In **England**, in order to commit for civil contempt of disobedience as in a breach of injunction, the court has to satisfy that, the terms of the injunction are clear and ambiguous,⁶⁸¹ the defendant has proper notice of the terms⁶⁸² and that breach has been proved beyond reasonable doubt.⁶⁸³ In order to establish contempt of court in breach of injunction, there is no need to establish a wilful disobedience to a breach

⁶⁸¹ *PA Thomas & Co. v Mould* [1968] 2 QB 913.

⁶⁸² *R v City of London Magistrates’ Court, ex p Green* [1997] 3 All ER 551.

⁶⁸³ *Re Bramblevale Ltd* (n. 193).

order, but merely that the contemnor understood what he must not do and the consequence.⁶⁸⁴ The same rule applies to breach of undertaking.⁶⁸⁵

In **Canada**,⁶⁸⁶ the **USA**,⁶⁸⁷ **Australia**⁶⁸⁸ and **New Zealand**, apart from proving the criteria as in England, the requirement of wilful disobedience is sufficient to constitute contempt. This also applies in **India**. Section 2 of the CCA 1971 defines civil contempt as ‘wilful disobedience to any judgment, decree, discretion, order, writ or other process of a court or wilful breach of an undertaking given to a court’. Therefore, it needs to prove that the act of disobedience is wilful and intention to do or not is needed to establish contempt. Mere disobedience without wilful element is not sufficient to constitute contempt.

(b) Contempt in the Face of the Court (*in facie*)

(i) England

According to *Blackstone*, 16th ed., 1825, Bk. 4, Ch. 20, p. 286, and *Oswald on Contempt*, 3rd ed., 1910, the phrase ‘in the face of the court’ has never been defined and its true meaning is to be ascertained from the practice of the judges over the centuries.⁶⁸⁹ *In facie* contempt may be broadly described as any word spoken or act done in or in the precincts of the court which obstructs or interferes with the due administration of justice or is calculated to do so.⁶⁹⁰

Thus, the judge usually has personal knowledge of the event leading to the contempt. He does not need the testimony of witnesses. This is because the contempt occurs in his presence. This kind of contempt usually involves a serious

⁶⁸⁴ *P v P (contempt of court: mental capacity)* [1999] 2 FLR 897.

⁶⁸⁵ With regard to solicitors, they are subject to special jurisdiction due to their status as officers of the courts if there is an alleged breach of obligation. The court has power to commit a solicitor summarily even though the undertaking has not been given directly or indirectly to the court itself and is not an undertaking given in connection with any legal proceedings. *Re A Solicitor, ex p Hales* [1907] 2 KB 539; *Re A Solicitor* [1966] 3 All ER 52.

⁶⁸⁶ *Universal Foods Inc. v Hermes Food Importer Ltd* [2005] 1 F.C.R. D 12.

⁶⁸⁷ *McComb v Jacksonville Paper Co.*, 336 US187: 93 Led 599.

⁶⁸⁸ *Jones v Toben* [2009] FCA 354.

⁶⁸⁹ *Archbold: Criminal Pleading, Evidence & Practice 2010* (58th edn Sweet & Maxwell, November 2009), para. 28-108.

⁶⁹⁰ *Almon* (n. 623); *Morris* (n. 235); *Balogh* (n. 230).

act or misbehaviour occurred in the sight of the judge. *In facie* contempt justifies the exercise of summary punishment. The way a lawyer conducts a case in court is calculated to bring the administration of justice into disrepute such as by insulting the judge or jury amounts to contempt.⁶⁹¹ In *R v Logan*,⁶⁹² Logan made an outburst in court after being sentenced to two years and three months imprisonment. Due to his outburst, the judge immediately added another six months of imprisonment. Arlidge *et al*⁶⁹³ comment that the outbursts in the dock normally arise from the stress or emotion of the moment. Due to this factor, although the matter should not be ignored, the contemnor should at least be afforded an opportunity to explain and apologise. On the other hand, as explained by Arlidge *et al*, it should be recognised that the judges sometimes have to take quick action and the contemnor is allowed to appeal on this decision.⁶⁹⁴

However, it is not always necessary for a contemptuous act that occurs within the court to have been seen by the judge. Likewise, it is not necessary that all the circumstances of the contempt should be within the personal knowledge of the judge dealing with the contempt.⁶⁹⁵ Nor it is necessary that the act of contempt take place wholly or in part of the courtroom itself, as it can happen at some distance from the court. This includes the intimidation or bribery of witnesses⁶⁹⁶ or jurors⁶⁹⁷ and the harassment of a defendant.⁶⁹⁸

In contempt in the face of the court, in committing a contemnor, what matters to the court is that his act involves a serious interference with the administration of justice and the process of the court. In the relatively recent case of *R v Steven Stanley Phelps*⁶⁹⁹ an appellant was convicted at Crown Court of possessing an offensive weapon and he was sentenced to 12 months imprisonment. In the course of the hearing he attacked two female dock officers while his counsel was

⁶⁹¹ *Parashuram v King Emperor* [1945] AC 264, PC

⁶⁹² [1974] Crim. LR 609, CA.

⁶⁹³ Arlidge, Eady and Smith (n. 19) pp. 703-704.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Balogh* (n. 230).

⁶⁹⁶ *Moore v. Clerk of Assize, Bristol* (n. 235).

⁶⁹⁷ *AG v. Judd* [1995] C.O.D. 15, DC.

⁶⁹⁸ *R. v. Runting*, 89 Cr.App.R. 243.

⁶⁹⁹ [2010] 2 Cr. App. R. (S.) 1.

addressing the judge in mitigating. He became disconcerted as he thought his counsel did not say everything on his behalf. He was told to calm down by the dock officers but he spat at one of them and punched her in the face. The judge ordered him to calm down and when he did not the judge ordered him to be handcuffed. While the three male officers tried to arrest and handcuff him, he lashed out with his fists punching the two female dock officers. He was brought to a local police station. The judge remained in court throughout the incident. In fact he rose briefly while the court was in commotion as the appellant was brought to custody. The judge later returned to court in the absence of the appellant and told the appellant's counsel that she proposed to deal with the contempt immediately after the counsel had completed his mitigation. The judge sentenced the appellant to two years imprisonment for contempt consecutive to the other sentences.

On appeal, the Court of Appeal reduced the sentence to twenty one months imprisonment. The Court of Appeal held that the Crown Court was not wrong in sentencing the appellant summarily, weighing the appellant's behaviour of a kind that could not be tolerated. However, the Court of Appeal decided that it was not an appropriate case for the maximum sentence of two years. The Crown Court should have taken time to reflect about what was the appropriate course to take, to allow counsel to take instructions and to address judge in mitigation. The Court of Appeal acknowledged that in this situation, a cooling off period together with other procedural safeguards might be appropriate. In the Court of Appeal's opinion, the sentencing judge could have put the case back for a short time in order to allow the appellant to calm down and be brought back to the court, to speak to his counsel and to apologise.

Contempt in the face of the court justifies the use of summary procedure to commit the contemnor. However, in England, concerns were often raised regarding a lack of clearly defined principles, especially on when and how to embark summary procedure.⁷⁰⁰ The superior courts of record have jurisdiction to deal summarily with contempt both in the face of the court and out of the court. The Crown Court is a superior court of record and has been preserved with

⁷⁰⁰ See *R v Griffin* (n. 341); *R v Tamworth JJ., ex p. Walsh* [1994] C.O.D. 277; *R v S* [2008] Crim.L.R. 716.

inherent power to make an order of committal on its own motion by virtue of Order 52 r. 5 of the Rules of the Supreme Court (RSC). However, Order 52 r. 1 (2) RSC restricts the circumstances in which such order can be made by the Crown Court to contempt *in facie*, disobedience of a court order or breach of undertaking to the court. The Magistrates' Court, which is not a court of record, has the power to punish for contempt under Section 12 CCA 1981.

On 5 April 2010, the Criminal Procedure Rules 2010 (CPR) came into force superseding the Criminal Procedure Rules 2005. This amendment was in response to the Court of Appeal's observation in *R v M*⁷⁰¹ in which the Crown Court's jurisdiction to punish for contempt of disobedience of restraint order was questioned. The Court of Appeal observed that the Crown Court has power but in the absence of relevant rules, the procedures are not clear. Part 62 of the CPR is a provision for contempt by disobedience of a court order etc. by the Magistrates' Court, Crown Court and the Criminal Division of the Court of Appeal. However, this provision does not extend to contempt in the face of the court. Therefore, in June 2010, the Criminal Procedure Rules Committee published a paper to consider a proposal to amend Part 62 CPR to make further rules about contempt of court. New rules proposed for inclusion in Part 62 would apply to contempt *in facie* and to be applied in Magistrates' Courts, Crown Court and in the Criminal Division of the Court of Appeal. The Committee expects to receive comments by 10 September 2010.⁷⁰²

(ii) Canada and Australia

In these jurisdictions, the common law rule as to contempt *in facie* applies. Therefore, any act or conduct that interferes with the due administration of justice and the process of the court amounts to contempt in the face of court justifies summary punishment.

⁷⁰¹ [2009] 1 Cr. App. R. 17.

⁷⁰² The Proposal Paper can be found at:

http://www.justice.gov.uk/criminal/prorules_fin/contents/docs/invitation-to-comment.pdf

In **Canada**, contempt in the face of court is also known as contempt by interference. It deals with the conduct of the contemnors that interfere with the courts' proceedings. Accordingly, the Canadian Charter of Rights must be taken into consideration when dealing with contempt cases. Contempt involves 'expression' under Section 2 (b) of the Charter, thus, to commit a person for contempt *in facie*, the alleged conduct must be so serious and present a clear and present danger.⁷⁰³ Showing-up drunk for court so as to enable to deal with the issues in the case is a corruption of expression interfering with court proceedings.⁷⁰⁴ An insolent and abusive witness may be committed for *in facie* contempt and may be dealt with instantly.⁷⁰⁵

As regards geographical limit, conduct out of the presence of a judge could be contempt in cognisance of the court if witnessed by an officer of the court. However, it was cautioned that in that situation it would prefer to treat such conduct as contempt out of the court.⁷⁰⁶

In an **Australian** case of *Ex parte Bellanto: Re Prior*,⁷⁰⁷ the court decided that words or action used in the face of the court or in the course of the judicial proceedings can only be contempt if they are such as to interfere with the course of justice.

Although there have been many prosecutions for acts of contempt in the face of court the issue of geographical limits which define the court's face remain unclear in Australia. This is highlighted in *R v E Sleiman (Judgment No. 29)*.⁷⁰⁸ The authorities conflict on the question. This is because the scope of what occurs 'in the face of the court' has been broadened by judicial decisions. In *Registrar*,

⁷⁰³ *Kopyto* (n. 300).

⁷⁰⁴ *R v Jolly* [1990] 57 C.C.C. (3d) 389 (B.C.C.A.).

⁷⁰⁵ *B.K. v Her Majesty The Queen* [1995] 4 S.C.R. 186. Although the conduct of the appellant was insolent, it was unjustified to convict him of contempt of court *instanter*. The *instanter* summary procedure was unjust, as there were no circumstances which made it urgent and imperative to act immediately.

⁷⁰⁶ *British Columbia Government Employee Union v A.G. of British Columbia* [1988] 2 S.C.R. 214.

⁷⁰⁷ (1963) 63 SR (N.S.W.) 190.

⁷⁰⁸ [1999] NSWSC 858.

Court of Appeal v Collins,⁷⁰⁹ contempt in the face of court encompasses not only conduct within the sense of judges but also conduct which takes place outside the courtroom yet with some geographic proximity such as the passageway, the veranda and the steps leading to it.⁷¹⁰ On the other hand, in *Fraser v The Queen*,⁷¹¹ the conduct should confine to which the judge could see or hear. The absence of such formulation of the rule introduces a degree of uncertainty as to precisely when the jurisdiction may be invoked. Priestley J. in *European Asian Bank AG v Wentworth*⁷¹² acknowledged that:

It is obviously desirable that the point should be settled one way or the other as soon as may be. Until the question is settled I find it difficult to see that any judge confronted with the question at first instance could be criticised for adopting either view.

In the relatively recent case of *In the Matter of Bauskis*,⁷¹³ Adam J. has considered the principles relevant to contempt *in facie*. In this case, John Wilson and Eric Jury sued a number of defendants, who were instrumentalists of the State of New South Wales. They claimed a right to trial by jury. The defendants filed notices of motion seeking to strike out the statement of claim. When the matter was called over the Registrar, a large number of persons were present in court, all wearing T-shirts with the words 'Trial by jury is democracy'. The matter was referred to Adam J., the judge in duty on that day.

The matter was called before Adam J. and Mr. Wilson, a lawyer who was at the Bar table, wearing the same T-shirt as the people in the public gallery. He demanded a jury trial which Adam J. refused. There was a heated argument between them to the extent that Mr. Wilson moved forward towards the Bench and asked the Sheriff to remove Adam J. At the same time, the judge also ordered the sheriff to remove Mr. Wilson. Mr. Wilson ignored this and kept saying that the judge should be removed and he will request for an issuance of a warrant of arrest against the judge. He continued to shout at the judge. The Court ordered Mr. Wilson to be removed from the court.

⁷⁰⁹ [1982] 1 NSWLR 682.

⁷¹⁰ *Ex parte Tubman; Re Lucas* [1970] 3 NSWLR 41.

⁷¹¹ [1984] 3 NSWLR 212.

⁷¹² (1986) 5 NSWLR 445, p. 458.

⁷¹³ [2006] NSWC 907.

During that time, the court was in uproar as the people at the public gallery who attended to support Mr. Wilson and Mr. Jury were yelling abuse at the judge and at the sheriff's officer. The court ordered the sheriff to remove those supporters who refused to remove their T-shirt, from the courtroom. One of them, Mr. Bauskis refused to leave and to take off his T-shirt. The court ordered him to be placed in custody. Later in the same day, he was given an opportunity to tender his apology which he refused. His defiance continued when he refused to give any information to the judge for the purpose of granting bail. Mr. Bauskis was taken into custody and remained in custody until he was brought back the following day. The next day, he still maintained his defiance and he was then sentenced to fourteen days imprisonment.

It can be seen in this case that the court was reluctant to cite contempt against a barrister and instead removed him from the courtroom. However, the court cited a person who defied the court order for contempt.

In **Australia**, contempt *in facie* usually involves barristers. For instance, *Wilson v The Prothonotary*⁷¹⁴ and *Morrissey v The New South Wales Bar Association*.⁷¹⁵ In *Wilson*, the Plaintiff had filed a statement of claim. The defendants applied to strike it out. The Court acceded to the defendants' request and ordered the proceedings to be dismissed with costs. While the judge was in the process of delivering his reasons, Mr. Wilson threw two bags of paint, one which struck the judge and splashed yellow paint over him. The second bag landed between the Judge's Associate and the court reporter, splashing paint on them as well. Wilson was cited for contempt and sentenced to a fixed term of imprisonment of two years. However, on appeal, the Court of Appeal extended leniency to Wilson and allowed appeal against sentence. The original sentence was quashed and he was released from custody on the day the judgment of the Court of Appeal was delivered. He had served three months and twenty days in custody.

In *Morrissey*, Joseph Morrissey, formerly a legal practitioner in the State of Virginia, USA, sought an admission as a legal practitioner in New South Wales,

⁷¹⁴ [1999] NSWSC 1148.

⁷¹⁵ [2006] NSWSC 323.

but there was a doubt as to his character. This was due to acts of contempt he had committed. During the proceeding regarding his admission, there ensued an exchange of provocative taunts and jibes, culminating in a fight in which several blows were exchanged. The presiding judge convicted both lawyers of contempt. He sentenced Morrissey to ten days imprisonment but suspended five days. In October 1997, Morrissey was convicted of contempt following an angry outburst to a judge who had passed a net sentence of fifteen years on his client for a drug-related offence. The words used in his outburst were:

That's outrageous, that is absolutely outrageous...I have never seen a more jaded, more bitter, more angry jurist in my life...

He was sentenced to thirty days imprisonment.

In this type of contempt, as can be seen from the above cases, the courts are at discretion to determine what acts may amount to contempt in the face of court, the way to impose punishment to the contemnor and also the variation of sanctions.

(iii) New Zealand

In **New Zealand**, what constitutes contempt is defined in Section 401 of Crime Act 1961. The definition covers assault, threats, intimidation, wilful insults to a judge or judicial officer; wilful interruption or obstruction of court proceedings or misbehaviour in court; and wilful disobedience of court orders or directions during the course of proceedings. The definition is broad and all-embracing as a category of contempt *in facie* cannot be closed.

In *Mair v Wanganui District Court*⁷¹⁶ a defendant was in defiance of a court order when he was ordered by the court not to say a prayer before the judge during the proceeding. In fact, he was given a chance to say the prayer before the hearing began. Due to his refusal, the court remanded him in custody until the next morning. The Court decided that he had improperly interrupted proceedings in the trial with the prayer after the plainest of warnings that to do so would be construed

⁷¹⁶ [1996] 1 NZLR 556.

as contempt. He considered the contempt prolonged and that it was a thoroughly public challenge to the authority of the Court. The following day he refused to apologise and was sentenced to twelve days imprisonment. He appealed against his conviction on the grounds that the District Court had no power to adjourn or remand a contemnor but had to pass sentence on the day of finding that contempt had occurred. He relied on Section 206 of Summary Proceedings Act 1957 which defines contempt of court and sets out the maximum penalties without mentioning a power to adjourn or remand for sentence. He suggested that this set out a code for dealing with contempt of Court. The Court rejected this argument as the Court decided that the District Court had the power to remand a contemnor prior to passing sentence. Sections 6 and 25 of the New Zealand Bill of Rights Act 1990 were consistent with this, as powers to remand or adjourn enhanced the various rights of minimum standards of criminal procedure. Also, Section 14 (1) of the Criminal Justice Act 1985 provided a power to adjourn an offender's hearing, and an offender included a person liable to be dealt with for contempt of Court. Section 10 of the Act, relating to the opportunity of legal representation, also supported the view that a contemnor could be remanded. Fundamentally, the power to give a contemnor the opportunity to apologise was one of the most important aspects of this summary procedure.

(iv) The USA

In the USA, a contemptuous act is classified as being either direct or indirect. The distinction between the two revolves around where the contempt occurred i.e. within the presence of the court or outside the presence of the court. Direct contempt occurs when the contemptuous behaviour is committed in the physical presence of the judge, or within an integral part of the court while the court is performing any of its judicial functions. In contrast, indirect contempt occurs out of court.⁷¹⁷ Indirect contempt is usually associated with the refusal of a party to comply with a lawful court order, injunction or decree which imposes a duty of action or forbearance. Labelling an act of contempt as direct or indirect becomes

⁷¹⁷ *Bagwell* (n. 675) p. 2557.

important because the distinction controls the manner in which the court may dispose of the matter. Direct contempt is punished summarily.

Section 401 (1) and (2), 18 U.S.C. deal with direct contempt. Section 401 (1) states ‘misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice’ and Section 401 (2) involves ‘misbehaviour of any of its officers in their official transactions’. As established in *American Airlines, Inc. v Allied Pilots Association*,⁷¹⁸ in order to establish a criminal violation of Section 401 (1), the following four elements must be established beyond reasonable doubt:

- (i) misbehaviour,
- (ii) in or near the presence of the court,
- (iii) with criminal intent,
- (iv) that resulted in an obstruction of the administration of justice.

*In re Williams*⁷¹⁹ the type of misbehaviour which falls under this kind of contempt is explained:

[t]he contemnor’s conduct must constitute misbehaviour which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied with the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice.

Therefore, there are dual elements of direct contempt to be punished summarily, which are:

- (i) a contumacious act committed in open court in the judge’s presence and immediate view that results in the judge’s personal knowledge. In this situation, it makes further evidence unnecessary for summary finding.
- (ii) a contumacious act constitutes an imminent threat to the administration of justice that result in demoralisation of the court’s authority.⁷²⁰

It must have a ‘judge’s personal knowledge’ in which the judge acquired by his own observation of the contemptuous conduct and ‘imminent threat’ elements. *In*

⁷¹⁸ 968 F.2d 523, 531 (5th Cir. 1992).

⁷¹⁹ 509 F.2d 949, 960 (2d Cir. 1975).

⁷²⁰ *Cooke v United States*, 267 U.S. 517, 536 (1925); *In re Oliver*, 333 U.S. 257, 275-76 (1948).

re Davis,⁷²¹ it further elaborates that where a judge has no personal knowledge of the alleged act of contempt because of its commission beyond his own actual physical presence, it will be treated as indirect contempt.

Therefore to justify a finding of summary contempt and imposition of summary sanction, the act must pose a threat that requires immediate sanction to preserve the dignity and authority of the court. As described by the Supreme Court in *In re Little*:⁷²²

The fire which [the contumacious act] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or probable; it must be immediate imperil.

Hence, there must be a finding of ‘an actual obstruction of justice’ in all Section 401 (1) for the court to exercise summary contempt power. *Fernos-Lopez v United States Dist. Court*⁷²³ has offered some helpful guidance i.e. ‘where there is no physical disorder in the courtroom, no laughing, shouts or abusive language, and no significant delay in the proceedings, obstruction of justice is not shown’.

Section 401 (1) usually applies to the counsel appearing before the court, whereas Section 401 (2) refers to other officers such as court clerks and other conventional court officers.⁷²⁴ Therefore, Section 401 (1) typically will be the controlling statutory provision whenever attorney conduct is involved. In the USA, contempt power is used to curb overzealous attorneys.

The cases of *Taylor v. Hayes*⁷²⁵ and *State of Illinois v William Allen*⁷²⁶ are the examples of how the courts dealt with the attorneys. In *Taylor’s* case, the attorney represented defendants in a jury trial presided over by a respondent trial judge. The trial judge told the attorney nine times that he was in contempt of court. After the jury verdict, the trial judge found the attorney guilty of criminal contempt and sentenced him to consecutive jail terms totalling over four years. The judge barred

⁷²¹ 602 N.E.2d 270, 274 (Ohio Ct. App. 1991).

⁷²² *In re Little* (n. 473).

⁷²³ 599 F. 2d. 1087, 1091-92 (1st Cir. 1979).

⁷²⁴ *Cammer v United States*, 350 U.S. 399, 405 (1956).

⁷²⁵ 418 U.S. 488; 94 S. Ct. 2697 (1974).

⁷²⁶ 397 U.S. 337 (1970).

the attorney from practicing law in part of the state court system. While the appeal was pending, the trial judge entered a corrected judgment. The appellate court affirmed the convictions for contempt and reversed the order barring the attorney from practice. Certiorari was granted. The Court held that petty contempt could be tried without a jury and denied the petitioner's request for a jury trial. The Court held that the attorney was entitled to due process rights of notice and an opportunity to be heard before being adjudged in contempt. Because the attorney was not accorded these rights, the Court reversed his conviction. The Court held that, if the attorney was to be retried on the contempt charges, a different judge should hear the trial.

In *William Allen*, an advocate was removed from the courtroom and disbarred for his abusive remarks to the court. In *Ex parte Adam Repos*,⁷²⁷ an attorney was found guilty for contempt for an obscene gesture made in the courtroom. He was ordered to ninety days in jail.

(v) India

In India, Section 2 (c) (i), (ii), (iii) CCA 1971 covers criminal contempt. Section 2 (c) defines criminal contempt as publication (whether by words spoken or written, or by visible representations or otherwise) of any matter or the doing of which (i) scandalises or tends to scandalise or lowers or tend to lower the authority of the court or (ii) prejudices, or interferes or tends to interfere with the due course of any judicial proceedings or (iii) interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

Although the Indian definition is broad and may perhaps cover nearly all the situations of contempt *in facie*, it would appear section 2 (c) (iii) specifically recognises the principle that the category of contempt *in facie* should not be closed because it provides a safety net for punishment of contempt that occurs 'in any other manner'. Even so, in determining whether the act amounts to contempt *in facie*, the court must ascertain whether the act complained of was calculated to

⁷²⁷ 2009 Tex. Crim. App. Unpub. LEXIS 725.

obstruct or had tendency to interfere with the course of justice and the due process of the administration of justice. If the answer is affirmative, contempt would have been committed under one of the relevant heads of Section 2 (c).⁷²⁸

(vi) The ICTY

The offence of contempt is explicitly dealt with in Rule 77 RPE. The current wording is a result of the amendment on 13 December 2001.⁷²⁹ The Rule indicates that the Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with the administration of justice, and lists some forms of contempt as follows:

- (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
 - (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
 - (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
 - (iii) without just excuse fails to comply with an order to attend before or produce document before a Chamber;
 - (vi) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
 - (vii) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

The list however is deemed to be non-exhaustive due to the wording of the provision ‘including’ and it has been consistently upheld by the Tribunal Chamber, as in *Vujin*,⁷³⁰ that in contempt cases, the form of contempt listed in

⁷²⁸ *Abdul Karim v M K Prakash and others* (1976) 3 SCR 276.

⁷²⁹ On 5 August 2002, a new paragraph (K) has been introduced to Rule 77, providing the possibility of appealing even decisions rendered under Rule 77 by the Appeals Chamber sitting as a Chamber of first instance.

⁷³⁰ Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin, *Tadic* (IT-94-1-A-R77), Appeal Chambers, 31 January 2001, paras. 24-26.

Rule 77 does not limit the inherent powers of the Tribunal to prosecute and punish for contempt.⁷³¹

The Rule does not classify contempt into civil or criminal, or direct or indirect. However, Rule 77 (A) (i) RPE has similarity as contempt *in facie* and direct contempt. This is illustrated in *Bulatovic*.⁷³² *Bulatovic* was charged under this rule of having knowingly and wilfully interfered with the administration of justice by contumaciously refusing to answer questions asked by the Prosecution during his testimony before Trial Chamber III of the ICTY on 19 and 20 April 2005. He was found guilty of serious contempt in the Tribunal and noted that his conduct would normally merit the immediate imposition of a custodial sentence in order to mark the gravity of the offence and to deter the Respondent and others who might be tempted to follow the same course, from defying the authority of the Trial Chamber.⁷³³

Another situation where an accused may be committed for contempt of the Tribunal is when he knowingly and wilfully obstructed the administration of justice and committed contempt by interfering with a witness as decided in *Beqa Beqaj*.⁷³⁴

⁷³¹ See also Judgment on Appeal by Anto Nobile Against Finding of Contempt, *Aleksovski* (IT-95-14/1-AR77), Appeal Chamber, 30 May 2001, para. 39; Decision on Motions to Dismiss the Indictment Due to Lack of Jurisdiction and Order Scheduling a Status Conference, *Marijadic and Rebic* (IT-95-14-R77.2), Trial Chamber, 7 October 2005, para. 17; Judgment on Allegations of Contempt, *Margetic* (IT-95-14-R77.6), Trial Chamber, 7 February 2007, para. 13.

⁷³² Decision of Contempt of the Tribunal, *Milosevic* (Contempt Proceedings Against *Kosta Bulatovic*) (IT-01-54-R77.4) Trial Chamber, 13 May 2005.

⁷³³ *Ibid.* para. 18.

⁷³⁴ Judgment on Contempt Allegations, *Beqa Beqaj* (IT-03-66-T-R77), Trial Chamber, 27 May 2005, paras. 40 and 55.

(c) Scandalising a Court or a Judge

(i) England

The offence of scandalising the court is often regarded as having fallen into desuetude⁷³⁵ and has been described as ‘virtually obsolescent’⁷³⁶ in England. Nevertheless it continues to exist in other parts of the Commonwealth. In England, scandalising the court remains a common law offence⁷³⁷ as it falls outside the scope of strict liability rule under the CCA 1981 as it comprises the interference with the administration of justice as a continuing process.

Generally, the *actus reus* of scandalising the court is the publication of material that is calculated to lower the repute of the court or judge and so undermine public confidence in the administration of justice.⁷³⁸ It has been established in common law that publications which scurrilously abuse the court or the judge,⁷³⁹ publications imputing corruption or suggesting bias on their part may be regarded as contempt.⁷⁴⁰ Hence, to constitute scandalising contempt, in principle, it requires proof of real risk, as opposed to remote possibility, that the public confidence in the administration of justice would be undermined.⁷⁴¹ The risk in undermining the administration of justice arising from the criticism is a real one, which means there is a practical reality that the publication would indeed disrepute the court or the judges and generally would interfere with the administration of justice.

⁷³⁵ In *Ahnee* (n. 601) p. 305. Lord Steyn, delivering the judgment of the Privy Council on an appeal from Mauritius noted:

In England such proceedings are rare and none has been successfully brought for more than 60 years.

⁷³⁶ *Secretary of State for Defence v Guardian Newspapers Ltd.* [1985] AC 339, p. 347.

⁷³⁷ The Phillimore Committee suggested that the matter should be dealt with by way of a new statutory offence to replace the common law relating to scandalising. However, this suggestion was not implemented when the CCA 1981 was passed. See Arlidge, Eady and Smith (n. 19) pp.389-390.

⁷³⁸ *R v Gray* (n. 183).

⁷³⁹ *McLeod v St. Aubyn* (n 529); *R v Gray* (n. 183); *Re Sarbadhicary* (1906) 95 LT 894; *R v Vidal* (1922) Times, 14 October; *R v Freeman* (1925) Times, 18 November; *R v Wilkinson* (1930) Times, 16 July. See Borrie, Lowe and Sufrin, *The Law of Contempt* (n. 18) pp.340-343.

⁷⁴⁰ *R v Editor of New Statesman, ex p DPP* (1928) 44 TLR 310; *R v Colsey* (1931) Times, 9 May. See *Ibid.* pp.350-356.

⁷⁴¹ *AG v Times Newspapers Ltd.* (n. 186). The statutory test under Section 2 (2) CCA 1981 does not apply.

However, scurrilous abuse is to be distinguished from criticism, as criticism is permissible.⁷⁴² It is legitimate to criticise a judge's conduct in a particular case or the decision delivered by the court provided that aspersions are not cast on the motives of a judge or court. The comments must be kept within the limits of reasonable courtesy and good faith.⁷⁴³ This means that criticism of a judge's conduct or conduct of a court, even if strongly worded, is not contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or a court.

In England, there is a changing perception that the special and extra protection for the judiciary does not need strict enforcement in order to uphold liberal ideals.⁷⁴⁴ Almost the same sentiment was expressed by Lord Hailsham in *Badry v Director of Public Prosecution of Mauritius*⁷⁴⁵ – the citation for contempt arising from critical comments about the judiciary and their work was not at all worthwhile. In that case Commonwealth countries were urged not to punish for contempt for scandalising the judiciary except for the most extreme forms of abuse.

In England, the trend now has changed. According to Borrie and Lowe, what kinds of publication are capable of scandalising the court or the judge is subject to changes depending on the changes in the social and political conditions of the country. They also take a view that what was held to amount to scurrilous abuse in 1900 or 1930 would not be held to amount to scurrilous abuse in the 1990s.⁷⁴⁶ The changing trend was highlighted in *Attorney General v Guardian Newspapers Ltd. (No.2)*⁷⁴⁷ or famously known as *Spycatcher*. In this case no action for contempt was taken against the *Daily Mirror* when it published upside-down photographs of all the Members of the House of Lords under the headline 'You Fools!' The publication was in response to the *Spycatcher* injunction in 1987. This situation reflects that when courts are confident of their stability and strength, scope for comments of the actions of the court are quite considerable. As described by Michael K. Addo, the English judges are part of a mature system of democracy

⁷⁴² See *Ambard* (n. 399) p. 335.

⁷⁴³ *Ex p Blackburn* (n. 274).

⁷⁴⁴ *Ibid.*

⁷⁴⁵ [1982] 3 All ER 973, p. 979.

⁷⁴⁶ Borrie, Lowe and Sufrin, *The Law of Contempt* (n. 18) p.343.

⁷⁴⁷ [1990] AC 109.

and they have had sufficient time to earn the respect and confidence of the public. They have matured with considerable tolerance which enables them to withstand criticism.⁷⁴⁸

At present, with the coming of the HRA 1998, the cases of scandalising the court must be read together with Article 10 of the ECHR: whether it is one which is 'necessary in a democratic society'. The restriction to the right of freedom of expression must meet the three-part test that it must be 'prescribed by law', for the maintenance of the authority ...of the judiciary' as a legitimate aim within Article 10 (2) of the ECHR and must be 'necessary in a democratic society'.⁷⁴⁹

In *De Haes and Gijssels v Belgium*⁷⁵⁰ two journalists had been subjected to penalties for publishing an allegation of bias against a group of judges. The case was brought up before the ECtHR. The ECtHR after reiterating its view that domestic court, as the guarantors of justice, must enjoy public confidence and must be protected from unfounded destructive attack, was satisfied that the article that contained the allegation of bias contained mass detailed information about the circumstances. The information was based on thorough research and supported by opinions of several experts. The journalists published what they had learned from the case and they could not be said to be failed in carrying out their professional obligations. The ECtHR found that their conviction was not necessary in a democratic society and Article 10 had been breached.

C.J. Miller observes that the decisions of the ECtHR hardly undermine the rationale for scandalising the court. It is supported as long as the requirement that truth or justification must be available as a defence. Miller, however, argues that the standard is still lower compared to Canada and the USA as these two jurisdictions adopt a very tight test of 'clear and present or imminent' danger.⁷⁵¹

⁷⁴⁸ Michael K. Addo, 'Scandalising the Court in England and Wales' in Michael K. Addo (ed) *Freedom of Expression and the Criticism of Judges. A Comparative Study of European Legal Standards* (Ashgate Publishing Ltd., Aldershot 2000) pp. 40-41.

⁷⁴⁹ See Chapter 4, 4.3.1.2, pp. 153-155.

⁷⁵⁰ (1997) 25 EHRR 1.

⁷⁵¹ C.J. Miller, *Contempt of Court* (n. 20) pp. 594-595.

(ii) Canada and the USA

In **Canada**, before the Canada Charter of Rights and Freedoms, there were number of prosecutions.⁷⁵² Since the Charter, the English common law offence of scandalising the court has been challenged in *Kopyto*.⁷⁵³ It has been held that this area of the law might fall foul of Section 2 (b) of the Charter which guarantees ‘freedom of thought, belief, opinion and expression, including freedom of press and other media of communication’. In *Kopyto*, an alleged contemnor was a lawyer whose client had brought an action against the police. After his client’s case was dismissed, he gave a statement to the press, part of which said:

This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone is above you said to do it...We’re wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the police are sticking so close together you would think they were put together with Krazy Glue.

The Court ruled that the common law test was not strict enough. In order to meet constitutional requirement of the Charter, the Crown have to prove that the act was done or word was uttered with the intent to cause disrepute to the administration of justice and evil consequences flowing from the act were extremely serious as it apprehended real, substantial and immediate danger. As Goodman JA said that the Charter accorded higher protection to expression of honest and sincere opinion and prosecutions would be constitutional if the reasonable limit on expression is a clear, significant and imminent present danger to the fair and effective administration of justice. Dubin JA called the publication ‘disgraceful’ but did not believe it could have any effect on the public confidence in the administration of justice. Houlden JA took a view that scandalising prosecutions were inherently unconstitutional as they exercised a disproportionate restraint on freedom of expression. The Crown took a higher stance on freedom of expression and judicial activism which reflects Canada’s modern condition as a newly fledged constitutional democracy.

⁷⁵² *R v Western Printing and Publishing Ltd* (1954) 111 CCC 122; *Re AG of Canada and Alexander* (1976) 65 DLR (3d) 608.

⁷⁵³ *Kopyto* (n. 300).

In *Kopyto*, it demonstrates that the Canadian judiciary evolves within a modern and civilised system, and thus able to withstand criticism. As Cory JA said:

...the courts are not fragile flowers that will wither in the hot heat of controversy.⁷⁵⁴

In Canada, with respect to *Kopyto*, the common law of scandalising contempt is no longer supportable.

In the USA, as observed by Borrie and Lowe,⁷⁵⁵ contempt by scandalising is not known but in contempt charges in relation to pending cases the position was summed up in *Bridges v State of California*.⁷⁵⁶ It must be proved that there exists real and present danger that the publication interferes with the administration of justice in order to constitute contempt of court. It means that a substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.⁷⁵⁷ In this jurisdiction, for attorneys who engage in making false, scandalous or other improper attacks upon a judge, the rule is clear that they are subject to discipline and potentially being disbarred.⁷⁵⁸

(iii) Australia and New Zealand

In Australia and New Zealand, scandalising contempt still has life. In **Australia**, *In Re Colina and Another; Ex parte Torney*⁷⁵⁹ the Court acknowledged that contempt by way of scandalising of the court still exists and can be dealt with summarily. However, the Court viewed that summary contempt power should be exercised sparingly and only when necessity demands.⁷⁶⁰ The vitality of this common law offence can be seen in *Fitzgibbon v Barker*⁷⁶¹ a publication which contained the statement that a man had been 'jailed for two years only because he

⁷⁵⁴ Ibid. p. 227.

⁷⁵⁵ Borrie, Lowe and Sufrin, *The Law of Contempt* (n. 18) p. 339.

⁷⁵⁶ *Bridges v California* (n. 473).

⁷⁵⁷ See also *In the Matter of Contempt of Court by Lorient D. Bozorth* 38 N.J. Super. 184; 118 A.2d 430.

⁷⁵⁸ *State of Oklahoma ex rel. Oklahoma Bar Association, Complainant v Harlan E. Grimes, Respondent*, 1960 Okla 65, 354 P. 2d 1080;

⁷⁵⁹ [1999] HCA 57, 545.

⁷⁶⁰ Ibid. p. 587.

⁷⁶¹ (1992) 111 FLR 191.

wanted to see his children' was held to be calculated to lessen or discredit the authority of the court in the minds of the public.⁷⁶²

That scandalising contempt survives in **New Zealand** was confirmed in *Solicitor-General v Radio Avon*⁷⁶³ and *Solicitor-General v Smith*.⁷⁶⁴ In order to establish an actionable contempt, as established in *Radio Avon*, it must be proved beyond reasonable doubt that there is a real risk as opposed to remote possibility that public confidence in the administration of justice will be undermined. Hence, the risk of harm has to be resulted. In *Smith*, a Member of Parliament broadcast several statements in which he sought to put pressure upon a judge of the Family Court to determine a custody dispute in favour of one of his constituents. The Court found that his comments were intended to lessen public acceptance and were apt to undermine public confidence in the Court's decision. The effect of his statements as perceived by the Court would put pressure on the caregiver or run the real risk of dissuading her and prospective litigants from resorting to the Family Court. The Court considered that the offence of scandalising the Court was a reasonable limit upon freedom of expression and survived the enactment of the Bill of Rights Act.

There had been a movement to reform this kind of contempt of court in **Australia**. The Australian Law Reform Commission Report No. 35 (1987)⁷⁶⁵ advocated a more limited version of scandalising. It proposed that it should be an offence to publish an allegation imputing misconduct to a judge or magistrate in circumstances where the publication is likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity. The offence should be indictable and should only be tried summarily with the consent of all concerned. The defences of fair, accurate and reasonably contemporaneous reporting of the legal proceedings or of parliamentary proceedings, and truth or

⁷⁶² See also *R v Dunbabin Ex p. Williams* (1935) 53 CLR 434; *Gallagher v Durack* (n. 274); *Nationwide News Proprietary Ltd v Wills* (1992) 177 CLR 1; *The Wik Peoples v State of Queensland*; *The Thayorre People v State of Queensland* (1996) 187 CLR 1.

⁷⁶³ [1978] 1 NZLR 225.

⁷⁶⁴ [2004] NZLR 540.

⁷⁶⁵ The Discussion Paper DP 26: *Contempt and the Media* (1986).

honest and reasonable belief in the truth of the allegations were suggested.⁷⁶⁶ Nevertheless, the proposal has not been taken up.

(iv) India

In India Section 2 (c) (i) CCA 1971 deals with the offence of scandalising the court. It deals with publication or doing of the act that has results in ‘scandalises or tend to scandalise, or lowers or tends to lower the authority of, any court’. In India, contempt by scandalising also has its life. However, as observed by Samaraditya Pal,⁷⁶⁷ the Indian courts have been taking inconsistent views when dealing with contempt by scandalising the court. The cases of scandalising the court in India are colourful. In *Vishwanath v E.S. Venkataramaih*,⁷⁶⁸ a former Chief Justice of India gave an interview which was published in several newspapers. In the course of the interview, he is stated to make the following comments:

The judiciary in India has deteriorated in its standards because such judges are appointed, as are willing to be ‘influenced’ by lavish parties and whisky bottles.

The High Court held that the words complained of did not amount to contempt because the entire interview appeared to have been given with an idea to improve the judiciary. A similar approach is taken in *Ish Kumar Valecha v Surjeet Banerjee*,⁷⁶⁹ whereby an affidavit which contained allegations of corruption, impotence, cowardice, favouritism and incompetence against the judiciary was not found to be contemptuous.

In *In Re SK Sundaram*⁷⁷⁰ an advocate sent a telegraphic communication to the Chief Justice of India calling upon him to step down. A contempt proceeding was initiated against him. In replying to a notice by the Solicitor General, he justified his actions by stating that he had done what he had believed to be right and fair

⁷⁶⁶ Borrie, Lowe and Sufrin, *The Law of Contempt* (n. 18) p. 363.

⁷⁶⁷ Pal (n. 23) p. 116.

⁷⁶⁸ 1990 Cri LJ 2179.

⁷⁶⁹ 2004 All LJ 341.

⁷⁷⁰ [2001] 3 LRI 1195.

within the bounds of his knowledge of law and language. He further contended that the action initiated against him was on the basis of the telegraphic communication which would not amount to publication; hence no contempt action could be taken on that premise. He also contended that any personal attack upon a judge in connection with the office he holds is dealt with under law of libel or slander. The Supreme Court of India held that the contempt of court jurisdiction is not to protect an individual judge but to protect the administration of justice from being maligned. Scandalising the court, therefore, would mean hostile criticism of judges as judges or judiciary. It is true that any personal attack upon a judge should be dealt with under the law of libel or slander yet defamatory publication in this case concerning the judge as a judge brings the court or judges into contempt. It is a serious impediment to justice and an inroad on the majesty of justice.

In *Re Arundhati Roy*,⁷⁷¹ the Supreme Court explained that the judiciary in India is under a constant threat and being endangered even after fifty years of independence. In order to restore public confidence in the judiciary, the courts are entrusted with power to punish for contempt especially when the act tends to undermine the authority of the law and bring it in disrepute by scandalising it. The CCA 1971 has been enacted to secure public respect and confidence in the judicial process. The case at point involves a contempt petition filed by an advocate alleging that he was attacked by the respondent along with others when he had protested against a demonstration against a judgment of the Supreme Court in which the respondent was a participant. On issuance of a show cause notice, the respondent filed a reply affidavit stating that 'the proceedings indicated a disquieting inclination on the part of the court to silence criticism and muzzle dissent and to harass and intimidate those who disagreed with it'. The respondent also stated that the court 'displayed a disturbing willingness to issue notice on an absurd despicable and entirely unsubstantiated petition'. The Court found the statements of the respondent prima facie contemptuous and initiated *suo motu* proceedings against her. The court felt that the respondent had committed

⁷⁷¹ [2002] 1 LRI 497.

contempt by imputing motives to the courts for entertaining the litigation and passing orders against her.

The respondent relied on the right to freedom of expression. However, the Court took a view that any expression of opinion would not be immune from the liability for exceeding the limits. If he tries to scandalise the court or undermines the dignity of the court then the court would be entitled to exercise its power. The Court gave higher protection to the administration of justice. The Court further stated that the legislature when enacting the CCA 1971 took into consideration some judgments of foreign courts but did not lose sight of the views, observations and opinions of the Indian judges. The judges took a view that in protecting the freedom of speech and expression, one cannot exceed the limit otherwise he can be subjected to contempt of court on the allegation of scandalising or intending to scandalise the authority of any court. The Supreme Court expressed that the legislature before enacting the CCA 1971 gave consideration to foreign cases and tried to 'bring the law on the subject into line with modern trends of thinking in other countries without ignoring the ground realities and prevalent socio-economic system in India, the vast majority of whose people are poor, ignorant, uneducated, easily liable to be misled.'⁷⁷²

In accordance to *Re Arundhati Roy*, in India, protecting the judiciary from any scurrilous abuse or comment that tends to lower its authority and integrity in the eyes of the public is crucial given the vulnerability of the society and incapability of assessing for themselves any allegations made against the judiciary.

It is to note that this species of contempt remains very much alive in **Singapore**. In Singapore, it is settled law that any which publication alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial functions, amounts to contempt.⁷⁷³ Contempt by scandalising is recently found in *Attorney General v Hertzberg and others*.⁷⁷⁴ One of the main issues in *Hertzberg* was the appropriate test for determining if the offence had

⁷⁷² Ibid. para. 26.

⁷⁷³ *Wain* (n. 317) citing *Pang Cheng Lian* (n. 396).

⁷⁷⁴ [2009] 1 SLR 1103.

actually been carried out. *Hertzberg*, citing prior Singapore case law on the matter,⁷⁷⁵ decided that the test of liability to be applied is ‘inherent tendency to interfere with the administration of justice’. The test is lower than the common law test of ‘real risk’. The Court justified the rejection of the ‘real risk’ test on the ground that ‘conditions unique to Singapore i.e. small geographical size and the fact that in Singapore, judges decided both questions of fact and law, necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts’.⁷⁷⁶

In support of these justifications, the Court relied on its earlier decision *Attorney General v Chee Soon Juan*⁷⁷⁷ in which the Court in that case expressed that ‘the geographical size of Singapore renders its courts more susceptible to unjustified attacks’. The Court in *Chee Soon Juan* relied on *Ahnee*⁷⁷⁸ where the Privy Council on appeal from Mauritius reasoned as follows:

[I]t is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman, *Civil Liberties & Human Rights in England and Wales* (1993), pp. 74-747; Barendt, *Freedom of Speech* (1985), pp. 218-219.⁷⁷⁹

In *Hertzberg*, by referring to *Ahnee*, it can be questioned whether this is an accurate description of the situation of the present day in Singapore. *Ahnee* is a lower threshold for determining whether a court has been scandalised and may be appropriate in jurisdictions where the position of the judiciary is unstable and vulnerable to undue pressure from executive or segment of public.

⁷⁷⁵ *Wain* (n. 317); *Attorney General v Chee Soon Juan* [2006] 2 SLR 650; *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642.

⁷⁷⁶ *Hertzberg* (n. 774) p. 1125.

⁷⁷⁷ *Chee Soon Juan* (n. 770) p. 659.

⁷⁷⁸ *Ahnee* (n. 601).

⁷⁷⁹ *Ibid.* pp. 305-306.

(d) *Sub judice* Rule

(i) England

In England, most applications to commit for contempt in respect of media publications are based upon strict liability provisions contained in Sections 1 and 2 CCA 1981.⁷⁸⁰ Under the ‘strict liability rule’, conduct may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so. Thus, this rule only applicable to publications that touch upon particular legal proceedings. Under the strict liability rule, the stricter time limits i.e. the ‘active’ test⁷⁸¹ and more precise test regarding the necessary risk of prejudice was introduced.⁷⁸² According to Fenwick and Phillipson, the Act also introduced a ‘public interest’ test designed to allow some

⁷⁸⁰ Prior the CCA 1981, the criminal contempt at common law was a crime of strict liability. It consisted of the element of the creation of a real risk of prejudice within the *sub judice* period, and an intention to publish. The *sub judice* period is a certain period of time before and a certain of time after the action when there was a risk that article published relevant to the might be in contempt. The starting point of this period is when the proceedings were ‘imminent’. This ‘imminent’ test was criticised because of its vagueness and width as it could be applied a long time before the trial. It also gave rise to ‘gagging writs’ i.e. a writ for libel was issued to prevent the newspaper from discussing a matter although there was no intention to proceed with the case. The newspaper might find itself in contempt if it continued to discuss the case. It was used to prevent further comment.

A newspaper could be in contempt if it was shown that the publication in question had created a risk that the proceedings in question might be prejudiced. It is irrelevant whether the proceedings had actually been prejudiced. The problem of over-breadth of imminence test was addressed by the Phillimore Committee in 1974 that suggested for the need to reform the law. Nevertheless, the reform only took place only after the ruling of the ECtHR in the *Sunday Times* case.

The ECtHR ruled that the decision of the House of Lords in *AG v Times Newspapers Ltd* had breached Article 10 of the ECHR. The decision of the House of Lords was criticised and the test applied was wider than the test of ‘real risk of prejudice’. The Lords applied the ‘prejudgment’ test which only little risk to the proceeding should be shown in order to fulfil the requirement of *actus reus*. The prejudgment test was, however, put to an end with the coming of Section 2 (2) CCA 1981.

As mentioned earlier, the CCA 1981 as partly to respond to the decision of the *Sunday Times* case. The Act, according to Fenwick and Phillipson, ‘was intended to maintain the stance of the ultimate supremacy of the administration of justice over the freedom of speech, while moving the balance further towards freedom of speech’. See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n. 607) p. 251. See also Fenwick, *Civil Liberties and Human Rights* (n. 143) pp. 334-337.

⁷⁸¹ Section 2 (3) CCA 1981. For criminal proceedings, the active period begins at the point of the issue of a warrant for arrest, an arrest without warrant or the service of an indictment (summons or an oral charge), and the ending point is acquittal, sentence, any other verdict or discontinuance of the trial. The starting point for civil proceedings is when the case is set down for a hearing in the High Court or a date for the hearing is fixed. The end point of the active period for civil proceedings comes when the proceedings are disposed of, discontinued or withdrawn. See Schedule 1 CCA 1981; *AG v Hislop and Pressdram* [1991] 1 QB 514.

⁷⁸² Section 2(2) CCA 1981.

material on matters of public interest to escape liability even though it created a risk of prejudice to proceedings.⁷⁸³

Section 2(2) CCA 1981 provides ‘the strict liability rule applies only to a publication which creates a substantial risk that the course of justice in particular proceedings in question will be seriously impeded or prejudiced’. It demands a ‘substantial risk of serious prejudice’ presupposes that the harm could not be characterised as slight or minimal.⁷⁸⁴ In satisfying the statutory test of ‘substantial risk of serious prejudice’ depends on many different factors such as the proximity in time between the publication and proceedings,⁷⁸⁵ the likelihood of the publication coming to the attention of a potential juror⁷⁸⁶ and the likely impact of the publication on the jurors from the time of the publication to the time of the trial.⁷⁸⁷

As mentioned earlier, for conduct to give rise to strict liability, it needs to establish ‘a substantial risk of prejudice’, i.e. the degree of interference, that is itself required to be ‘serious’. Hence, the question whether the course of justice, in particular proceedings, will be impeded or prejudiced by a publication depends primarily upon whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would have otherwise have followed.⁷⁸⁸ Therefore, for there to be contempt under this heading there must be both some risk that the proceedings in question will be affected and a prospect that, if the proceedings are affected, the effect will be serious.⁷⁸⁹ This

⁷⁸³ Section 5 CCA 1981. See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n. 607) p. 251.

⁷⁸⁴ According to Fenwick and Phillipson, Section 2(2) on its face answers to the findings on proportionality in *Sunday Times* case. In that case, in balancing the value of the speech against the harm under Article 10(2) ECHR, it was found that the harm caused was quite slight. See *Ibid.* pp. 257-258.

⁷⁸⁵ See *AG v News Group Newspapers Ltd.* [1987] 1 QB 1.

⁷⁸⁶ For example, the court will consider whether the publication circulates in the area from which the jurors are likely to be drawn and how many copies are circulated. See *AG v English* (n. 430).

⁷⁸⁷ In *AG v Unger* (1998) EMLR 280, it has been decided that the impact of the publication on the jurors would have faded over the period of time, and the jurors would decide cases according to the evidence put before them. Thus the substantial risk of prejudice did not arise. See also *AG v MGN Ltd* [1997] 1 All ER 456 where the Court emphasised that the jurors are able to ignore possibly prejudicial comments in the media.

⁷⁸⁸ *Re Lornho plc* [1990] 2 AC 154; *AG v MGN Ltd* (n. 787).

⁷⁸⁹ *AG v News Group Newspapers Ltd.* (n. 785), p. 15. In *AG v English* (n. 430) p. 142, Lord Diplock said:

means that showing a slight risk of serious prejudice or a substantial risk of slight prejudice would not be sufficient.⁷⁹⁰

In *AG v English*⁷⁹¹ the House of Lords defined substantial risk as excluding a risk which is only remote. C.J. Miller comments that the ‘substantial risk’ element of the statutory test has the same meaning as the common law test interpreted by Lord Reid in the *Sunday Times* case - a remote possibility of prejudice is not sufficient but a small likelihood is.⁷⁹² A similar approach was adopted in *AG v News Group Newspapers Ltd.*⁷⁹³ It was found that ‘substantial’ as a qualification of ‘risk’ does not have the meaning of ‘weighty’ but rather means ‘not insubstantial’ or ‘not minimal’.

Nevertheless, the cases such as *AG v MGN*, *AG v Unger* and *AG v Guardian Newspapers*, which were decided around the time of the inception of the HRA but before its coming into force, marked the turning point in the approach to the test of liability under Section 2 (2) CCA 1981. The judicial approach was affected by the imminent reception of Article 10 ECHR into domestic law.

In *AG v MGN*, the Court found that the article creating the inference that the defendant in the forthcoming trial was guilty, had not sufficiently created substantial risk of serious prejudice, despite that the article in combination with other articles had led the trial judge to stay the proceedings. In *AG v Unger*, the article imputed guilt on the part of the defendant was not found in itself to create substantial risk due to the lapse of time.⁷⁹⁴

*AG v Guardian Newspapers*⁷⁹⁵ gave much weight to the term ‘substantial’ and far more compelling than those of *AG v English*. In this case, The Observer published an article while the trial of one Anthony Kelly, an artist who had been charged

If, in a criminal trial upon indictment, it is the outcome of the trial which is put at risk, or the risk is that the jury might have to be discharged without proceeding to a verdict, then that is as serious as anything could be.

⁷⁹⁰ *AG v News Group Newspapers Ltd* (n. 785).

⁷⁹¹ [1983] 1 AC 116.

⁷⁹² C.J. Miller, *Contempt of Court* (n. 20) p. 231-232.

⁷⁹³ *AG v News Group Newspapers Ltd* (n. 785) p. 15.

⁷⁹⁴ See *supra.*, (n. 787).

⁷⁹⁵ *AG v Guardian* (n. 429).

with stealing body parts, was in progress. The article suggesting that Kelly had acquired the body parts not for serious artistic purpose but because of an obsessive interest in necrophilia. The writer linked Kelly's obsession to a serial killer, Jeffrey Dahmer.

The Court was concerned with whether the article will affect the jury thus impeding or prejudicing the trial, in the sense that 'such prejudice as would justify a stay or appeal against conviction'.⁷⁹⁶ The article was read by only one juror whom indicated to the judge that she would not be influenced by the article and promised not to mention its contents to fellow jurors. Furthermore, the judge also warned the jury that they need to try the case on the evidence alone. The article, on its face, was damaging to Kelly's case as in the jury's eyes it could have undermined his credibility. It created a risk of serious prejudice to the ongoing trial but the Court of Appeal concluded that the risk of prejudice was not 'substantial'.

In interpreting Section 2 (2) CCA 1981 as to what amount to 'substantial risk', the Court of Appeal placed a strong reliance on the Article 10 (2) test as interpreted in *Worm v Austria*.⁷⁹⁷ In *Worm v Austria*, the test used was that of 'likelihood' of risk which appears to mean that the risk is more likely than not to materialise. It is accepted that there was no necessity to show that prejudice to the proceedings had actually arisen. It is enough if there is likelihood that at least the lay judges would read the article. The test appears to mean that the risk is more likely than not to materialise.

Worm v Austria concerned an article published during the ongoing criminal trial which clearly imputed guilt against the defendant. The article was highly critical of Mr. Androsch, a former Minister of Finance, who was charged with tax evasion. The Austrian Court of Appeal convicted Worm on the basis that the article had a potential influence on the criminal proceedings since it had the capacity to affect at least two lay judges involved in the proceedings. Worm

⁷⁹⁶ Ibid., p. 915.

⁷⁹⁷ *Worm v Austria* (n. 556).

argued before the ECtHR that his conviction constituted an interference with the freedom of expression guaranteed by Article 10 ECHR.

In dismissing his complaint of the violation of his right to freedom of expression, the ECtHR noted that the interference was necessary in a democratic society due to the fact that politicians who are the public figures, are still entitled to the enjoyment of the guarantee of a fair trial set out in Article 6 (1) which in criminal proceedings includes the right to an impartial tribunal. It found:

This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.⁷⁹⁸

In interpreting Article 10 i.e. in framing the law to protect the ‘authority and impartiality of the judiciary’, the ECtHR provides that the States could look ‘beyond the concrete case to the protection of the fundamental role of courts in a democratic society’. The ECtHR made it clear that Article 6 will take precedence over Article 10 where it can be said that there is a real likelihood of prejudice.⁷⁹⁹

Fenwick and Phillipson argue that the interpretation of Section 2 (2) CCA adopted in *AG v Guardian*, influenced by *Worm* afforded much higher threshold for the test comparing to the test laid down in *AG v English*.⁸⁰⁰ It has given due weight to the protection of freedom of speech.

As mentioned earlier, the Act also introduced a ‘public interest’ test under Section 5, which provides that a substantial risk of serious prejudice to a trial can be created but no liability may arise so long the test under this provision is fulfilled. Section 5 was adopted as a response to the *Sunday Times* case, as a measure intended to protect media freedom when the publication in question concerns a general issue of public interest. Section 5 reads:

⁷⁹⁸ Ibid., para. 50.

⁷⁹⁹ Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n. 607) p. 187.

⁸⁰⁰ Ibid., pp. 268-279.

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 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.

Section 5 does not apply if the Attorney General can show that Section 2 (2) is fulfilled. *AG v English* is the leading case on Section 5. The case concerned an article published by the Daily Mail in support of ProLife candidate, Mrs. Carr, in a contemporaneous by-election. Mrs. Carr's election policy was that the killing of deformed babies should be stopped. The article also touched upon the general topic of mercy killing where the journalist spoke disparagingly of what he described as the common practice of doctors deliberately failing to keep deformed children alive. The article, which was published while the trial of one Dr. Arthur for euthanasia was pending, found to prejudice his trial. He was standing trial for the murder of Down's syndrome babies.

In determining the applicability of Section 5, Lord Diplock adopted a two stage approach. Firstly, it has to be determined that the article must at least be a 'discussion' which presumably means an examination by argument or debate.⁸⁰¹ In this case, Lord Diplock found that a 'discussion' could include implied accusations and not merely confined to abstract debate. Furthermore, the discussion must be of 'public affairs or other matters of general public interests'. Mrs. Carr's candidature was found to be a matter of 'public affairs' and the moral justification of the mercy killing of the deformed babies was a matter of 'general public interest'. Secondly, the Lords went to find whether risk of prejudice to Dr. Arthur's trial was merely an incidental to the discussion i.e. the candidate's election policy. In fact, the article had not used the trial as a direct illustration. On this point, the Court decided that the risk of prejudice to Dr. Arthur's trial was merely incidental to the main theme of the article.

Therefore, in order to determine that the risk of prejudice is not merely incidental to the discussion, 'a better and surer test is simply to look at the subject matter of the discussion and see how closely it relates to the particular legal proceedings.

⁸⁰¹ C.J. Miller, *Contempt of Court* (n. 20) p. 358.

The more closely it relates the easier it will be for the Attorney General to show that the risk of prejudice is not merely incidental to the discussion’.⁸⁰²

As discussed above, the CCA 1981 has created the strict liability provisions under Sections 1 and 2. Nonetheless, common law of contempt, not only generally, but also in the area of media publication, provided the mental element is present, has been retained. It is left open under Section 6 (c) the possibility of bringing an action under common law contempt where it can be shown there is specific intent to prejudice the administration of justice by the publication in question. Section 6 (c) reads:

Nothing in the foregoing provisions of this Act-

...

(c) restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice.

The provision of the CCA 1981 left unaffected the *actus reus* of publication contempt falling outside the strict liability rule. Therefore, publications which are intended to impede or prejudice the administration of justice may be punishable as contempt of court at common law.⁸⁰³ Therefore, if the proceedings which have been impeded were not ‘active’ at the time of the publication, or the prejudice was not caused by the publication within the meaning of Section 2 (1) CCA, strict liability rule cannot apply, but Section 6 (c) CCA will come in. Arlidge *et al* explains that reference should be made to ECHR and HRA in situations when the common law contempt relating to this type of contempt is unclear.⁸⁰⁴ This is due to the backdrop of the coming of the CCA. The Parliament took in the CCA 1981, in particular by the adverse decision and comment in the law of contempt in *Sunday Times* case.

Publication contempt, when not falling within the strict liability rule, consists of the usual two elements *actus reus* and *mens rea*.⁸⁰⁵ The *actus reus* of this contempt is the impedance of or interference with the administration of justice by

⁸⁰² Per Lloyd LJ in *AG v TVS Television Ltd, The Times*, 7 July 1989 which is mentioned in C.J. Miller, *Contempt of Court* (n. 20) pp. 361-362.

⁸⁰³ Section 6 (c) CCA 1981.

⁸⁰⁴ Arlidge, Eady and Smith (n. 19) p. 327.

⁸⁰⁵ *AG v Sports Newspapers Ltd*. [1992] 1 All ER 503, p. 519.

the court.⁸⁰⁶ There are three elements to be justified if the publication is to fall within the area of liability preserved by Section 6 (c) CCA 1981 –specific intent to prejudice proceedings must be shown, proceedings are imminent, and a real risk of prejudice must present.⁸⁰⁷

As discussed earlier, the required *mens rea* for this type of contempt is an intention to prejudice the administration of justice, and that ‘intention’ refers to specific intent.⁸⁰⁸ The requirement to prove intent was reaffirmed in *AG v Punch*.⁸⁰⁹ In order to establish *mens rea*, it has to prove that the accused knew the publication would interfere with the course of justice by defeating the purpose underlying the injunction.

According to Lord Reid in the *AG v Times Newspapers*⁸¹⁰ the test of what constitutes publication contempt at common law is that established in *R v Duffy*⁸¹¹ – that there must be a real risk of prejudice, as opposed to a remote possibility. The risk to the administration of justice is assessed at the time of the publication.⁸¹² Furthermore, it seems that in order for this to be the case, the proceedings must be ‘pending’ or ‘imminent’ at the time of the publication.⁸¹³

⁸⁰⁶ *AG v Times Newspapers Ltd.* (n. 186) pp. 206-207. For more detail on the potential *actus reus* under common law publication contempt, see Arlidge, Eady and Smith (n. 19) pp. 330-363.

⁸⁰⁷ See Helen Fenwick, *Civil Liberties and Human Rights* (n. 143) p. 363.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *AG v Punch* [2002] UKHL 50.

⁸¹⁰ *AG v Times Newspapers* (n. 186) pp. 298-299.

⁸¹¹ *R v Duffy* (n. 309) p. 200.

⁸¹² *AG v Times Newspapers Ltd* (n. 423) p.215.

⁸¹³ In criminal proceedings, at common law, pending proceedings as established in *Clarke, ex p. Crippen* (1910) 103 LT 636, that proceedings may be regarded as pending at an earlier point in the criminal process. The earlier point as stated in the obiter is when a warrant had been issued for the arrest of the suspect. If the person is arrested without warrant, then proceedings may be regarded as pending when a person has been arrested and charged is firmly established. However, in *Parke, ex p. Dougal*, [1903] 2 KB 432, publication contempt may be committed at common law even though the relevant proceedings are not pending at the time of the publication but are only imminent. As established in *AG v News Group Newspapers plc.* [1989] QB 110, p. 135, criminal proceedings are ‘imminent’ where the prosecution is certain to be commenced and particularly where it is to be commenced in the near future. It is noted that at common law, no consensus reached on the test to be applied when determining whether criminal proceeding have become *sub judice*. For more, see C.J. Miller, *Contempt of Court* (n. 20) pp.258-263; Fenwick, *Civil Liberties and Human Rights* (n. 143) pp. 365-366.

(ii) Canada and the USA

In the USA, a different approach was taken. State courts have been denied the power to punish for contempt by publication unless there has been a 'clear and present danger' to the administration of justice.⁸¹⁴ The freedom of expression is taking precedence over the right to a fair trial as the courts are unwilling to use contempt power.⁸¹⁵

In Canada, in order to be found guilty for *sub judice* publication, *R v Bowes Publishers Ltd*⁸¹⁶ lists the elements to be proved as follows:

- (i) the identity of the respondents as the ones responsible for the publication,
- (ii) that it was the activity or conduct of the respondents that brought about the publication, and
- (iii) that the respondents intentionally published the articles and at the time of publication objectively ought to have foreseen that the articles posed a real risk of prejudice to a fair trial for the accused.

The Court in this case took a view that the risk of prejudice to a fair trial must be real, serious and substantial.

However, in *Dagenais v. Canadian Broadcasting Corporation*,⁸¹⁷ the Court issued a publication ban on a television programme dealing with the sexual and physical abuse of children in a Catholic orphanage while the trials of four members of a Catholic order charged with similar crimes was in progress or

⁸¹⁴ See *Nebraska Press Association v Stuart* 427 US 539 (1976).

⁸¹⁵ A contrast view was adopted in *Gentile v State Bar of Nevada*, 501 U.S. 1030, 1033 (1991). In this case, an attorney conducted a press conference immediately after his client was criminally charged. 6 months after the press conference, the case was tried before a jury and his client was acquitted. The State Bar filed a complaint against Gentile for violating a rule that he should not make extrajudicial statement that will prejudice the proceedings. At the Disciplinary Board, he was found guilty for violating the rule. He appealed to the US Supreme Court. In this case, the Court asserted that the speech of the attorney representing client in cases that are pending is limited under a less stringent standard i.e. substantial likelihood of material prejudicial. This is due to the fact that attorneys are the key participants in the criminal justice system and have fiduciary responsibility not to engage in public debate that will redound to their clients' detriment or to obstruct a fair administration of justice. See Mattei Radu, 'Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Right of Criminal Defendants, and Society's Right to the Fair Administration of Justice' (2006-2007) 29 Campbell Law Review 497.

⁸¹⁶ (1995), 30 Alta. L.R. (3d) 236 (Q.B.) p. 241.

⁸¹⁷ (1995) 120 DLR (4th) 12.

pending. The Supreme Court of Canada held that the ban could not be upheld, rejecting the traditional common law rule in favour of a fair trial. Lamer CJ said:

The pre-Charter common-law rule governing publication bans emphasised the right to a fair trial over the expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss.2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common-law rule that automatically favoured the right protected by s.11(d) over those protected by s.2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁸¹⁸

The Supreme Court of Canada set out the issue as being whether a restriction on freedom of expression was ‘necessary in a democratic society’. Lamer CJ stated:

The common law must be adapted so as to require a consideration of both the objectives of the publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:

A publication ban should only be ordered when:

- (a) such ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban.⁸¹⁹

His Lordship then set forth a number of alternative measures to a publication ban, which could reduce the prejudicial effect of media coverage:

Possibilities that readily come to mind, however, include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dire*s during jury selection, and providing strong judicial direction to the jury.⁸²⁰

⁸¹⁸ *Dagenais* (n. 817) p. 37.

⁸¹⁹ *Ibid.* p. 38.

⁸²⁰ *Ibid.*, p. 40.

Nevertheless the cases after *Dagenais* applied common law principle of *sub judice* contempt.⁸²¹

(iii) **Australia and New Zealand**

In **Australia**, a publication having a real and practical tendency to interfere with the administration of justice in a current or pending trial is contempt.⁸²² It has been recognised for a long time a test for liability for *sub judice* contempt as provided in *Ex p. Bread Manufacturers Ltd.*⁸²³ The balance must be maintained between the right of a person to contribute to the discussion of matters of public interest and their impact upon a pending trial. The Court held that a publication which has a tendency to interfere with the administration of justice by preventing the fair trial of any proceeding in a court is contempt if it is proven beyond reasonable doubt that such interference was either intended or likely.

In *Hinch v AG*⁸²⁴ the Court concluded that the law would intervene to protect the administration of justice from any substantial risk of serious interference as a matter of practical reality. It means that when the impugned material has a real and definite tendency to prejudice or embarrass pending proceedings then only the publisher or distributor can be committed for contempt.

The same approach is taken in **New Zealand** as seen in *Gisborne Herald Co. Ltd. v. Solicitor General.*⁸²⁵ *Gisborne* rejected *Dagenais* on the basis of influence of culture and values of the particular community, and the Court also described the approach in *Dagenais* as uncommon, inconvenient and expensive.⁸²⁶ As such, the traditional common law rule still applies.

⁸²¹ *R v Edmonton Sun* [2000] ABQB 283.

⁸²² *James v Robinson* (1963) 109 CLR 593.

⁸²³ *Ex p. Bread Manufacturers Ltd* (n. 398).

⁸²⁴ *Hinch* (n. 665).

⁸²⁵ [1995] 3 NZLR 563.

⁸²⁶ *Ibid.* p. 575.

(iv) India

The law relating to *sub judice* rule can be found under Section 2 (iii) of the CCA 1971. The provision does not use any expression like ‘substantial risk’ and makes the requirement of specific intent not relevant to India since the absence of *mens rea* in the strict sense is no defence in criminal contempt.⁸²⁷

In India, in determining whether the publication falls under this type of contempt, the question is not whether the publication does interfere but whether it tends to interfere with the administration of justice.⁸²⁸ The question is not on the intention of the contemnor but whether it is calculated to interfere with the due administration of justice.⁸²⁹

The Act does not expressly deal with the question of liability of editor, publisher and reporter except that of distributor under Section 13 (3). Hence the Supreme Court has observed that an irresponsible conduct and attitude on the part of the editor, publisher and reporter cannot be consistent with good faith but was distinctly opposed to the high professional standard.⁸³⁰ The concerned quarters must ensure that information is factually accurate, facts are not distorted and no essential facts are suppressed. Responsibility shall be assumed for all information and comments published.⁸³¹

(v) The ICTY

The ICTY dealt with a number of contempt cases.⁸³² In relation to publication contempt, prosecuting journalists for contempt for revealing the identity of the

⁸²⁷ Pal (n. 23) p.140.

⁸²⁸ See *Crown v Faiz Ahmed Faiz*, AIR 1950 Lah 84 (SB); *Kallo Guha Thakurata v Biman Basu, Chairman, Left Front, West Bengal*, (2005) 2 CHN 330.

⁸²⁹ *In re PC Sen* (n. 312).

⁸³⁰ *In re Harijai Singh*, 1966 (6) SCC 466.

⁸³¹ *Court of its own motion v A.J. Philip, Partner, Publisher and Officiating Editor the Tribune Press Chandigarh*, (2004) Pun LR 421.

⁸³² In chronological order, as of 14 September 2009, the cases in which convictions were pronounced for contempt of the tribunal at the ICTY are the following: *Aleksovski* (n. 731); *Vujin* (n. 730); *Bulatovic* (n. 732); *Beqa Beqaj* (n. 734); *Marijacic and Rebic* (n. 731); Judgment, *Jovic*

protected witnesses is a fairly recent phenomenon at the Tribunal.⁸³³ Nevertheless, the case of *Florence Hartmann* is different as it deals with the disclosure of parts of confidential decisions made by the Tribunal.⁸³⁴

Florence Hartmann, a former French journalist and author, worked from October 2000 to October 2009 as an official spokesperson and Balkan adviser to Carla Del Ponte, chief prosecutor of the International Criminal Tribunal for the former Yugoslavia at The Hague. She was charged with two accounts of contempt under Rule 77 (A) (ii) RPE, for knowingly and wilfully interfering with the administration of justice by disclosing information in knowing violation of two decisions of the Appeal Chambers in *Prosecutor v Slobodan Milosevic*.⁸³⁵ This is due to her publication of a book '*Paix et Chatiment* (Peace and Punishment)' and an article 'Vital Genocide Documents Concealed', allegedly to disclose information related to two Appeal Chambers approving black-outs and exclusions from critical historical war documents showing Serbia's involvement in the Bosnian war of the 1990s.

In order for the offence of contempt to be established, the Tribunal has to evaluate the *actus reus* and *mens rea* of the accused in publishing the materials that contain the confidential information. The *actus reus* of this form of contempt is the physical act of disclosure of information relating to proceedings before the Tribunal, where such disclosure breaches an order of a Chamber. It has to be proven that there is a breach of the Order not to disclose the confidential information. If the breach is proved then it is not necessary to prove actual interference with the Tribunal's administration of justice. It is because the violation of the Order itself is interference to the Tribunal's administration of justice. As to *mens rea*, it has to be proved that the accused disclosed the information knowing it was a violation of the Order. Then, a finding of intent to violate the order has to be established.

(IT-95-14/2-R77), Trial Chamber, 30 August 2006; *Margetic* (n. 731); Judgment on Allegation of Contempt, *Florence Hartmann* (IT-02-54-R77.5), Trial Chamber, 14 September 2009.

⁸³³ *Marijacic and Rebic* (n. 731); *Margetic* (n. 731).

⁸³⁴ *Florence Hartmann* (n. 832). This case is on appeal.

⁸³⁵ (IT-02-54-AR108bis.2) and (IT-02-54-AR108bis.3).

Hartmann's counsel argued that the Tribunal has no jurisdiction to try the matter as the conduct falls outside the ambit of Rule 77 RPE, among others that the proceedings to which the disclosure pertains have terminated. Thus, it is contended that the accused should have enjoyed her freedom of expression. Furthermore, the test for the conduct to merit contempt punishment must be of 'real risk' that the administration of justice will be seriously interfered with.

The Tribunal rejected the arguments. The Tribunal relies on Rule 77 RPE and held that any knowing or wilful conduct that interferes with the administration of justice of the Tribunal may be tried as contempt. It is not necessary to prove actual interference with the Tribunal's administration of justice. The Tribunal was satisfied that the Accused had knowledge that the information was confidential at the time of the disclosure as the information was filed 'confidential' and she disclosed this confidential information by publishing the said book and article. It is worth to note here that she was a spokesperson for the former chief prosecutor and obviously had access to some sensitive and confidential documents in the possession of the Tribunal, even though she was not supposed to.

As regards *mens rea*, the Defence counsel submitted that the Prosecution must prove that the accused acted with specific intent to interfere with the administration of justice. The Counsel submitted that the accused lacked such intent. However, the Tribunal ruled that it is not necessary to prove specific intent as having established either actual knowledge or wilful blindness to the existence of the Order, or reckless indifference to the consequences of the act by which the order is violated makes that the intent to interfere with the administration of justice is also established.⁸³⁶

As to the accused's right to freedom of expression, the Tribunal notified that there is a need to balance the protection of confidential information in court proceedings and the right to freedom of expression. After considering the rules under the ECHR, the ICCPR and the UDHR, the Tribunal found that these instruments contain qualifications on freedom of expression in relation to court proceedings. It

⁸³⁶ *Florence Hartmann* (n. 832) p. 3261.

was decided that the right to protect confidential information in court proceedings carries more weight.

After due consideration, the Tribunal found Hartmann guilty of contempt for disclosing confidential information in her publications. She was sentenced to pay a fine of 7000 Euros.

The Tribunal in this case applied the common law test of liability in determining whether the publication was contemptuous. As regards the balancing between the two conflicting interests, the Tribunal upheld the right to protect confidential information in court proceedings, at the expense of the freedom of expression.

4.3.2.3 *Mens Rea* or Intent

The status of the requirement *mens rea* in contempt cases in most of common law jurisdiction varies and sometimes is unclear. In **England**, *AG v Times Newspaper Ltd*⁸³⁷ stated that liability for breaking a court order is strict. All that is required to be proved is service of the order and the breach of the said order. It is neither necessary to show that the defendant is intentionally contumacious nor that he intends to interfere with the administration of justice.⁸³⁸ This law has been established in the classic case of *Stancomb v Trowbridge UDC*⁸³⁹ as it decided that if a person is restrained by an injunction from doing a particular act but he commits a breach of the injunction, he is liable for contempt if he in fact does the act. He cannot say that his act was not contumacious as he has no direct intention to disobey the order. It is sufficient for the court to look at his act of committing such breach. In *Irtelli v Squatriti*,⁸⁴⁰ the Court of Appeal held on the facts that the appellants had not intentionally breached an injunction and so were not in contempt. It establishes that there is a need to prove that the appellant did intend to act in contempt of the court's authority. The recent decision in *Blue Sky One Ltd v Mahan Air & Others, PK Airfinance US Inc v Blue Sky Two Ltd & Others*⁸⁴¹

⁸³⁷ *AG v Times Newspapers Ltd.* (n. 423).

⁸³⁸ See *Knight v Clifton* [1971] Ch 700.

⁸³⁹ *Stancomb* (n. 225).

⁸⁴⁰ [1993] QB 83.

⁸⁴¹ [2010] All ER (D) 25 (Feb).

stands on the same footing with *Irtelli*. In this case it was ruled that all that needed to be shown to establish that the party was in contempt in not complying with an order was that his conduct was intentional and that he knew the facts that rendered that conduct a breach of the relevant order.

As for criminal contempt, it is uncertain whether it must also be proved that the accused intended to interfere with the course of justice. This uncertainty can be seen in the case of *AG v Butterworth*.⁸⁴² The judges were divided in the requirement of *mens rea* in criminal contempt. Lord Denning MR. thought that in general, contempt required a guilty mind so that an intention to interfere with the course of justice is normally required. In contrast, Donovan LJ. thought that if an act is clearly and of itself calculated to interfere with the administration of justice no further evidence of intent or motive is required. As for contempt in the face of court, what is needed to be proved is that the accused intended to do the act in question and his intention is not needed. Thus, *mens rea* is not an element.

*AG v Punch Ltd & Anor*⁸⁴³ deals with publication contempt whereby contempt proceedings were brought by the Attorney General against the editor for publishing an article which contained information that was prohibited to be disclosed as ordered by the court. In this case, the Court required the Attorney General to prove that the accused did the relevant act (*actus reus*) with the necessary intent (*mens rea*). In order to establish *mens rea*, it has to prove that the accused knew publication would interfere with the course of justice by defeating the purpose underlying the injunction.

In England, as regards publication which falls under the strict liability rule, intention is not necessary and for other kinds of contempt the common law rule applies.⁸⁴⁴ In most of the common law regime as discussed above, *mens rea* is not an element. What needs to be proved is intention to publish but not beyond it.

⁸⁴² *AG v Butterworth* (n. 227).

⁸⁴³ *AG v Punch* (n. 809).

⁸⁴⁴ Section 6 (c) CCA 1981.

With respect to the ICTY, Rule 77 RPE specifically mentions that the Tribunal may hold in contempt those who knowingly and wilfully interfere with its administration of justice. In *Prosecutor v Aleksovski*,⁸⁴⁵ the Tribunal held that when the alleged contemnor had knowledge of the existence of the order, a finding that he intended to violate it would necessarily follow. In *Prosecutor v Brdjanin*,⁸⁴⁶ the Tribunal clearly stated that ‘for each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal’s due administration of justice’. Nevertheless, in *Florence Hartmann*, it is not necessary to prove intent beyond publication.

4.3.2.4 Mode of Trial or Procedures

In all jurisdictions discussed above, the procedure for committal in cases of contempt in the face of court is summary.⁸⁴⁷ Nevertheless, the concern rose as to the exercise of summary power due to a lack of safeguards such as a specific charge against the contemnor being clearly and distinctly stated and the opportunity of answering being given. That is to say, the alleged contemnor is given an opportunity to ‘show cause’ why he should not be committed for contempt of court and by so doing, an attempt is made to correct any misapprehensions between the court and himself.⁸⁴⁸

In **England**, the *locus classicus* with regard to the procedure to be adopted for committals for contempt *in facie*, is *In Re Pollard*.⁸⁴⁹ The Privy Council pointed out that before the alleged contemnor is convicted, the specific charge against him must be distinctly stated and opportunity of answering given to him. Consequently, the alleged contemnor must be aware that he is being charged with

⁸⁴⁵ *Aleksovski* (n. 731).

⁸⁴⁶ Case No. IT-99-36-R77.

⁸⁴⁷ See generally cases with regard to committal for contempt by summary procedure. In England—*Morris* (n. 237). Australia—*Coward v Stapleton* (1953) 90 CLR 573; *Morris v Withers* (1954) VLR 100; *Skouvakis v Skouvakis* (1976) 11 ALR 204; *Ex parte Tuckerman*; *Re Nash* [1970] 3 NSWLR 23. New Zealand—Section 401, Crimes Act 1961. India—Section 14 CCA 1971. Canada—*R v Dunning* (1979) 50 CCC (2d) 296, *R v Schumiatcher* (1967) 64 DLR (2d) 24. United States—the rules for trying an alleged contemnor summarily have been codified. Section 401 18 U.S.C. and Rule 42 of the Federal Courts Rules.

⁸⁴⁸ See *Chang Hang Kiu v Piggot* [1909] AC 312.

⁸⁴⁹ (1868) LR 2 PC 106.

contempt and must be left in no doubt as regards what part or parts of his conduct the judge finds undesirable.

Section 12 CCA 1981 provides for magistrate's power to punish for contempt for conduct committed by the alleged contemnor which wilfully insults the courts and its officers or wilfully interrupts the court's proceedings or misbehaves in court. Under such circumstances, the Magistrate may order the officer of the court to take the offender into custody and detain him until the rising of the court. The court may if it thinks fit, commit the offender to custody or fine him.⁸⁵⁰

Another point highlighted in *Re K*⁸⁵¹ is that the alleged contemnor ought to be allowed legal representation so that an opportunity of seeking and taking advice ought to have been given. Currently, legal aid is available for contempt by virtue of section 13 CCA. Section 13 provides that in any case where a person is liable to be committed or fined for contempt of court, the court may order that he shall be given legal aid for the purpose of the proceedings.

In **Australia**, the leading case on the relevant procedure for committal for contempt is *Coward v Stapleton*.⁸⁵² It has been laid down that no person ought to be punished for contempt unless a specific charge against him has been distinctly stated and opportunity of answering the charge is given to him. Thus, he must be allowed reasonable opportunity to place his evidence and submission which he may want the court to consider.

Similarly in **Canada**, as decided in *Cotroni v Quebec Police Commission and Brunnet*,⁸⁵³ no one should be found guilty of contempt unless a specific charge has been brought against him. The opportunity to 'show cause' must also be given to the alleged contemnor. The importance of the 'show cause' procedure is also recognised by the Canadian Law Commission wherein in the proposed legislation, recommends with regards to disruption of judicial proceedings before the court,

⁸⁵⁰ See *R v Newsbury Justices, Ex parte Pont and others* (1983) 78 Cr.App. Rep. 255.

⁸⁵¹ (1983) 78 Cr. App.Rep. 82.

⁸⁵² *Coward v Stapleton* (n. 847).

⁸⁵³ [1978] 1 SCR. 1048.

that court should call on the alleged contemnor to show cause why he should not be found guilty.⁸⁵⁴

There were attempts to codify the law of contempt and to ensure that the alleged contemnor enjoys a fair and impartial trial. Bill C-19 on Contempt of Court, attempted such codification. It proposed, *inter alia*, to dispose of summary procedure and replace it with the ordinary procedure for criminal trials. Thus, when a judge is satisfied that a person's conduct in respect of a proceeding at which he, the judge, is presiding, constitutes contempt in the face of the court, he must first warn that person that he may be prosecuted or cited for contempt.⁸⁵⁵ Notwithstanding the warning, if the person persists in conduct which, in the opinion of the judge amounts to contempt in the face of the court, the judge may cite him in writing for the offence and direct that a police officer take him into custody. However, before ordering that an alleged contemnor be taken into custody, the court must give regard to the following:

- (i) any costs or inconvenience to parties or witnesses;
- (ii) any need to deal expeditiously with the person in respect of that offence; or
- (iii) any circumstances that would render the above appropriate.

The judge must inform the alleged of his rights, such as his right to retain counsel without delay, and his right to call witnesses at his trial for the offence.

The provisions of the Bill are an improvement on the common law procedure of committing for contempt in the face of the court, in the sense that the alleged contemnor is guaranteed more rights. The provisions are less summary than the summary procedure of the common law.

In **New Zealand**, Section 401 of the Crimes Act 1961 lays down certain procedures to be adopted when an alleged contemnor is to be committed for the offence of contempt in the face of the court. However, as previously discussed, it is noted that there is nothing to prevent the court from exercising its inherent powers as such powers are protected by Section 9 of the Crimes Act.

⁸⁵⁴ Criminal Law Reform Act 1984.

⁸⁵⁵ See Bill C-19, Section 131.15 (1).

Therefore, in New Zealand, a person could be committed by virtue of the procedure under Section 401 or could be tried immediately under the inherent powers, which are preserved by the Crimes Act.

In **India**, where contempt law has been comprehensively codified, the procedures for contempt in the face of court are to be found in Section 14 CCA 1981. The provision says when an alleged contempt occurs in the face of the High or Supreme courts, the court may cause the alleged contemnor be detained in custody and at any time before the rising of the court on the same day, or as early as possible thereafter:

- (i) inform him in writing of the contempt with which he is charged;
- (ii) afford him an opportunity to make a defence to the charge;
- (iii) after taking such evidence as may be necessary, or as may be offered by such person and after hearing him, proceed, immediately or after the adjournment, to determine the matter of the charge; and
- (iv) the court may make an order for punishment or discharge of the person as may be just.

Section 14 incorporates most of the principles stated in the leading English case *Pollard*⁸⁵⁶ but the Act requires the alleged contemnor to be specifically informed of the nature of the charge against him in writing as opposed to the principle in *Pollard*, where it would suffice to inform him orally.

In the **USA**, it should be recalled that the power for punishing contempt in the face of the court is inherent in all courts. Such powers have been mainly regulated by statutes and rules of court. With reference to punishment, Section 401 18 U.S.C provides that a federal court may punish by fine or imprisonment such contempt of its authority, misbehaviour in the courtroom or near the courtroom thereto as to obstruct the administration of justice. Rule 42 of the Federal Rules of Criminal Procedure provides that criminal contempt may be punished summarily, if the judge certifies that he saw or heard the alleged conduct.

⁸⁵⁶ *Pollard* (n. 849).

The problem in the procedure as well as sentencing in contempt offences is due to the judicial utterances which are based on very broad guidelines, as judges are given wide discretionary to determine the matter. The common law judges have enjoyed virtually unchallenged wide-reaching powers to lay down broad principles as to what conduct should be deemed punishable as contempt, what special procedures for trial should be applied and what penal sanctions should be imposed, as well as to decide from time to time that changes should be made to the law and procedures. This is evident in the application of summary procedure as discussed under the heading of contempt in the face of the court.

India has taken a step to overcome the matter by codifying the contempt law in providing certainty in the law. As regards the procedures for contempt, there has been no modification as to the summary powers of the court to deal with contempt especially contempt in the face of court. However, the Act provides for the procedural safeguards like in the case of contempt in the face of court, the court be able to deal with it after informing the person charged with contempt of the charge against him and after giving him an opportunity to make his defence to the charge.

In **Canada**, Bill C-19 that provides for codification of the law of contempt was introduced to the Parliament but it has not been proceeded with. The provision in the Bill for continuation of the common law offence suggests repeal to the current law. Thus it will affect the judges' wide authority to deal with contempt. Since the Bill has not been proceeded with, the courts continue to rely on the development of common law and on the provision of the Charter.

Placing the rules on procedures in a piece of legislation is helpful to provide clarity. The ICTY for instance has clearly stated the procedures to be followed in initiating contempt of court. Rule 77 (D) RPE explains who can initiate the proceedings. Rule 77 (D) (ii) RPE provides that if the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue and order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.⁸⁵⁷

⁸⁵⁷ Florence Hartmann (n. 832).

4.3.2.5 Sanctions and Remedies

In common law jurisdictions, sanctions are perceived as flexible because there is no maximum limit of sentencing. Sanctions rank from imprisonment to fine. Contempt must be serious enough to merit imprisonment. An immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice.⁸⁵⁸ In **England**, an order for committal must be for a fixed term, which must not on any occasion exceed two years in the case of committal by a superior court⁸⁵⁹ or one month in the case of committal by an inferior court.⁸⁶⁰ As an alternative or in addition to committing a contemnor, the court may impose a fine or require security for good behaviour. There is, however, no limit to the amount of fine which the superior court can impose.⁸⁶¹ For the inferior court, there is no limit applies to the amount of the fine but the fine must not on any occasion exceed £ 2, 500.⁸⁶² As a further alternative to ordering committal, the court may, in its discretion, adopt the more lenient remedies such as by granting an injunction to restrain repetition of the act of contempt⁸⁶³ or by ordering the contemnor to pay the cost of the application.⁸⁶⁴ In the **USA**, the courts may order disbarment against the attorney.⁸⁶⁵ Apology plays a role in mitigating and purging the contempt.

It is worth noting that, in some jurisdictions, although there is provision regulating the imposition of sanction or punishment, the courts on the basis of ‘inherent power’, may impose sanction contrary to what has been stated in the provision. The case of *Chambers v Nasco*⁸⁶⁶ as discussed above is amongst the examples.

⁸⁵⁸ See *AG v Times Newspapers Ltd* (n. 186) p. 63.

⁸⁵⁹ See Section 19 CCA 1981.

⁸⁶⁰ See Section 14 CCA 1981.

⁸⁶¹ In *AG v News Group Newspapers plc.* [1988] Ch 333, the proprietor of a newspaper fined £ 75, 000 for publishing articles intended to prejudice the fair trial of a defendant on a charge of rape; in *AG v Hislop and Pressdram* [1991] 1 QB 514, editor and proprietor of a magazine fined £ 10, 000 each for publishing articles intended to dissuade a litigant from pursuing a defamation action against the magazine.

⁸⁶² See Sections 12 and 14 CCA 1981.

⁸⁶³ An injunction may also be granted to restrain contempt before it has been committed. See *AG v Times Newspapers Ltd* (n. 186).

⁸⁶⁴ See *AG v Butterworth* (n. 227).

⁸⁶⁵ See *In the Matter of Kenneth Heller, an Attorney* 9 A.D.3d 221; 780 N.Y.S.2d 314.

⁸⁶⁶ *Chamber v Nasco* (n. 634).

4.3.3 Empirical Study of Malaysian Judicial Personnel, Advocates & Solicitors and Prosecutors

An empirical study was conducted in Malaysia during the period of January to March 2009. It was carried out amongst the judicial personnel, namely superior court judges and subordinates courts' judicial officers, advocates and prosecutors. Advocates together with prosecutors are treated alike before the courts as both fall under the judge's contempt power.

The study intends to elicit the opinion of these key players on the issues in the law and practice of contempt of court in Malaysia, their attitudes towards the use of contempt power over lawyers and also their views on what should be the best suggestions to address the uncertainties in the present law of contempt of court. It is noted that the data is not relating to statistic significance. It merely provides some exploratory information about the knowledge and opinions of the legal actors about the law and practice of contempt of court in order to give better insight on the main areas of concerns and possible acceptance in relation to proposals for reform.

4.3.3.1 Research Designs

The research method chosen for this study was questionnaire⁸⁶⁷ and semi-structured personal interview with the judges, advocates and prosecutors. The questionnaire type relies on open-ended questions. It is designed as such so that respondents could be more expansive and express their views freely. A postal questionnaire was selected as this allows the respondents to complete the questionnaires at their own convenience and at their own pace.⁸⁶⁸ However, the setback of this method is its low return rates. According to Uma Sekaran,⁸⁶⁹ the return rates of postal questionnaires are typically low. Hence, semi-structured

⁸⁶⁷ The questionnaire is attached as Appendix B.

⁸⁶⁸ The respondents were also provided with self-addressed and stamped return-envelopes to encourage their participation.

⁸⁶⁹ Uma Sekaran, *Research Methods For Business A Skill Building Approach* (3rd edn John Wiley & Sons, Inc., New York 2000).

interviews were considered appropriate to support and to add additional points to the data collected.

Semi-structured interviews allow lists of predetermined questions to be posed to the interviewees personally. It uses open-ended questions as predetermined by the researcher and sometimes some questions arise naturally during the interviews. This method was chosen because of its high validity as it probes the ideas of the interviewees about the phenomenon of interest, thus allowing for in-depth knowledge sharing. Complex questions and issues can be clarified. Furthermore, new ideas can also be discussed with the interviewees and can be a bonus to the research.

Two sets of questionnaire were prepared: one set for judicial personnel and the other one for advocates and prosecutors. This is due to a question relating to the respondents' personal experience with contempt of court i.e. for being cited for contempt and for citing a person for contempt as appeared in question no. 5 of the questionnaire. There were 22 questions in the questionnaire as well as interview. The questions asked during the interviews were basically the same questions structured in the questionnaires. The questions were arranged in two main parts: questions relating to background such as the age, gender, profession etc.; and questions about the opinion and knowledge of the respondents on the issues of the law and practice of contempt of court in Malaysia.

4.3.3.2 Research Process

Initially, before the questionnaires were sent out via post, they were sent to subordinate courts' judicial officers, advocates and prosecutors via e-mail. The questionnaires were placed in the mailing lists of the respondents whom were chosen at random regardless of their working experience. The result of this was a very poor return rate. It is deduced that the less experience judicial officers and lawyers who are not familiar with the law and practice of contempt of court were not interested in participating. Contempt law is a technical and 'specialised' area of law for the senior and experienced — with a minimum of ten years experience.

The method of distribution via email was found to be ineffective. Instead, the researcher decided to send the questionnaires via post to the respondents who were chosen at random but selected according to their seniority. For example, the prospective respondents from the legal profession were selected from the seniority list from the Bar Council Directory. As the respondents were senior and experienced, only 40 questionnaires were sent to judicial personnel of all the tiers of the Malaysian court hierarchy, another 40 to advocates chosen randomly in the Central Region, which consists of Selangor, Federal Territories of Kuala Lumpur and Putrajaya, and 40 prosecutors at the Attorney General's Chambers at Putrajaya. The Central Region is chosen because it is Malaysia's populous region whereby the number of advocates and legal firms are bigger in this region as compared to other regions. It is reported that the number of lawyers in this region has reached to 8100.⁸⁷⁰ Moreover, the superior courts, namely, Federal Court and Court of Appeal are situated in Putrajaya. The respondents were given three weeks, until the end of February 2009 to complete and return the questionnaires.

The semi-structured interview was conducted with 5 judges, 6 advocates and 4 prosecutors. These interviewees were chosen due to their prominence and experience in the matters. There were some difficulties faced in getting appointments with the interviewees, especially the judges, who are very busy and not easily accessible. The interviewees were sent the questions before the interview took place to give them a general idea of what was expected from them during the interview. The interviews were conducted in their offices. The records of the interviews have been kept confidential on recorder and notes written during the interviews.

The results are presented by means of tables. Comments from the respondents are quoted or paraphrased.

⁸⁷⁰ <http://www.malaysianbar.org.my/legal_directory_statistics.html> accessed July 2009.

4.3.3.3 The Result

(i) The Questionnaire Response Rate

The response rate for the questionnaires is as follows:

Table 4.2: Questionnaire Response Rate

Category of Respondents	No. of questionnaires sent	No. of responses	Percentage of responses (%)
Judicial Personnel	40	7	17.5
Advocates	40	12	30
Prosecutors	40	5	12.5
Total	120	24	20

Table 4.2 shows that 120 questionnaires were sent to the respondents, 40 to each group. Only 24 were returned to the researcher. It is acknowledged that the overall rate of 20% is low. However, the nature of open-ended questionnaires helps in providing more details of information relating to the law and practice of contempt of court in Malaysia. The sources of information came from the majority of the respondents who are experienced and familiar with this area of law which is perceived as specialised and technical. In addition, the interviews were conducted in order to support and to add extra useful hands-on data.

The most notable response rate came from the advocates with a response rate of 30%. The figure supports the Bar's concerns on the law and practice of contempt of court in which the Bar had suggested the law of contempt to be placed in a statute to overcome the vagueness. The figure also reflects the Bar's concerns since advocates fall under the judge's contempt power.

(ii) The Length of Involvement in the Law-Related Field and Experience

It is useful to find out how long have the respondents been in the law-related arena as judicial personnel, advocates and prosecutors. The length of their involvement in their field would mean how well the respondents understand the subject matter at point and vice versa. This was highlighted in the questionnaire from Judicial Personnel number 7 who had between 1 and 5 years of service and states that she does not know much about the law of contempt. ‘Even we as magistrates do not know what amount to contemptuous act, procedures and standard of proof to be applied’. Conceivably, due to this reason, the response rate was relatively low as the respondents who were not familiar with the subject matter and who rarely appear in the courtroom would rather not answer the questionnaires. The law of contempt is perceived as technical.

The knowledge and experience link to the credible information and facts injected to this research. The data from the questionnaire are set out in Table 4.3 below:

TABLE 4.3: Questionnaire: The Length of Involvement in the Law Related Field and Experience

The Length	Less than 1 year	1-5 years	6-10 years	10-20 years	More than 20 years
Judicial Personnel	0	4	1	1	1
Advocates	0	0	3	3	6
Prosecutors	0	0	3	0	2
TOTAL	0	4	7	4	9

As for the interview, the 6 judges are among the senior judges of the Federal Court and the Court of Appeal as well as retired judges who held the highest position in the judiciary. The advocates were chosen from those who have been in private practice for more than 15 years. They have vast experience and some of them had chances to deal with contempt matters. This is also the criteria considered in selecting the prosecutors for interview.

During the interviews, the interviewees were asked about their previous profession. In general, some of the judges were from the private practice before being elevated to the Bench. The remaining judges were from the Judicial and Legal Service and had been prosecutors before their appointment as judges. Therefore, it is noted that numbers of the sample had at some point in their career shared the same experience of being lawyers acting before the court. Most likely, any different views they might have on the material issues involved in the study would be because of their different personal experience during their careers, instead of by their careers.

(iii) Personal Experience with Contempt of Court

The lawyers were posed a question: ‘Have you ever been cited for contempt of court?’ while the judicial personnel were asked ‘Have you ever cited a person for contempt of court?’ All respondents were asked to choose either ‘Yes’ or ‘No’ and to state a brief summary of the reasons for being cited for contempt, and for judicial personnel, for exercising contempt power. Table 4.4 and Table 4.5 below are the result from the questionnaire.

TABLE 4.4: Questionnaire: Lawyers’ Personal Experience with Contempt Citation

Question 5: Have you ever been cited for contempt of court?		
Respondents	Yes	No
Advocates	-	12
Prosecutors	-	5

TABLE 4.5: Questionnaire: Judicial Personnel’ Personal Experience with Contempt Citation

Question 5: Have you ever cited a person for contempt of court?		
Respondents	Yes	No
Judicial Personnel	1	6

Table 4.4 shows question 5 of the questionnaire was asked in order to find out whether any of the respondents had ever had personal acquaintance with contempt

sanctions and if so, for what reason. The lawyers were asked whether they had experienced being cited for contempt. It is noted that none of the above-mentioned respondents have been cited for contempt of court but only two acknowledged that they had experience with contempt. Advocate number 1 explained that a contempt proceeding was initiated against him by the Attorney General for what he had said to the media during the trial of one high-profile case. He was given a 'show cause notice' why he should not be cited for contempt for comments he made to the media on the refusal of the police to open the gates of the court compound to allow Bar representatives to keep a watching brief in the said trial. However, after his explanation to the court and the acceptance of this explanation by the Attorney General, no contempt was found against him. Advocate number 5 said that he was threatened by court with contempt and was asked to show cause. However, the court did not proceed with contempt citation as his case was referred to the Disciplinary Board for disciplinary action. He was cleared of the allegation at the Disciplinary Board. However, Advocates number 1 and 5 did not explain the subject matter of which they were 'threatened' with contempt citation. As for the prosecutors, none of them had ever been charged with contempt

Table 4.5 shows question 5 of the questionnaire which asked the judicial personnel about the use of contempt power to cite the lawyers for contempt. As seen in the table, except Judicial Personnel number 4 who said that he seldom cite a person for contempt, the rest of the respondents answered that they have not exercised their contempt power and have not held a lawyer in contempt. Judicial Personnel number 7 explained that she was reminded to only invoke contempt sanction in exceptional circumstances and if possible to not to exercise this power. Besides that, she also 'confessed' that she does not know much on contempt — from the acts that amount to contempt to the procedures to be invoked. With that, she would rather not to invoke contempt due to her 'lack of knowledge'.

In the interview, none of the advocates and prosecutors has been cited for contempt. Advocate number 1 in the interview, however, admitted that while he had not experienced any contempt citation, he had experienced being threatened with contempt citation by the judge during the trial of one high profile case.

Out of the 6 judges interviewed, 3 said that they never used the power. When asked what they would do if they encountered a heated situation in their courtroom, they responded that they would adjourn the proceedings for a while in order to let the situation cool down and the parties calm down. Judge number 5 was of the opinion that ‘contempt should be like a headmaster’s unused cane. The cane is there but needs not be used’. According to him, the power to invoke for contempt is there, but it does not need to be used often except in an exceptional circumstance but it is good to know that the power is there. Judge number 6 was of the same opinion. In addition, he considered that the judge during the proceedings is also at trial and he has to gain public confidence in the administration of justice. Thus the judge is supposed to keep his temper and retain his composure. On the other hand, the other 3 judges had decided a few contempt cases.

The sample shows that contempt sanctions were used more against the advocates in contrast to the prosecutors, although it does not provide extensive list of misconduct. From the sample, the judges would either deal with a contempt matter personally (or the matter is moved by the Attorney General) or refer the lawyers to the Disciplinary Board for the misconduct. Apparently, it would be likely for judges to exercise contempt power if they were both comfortable with, and well-versed in contempt law and were aware that they were able to exercise such contempt power.

(iv) Hypothetical Reasons for Contempt Sanctions Being Warranted

Both in the questionnaire and during the interview, the respondents were asked to share their opinion on the hypothetical reasons for contempt sanctions being warranted. The question is: ‘In your opinion, what are the main reasons for lawyers being cited for contempt?’ The aim of this question is to identify the common reasons for contempt sanctions being warranted against lawyers. It is noted that some of the respondents shared the same ideas and reasons for contempt citation. Therefore it is useful to list the reasons given verbatim and comprehensively before trying to find common points. Table 4.6 is the reasons

stated in the questionnaire and is followed by the reasons extracted from interview in Table 4.7 below.

TABLE 4.6: Questionnaire: Reasons for Contempt Sanctions Being Warranted

Question 6: In your opinion, what are the main reasons for lawyers being cited for contempt?		
Judicial Personnel	Advocates	Prosecutors
<ul style="list-style-type: none"> • breach or failure to comply with court's order, undertaking, ruling and directive • misbehaviour • disrespectful towards the court • contempt in the face of the court • interference with the court's proceedings • interference with the administration of justice • deliberate action or omission that mislead the court • lawyers are carried away by emotion • cross the line as they forget their true role • self interest • political interest 	<ul style="list-style-type: none"> • flouting a court order • breach of undertaking • obstructing course of justice like concealing documents • inability to observe judge's rules and inclination • misleading the court • misbehaviour in courtroom • improperly interfere with court's process • inadequate preparation • attitude problem and over-consuming idea that they are above the law • overbearing, overconfident, snobbish, careless • foolish overzealous lawyers • arrogant sensitive judge • interfering, difficult judges who do not understand the needs of adversarial system, advocacy, zealous and trenchant • criticize judge • One of the reasons is that it is left to the whim and fancy of the judges in interpreting any act as 'conduct obstructing justice' or 'interfering with the course of justice'. For instance, it is contempt when counsel did not 	<ul style="list-style-type: none"> • disobedience of the court's orders • blatant disregard • disrupting court's proceedings • unethical conduct • impropriety of speech • tampering with evidence • clash of ego • lack of decorum

	<p>give satisfactory explanation as to why his client's mere absence; mere application by counsel on good grounds to disqualify judge; extending a copy of letter written to the litigant, to the judge; application by counsel on client's instruction to disqualify Deputy Public Prosecutors; failing to attend hearing.</p>	
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TABLE 4.7: Interview: Reasons for Contempt Sanctions Being Warranted

Judge number 1	Lawyers probably do not behave properly in court. The behaviour and language used tend to anger the judge. Judges may get emotional, being impatient. After all, it is human nature.
Judge number 2	The reason can be widespread in the sense that it starts with the non-compliance of the court's order up to contempt in the face of the court. It can be any of the reason in between also.
Judge number 3	Disobedience of the court's orders and interference with the due administration of justice.
Judge number 4	It can be due to the disobedience of the court's orders to the interference with the course of justice
Judge number 5	<ol style="list-style-type: none"> (1) Disobey the orders. (2) Act or conduct that interferes with the administration of justice. (3) Personality of the Bench – if the judge is less tolerant of certain behaviour then he is quick to use the weapon of contempt. (4) Personal clash between lawyer and judge. Fire salvo at each other.
Judge number 6	<ol style="list-style-type: none"> (1) Look at the personality of the Bench. Some judges are too quick to cite lawyers for contempt. (2) Personality clash. Some of the judges were from private legal practice. Perhaps, they had personality clashes with some lawyers, so would take on those lawyers when they appeared before him.
Advocate number 1	The trends for citing lawyers for contempt were very rampant after the 1988 fiasco. One of the reasons was that soon after 1988, there was a judicial crisis and judges were unsuitable had been appointed as judges. These were people

	of the Bar who were not necessarily outstanding at the Bar. It was a trend or practice especially after the crisis when the judiciary started to appoint its own people. These lawyers-appointed-judges, some of them have the habit of citing people for contempt just to show their authority.
Advocate number 2	Disobedience of the court's order and interference with the administration of justice are just common reasons for the citation. However, there is also a problem with the judges. They may get personally involved and may lose the objective.
Advocate number 3	Judges are the main problem in contempt of court. They emotionally take on the persons themselves especially when exercising summary procedures which have tendency of abusing the power.
Advocate number 4	Misbehave before a judge. We have colourful characters at the Bar. There were incidences like a lawyer who did not know how to address the judge and to move the court, and also another incidence when a lawyer appeared in the superior court without robe i.e. he was not properly attired. In my dictionary, they could be cited for contempt.
Advocate number 5	There were cases for judges to cite lawyers for contempt for petty or less serious case such as failure to attend the court.
Prosecutor number 1	<ol style="list-style-type: none"> (1) Misconduct (2) Concealment of information. No full and frank disclosure (3) Scandalous affidavit filed by lawyers (4) Contempt in the face of court (5) <i>Sub judice</i> i.e. when someone passed comments in the midst of the proceedings or when the trial is imminent (6) Non-compliance of the court's order.
Prosecutor number 2	<ol style="list-style-type: none"> (1) Disobedience of the court's order (2) Over-criticising the judge unnecessarily that can put the administration of justice into disrepute.
Prosecutor number 3	<ol style="list-style-type: none"> (1) Misconduct and misbehaviour (2) Non-compliance of the court's order.
Prosecutor number 4	Interference and disobedience.

From the tables above, the differences between what the judges thought and what the advocates or prosecutors viewed as the main reasons for contempt sanctions being warranted are quite clear and to certain points they are quite distinctive. Generally, the majority of the respondents were concerned with respect for the court and its order, ethical conducts, courtroom decorum, conducts that interfere with the proceedings as well as with the administration of justice. At this juncture,

both advocates and prosecutors stressed the same concerns as the judicial officers that the main reasons for citation of contempt were centred and lingered around lawyers. However, as mentioned by the advocates in the questionnaire, ‘foolish overzealous lawyers, arrogant sensitive judge’ could be the main reasons for contempt sanctions being warranted.

A number of respondents, some of whom were from the judiciary, pointed out that judges are the main reason of the material issues. Looking at the response by an advocate in the questionnaire, he accentuated that the whim and fancy of the judges in interpreting any act as ‘conduct obstructing justice’ or ‘interfering with the course of justice’ was among the contributing factors for lawyers to be cited for contempt, apart from the inexact and arbitrariness in the law. There was a strained relationship between the Bar and the Bench, as portrayed by the responses of Advocate numbers 1, 2, 3 and 5 during the interviews. Interestingly, Judge numbers 1, 5 and 6 were in mutual agreement on this point.

As mentioned in Chapter 3, the approach taken by the courts in contempt cases seems to be connected with events outside the court. This was supported by Advocate number 1 during the interview when he said ‘the trends for citing lawyers for contempt were very rampant after the 1988 fiasco. One of the reasons was that soon after 1988, there was a judicial crisis and judges were unsuitable had been appointed as judges. These were people of the Bar who were not necessarily outstanding at the Bar. It was a trend or practice, especially after the crisis when the judiciary started to appoint its own people. These lawyers-appointed-judges, some of them have the habit of citing people for contempt just to show their authority. Hence the two events i.e. the removal of Salleh Abbas in 1988 that resulted in the finding of contempt against the then President of the Bar Council⁸⁷¹ and the removal of Anwar Ibrahim as the Deputy Prime Minister which led to the finding of contempt against Zainur Zakaria,⁸⁷² have to a large extent affected the relationship between the Bar and the Bench and arguably have shaped the development of contempt law.

⁸⁷¹ *Manjeet Singh Dhillon* (n. 8).

⁸⁷² *Re Zainur Zakaria* (n. 234).

(v) The Necessity of Contempt Law

The respondents were asked on the necessity of contempt laws in ensuring the court’s orders are obeyed, in ensuring no interference with the administration of justice as well as protecting a right to a full and fair trial. The answers given by the respondents in the questionnaire are tabled in Table 4.8 below. The respondents were asked to give the reasons for their answer.

TABLE 4.8: Questionnaire: The necessity of the Law of Contempt in Ensuring Obedience to Court’s Orders, in Protecting the Administration of Justice from any Interference and Protecting the Right to Fair Trial

Question 7(a): Do you agree that the law of contempt exists to ensure that court orders are obeyed?	Judicial Personnel			Advocates			Prosecutors		
	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know
	7	-	-	12	-	-	5	-	-
Question 7(b): Do you agree that the purpose of the law of contempt is to ensure that the administration of justice is not interfered with?	Judicial Personnel			Advocates			Prosecutors		
	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know
	7	-	-	12	-	-	5	-	-
Question 7(c): Do you agree that the purpose of the law of contempt is to protect the right to fair trial?	Judicial Personnel			Advocates			Prosecutors		
	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know	Agree	Disagree	Do Not Know
	7	-	-	12	-	-	5	-	-

Table 4.8 shows the results from question 7(a), (b) and (c) of the questionnaire regarding their perception on the need of contempt of court to ensure obedience to the court orders, to protect the administration of justice from any interference and to protecting right to fair trial. The majority of the respondents, regardless of their

professional positions, agreed that judicial contempt power is necessary though some said that it is a necessary evil.

From the responses tabled in Table 4.8, the majority agreed that the law of contempt exists to ensure that court orders are obeyed. As regards to disobedience of court orders, Judicial Personnel number 4 mentioned that ‘it sounds rather funny if there is no law to punish those who disobey the court orders. This power is given to the court to make sure that orders are obeyed. Courts must be respected at all times as they are the final arbiters. Contempt power is the power given to the court to ensure due administration of justice’.

However, the respondents gave different sentiments with regard to the issue of contempt law and interference with the administration of justice. The majority of the judicial officers and prosecutors were emphatically positive that law of contempt is needed to ensure that the administration of justice is not interfered with. However, with the exception of some advocates i.e. Advocates numbers 1, 4 and 6, who opined that the contempt power would meet its purpose if the true meaning of interference with the administration of justice is fully understood by the judges. Otherwise it would be meaningless as it depends on judges’ arbitrary interpretation. Advocate number 11 explained that ‘the discretion to exercise contempt power lies in the hand of the presiding judge. As such, it is discretionary and therefore subject to his or her personal judgment. This judgment can further be influenced by emotion and not necessarily rationale’. The same sentiment is expressed by the respondents in relating to the use of contempt of court in protecting a fair trial. Theoretically, the respondents agreed that the law of contempt seeks to protect such right.

The advocates also raised concerns regarding outside influence on the judges which could affect a fair trial of an accused. Advocate number 9 said that ‘there can be instances of the executive or powerful interest or even lobbies attempting to interfere with the legal process for a number of reasons. This should not be allowed as it will interfere with a person’s right to a fair trial’. Furthermore, Advocate number 12 expressed that ‘the law of contempt of court is to protect the sanctity of justice. The judges cannot use it to display extensive personal ability to

manipulate the system and instill emotional points irrelevant to a case at hand'. From the responses given by the advocates it reveals that their concerns were related to the exercise of the power by the judges who were often perceived as misused.

Theoretically, the law of contempt is needed for the obedience of the court orders; it is required so that the administration of justice is not interfered with as well as to protect the right to full and fair trial. In practice, however, it has too much discretion and influence from the third party. As mentioned by the Advocate number 9, it is deplorable that 'there can be instances of the executive or powerful interests or even lobbies attempting to interfere with legal process for a number of reasons'. During the interviews, the interviewees were asked the same questions. They shared the same idea and sentiments as the respondents in the questionnaire.

It can be derived from the answers given that contempt power is a sword as well as a shield to be used by the courts when there is any disobedience of the courts' orders or when the administration of justice is interfered with. However, it must be borne in mind that the whole basic idea of contempt is to uphold the authority of the court not the personal dignity of judges. Although judges are only the medium for the courts to dispense justice, sometimes judges are perceived to act beyond it. In addition, when the judiciary does not fully enjoy the doctrine of separation of power, the executive may impose its influences, interests or lobbies to interfere with the legal process. Therefore, the authority of the court must be guarded from any influences. By guarding the authority of the court, the confidence of the public in the administration of justice is maintained.

(vi) The Main Areas of Concern

Under this theme, five questions were asked on the probable anomalies in the law of contempt in Malaysia. They are as follows:

(a) **Overlapping between Civil and Criminal Contempt**

Question 8 of the questionnaire asked the respondents: ‘Do you agree that the dichotomy between criminal and civil contempt of court is almost imperceptible due to the broad concept of contempt i.e. any conduct which interferes with the administration of justice may amount to a contemptuous act?’ Question 8 is followed by Question 9 whereby the respondents were asked ‘Should the distinction between civil and criminal contempt be abolished?’ The same questions were asked in the interview.

The aim of both questions is to inquire whether the classification of contempt as being civil and criminal be abolished due to its decreasing significance, as the demarcation line between the two has become blurred. Both involve interference with the administration of justice.

Three selections of ‘agree, disagree, do not know’ were given to question 8 for the respondents to choose from. The answers from the questionnaire are in Table 4.9 below:

TABLE 4.9: Questionnaire: Imperceptible Dichotomy between Civil and Criminal Contempt

Question 8: Do you agree that the dichotomy between criminal and civil contempt is almost imperceptible due to the broad concept of contempt of court i.e. any conduct which interferes with the administration of justice may amount to a contemptuous act?			
Respondent	Agree	Disagree	Do Not Know
Judicial Personnel	7	-	-
Advocates	12	-	-
Prosecutors	5	-	-

All of the respondents agreed that the dichotomy between criminal and civil contempt of court is almost imperceptible due to the broad concept of contempt i.e. any conduct which interferes with the administration of justice may amount to contempt of court. The reasons given by the respondents as follows:

Judicial Personnel

- It is true that the dividing line is very slim. However, civil contempt is different from criminal contempt. Civil contempt deals with disobedience while criminal contempt is contempt by interference.
- The concept of contempt is broad as it involves the interference with the administration of justice

Advocates

- The division between the two types of contempt becomes blurred as it involves the element of interference of the administration of justice. However, civil contempt largely involves with non-compliance with court orders.
- The dividing line can be vague and sometimes confusing. Civil contempt might be 'criminal' contempt.
- Because they share the same principle and the punishment to be meted out are similar

Prosecutors

- Breach of court orders and injunctions is also an interference with the administration of justice.
- The demarcation may seem very slim but to a certain extent it is clear so to allow for safeguarding of all relevant interests

Although the respondents were of the same opinion that the distinction between civil and criminal contempt has become blurred, they disagreed that the distinction be abolished. This is the result extracted from the answers from Question 9 of the questionnaire which is tabled in Table 4.10 below.

TABLE 4.10: Questionnaire: The Abolition of the Distinction between Civil and Criminal Contempt

Question 9: Should the distinction between civil and criminal contempt of court be abolished?			
Respondent	Yes	No	Do Not Know
Judicial Personnel	-	7	-
Advocates	6	6	-
Prosecutors	-	5	-

Three options were given to the respondents to choose from 'yes, no, do not know' to the question 'Should the distinction between civil and criminal contempt of court be abolished?' and the majority chose to disagree with the exception to 6

advocates and solicitors. The majority shared the same concern that there must be a distinction between the two. This is because the procedures and punishment to be imposed are different in both types of contempt. An alleged contemnor can be punished instantly if he commits a serious contemptuous act in the face of the court but not in civil contempt in which most of its proceedings are initiated by motion.

The 6 advocates who opted for the abolition of the distinction between civil and criminal contempt shared the same reason i.e. civil or criminal contempt carries the same effect i.e. interference with the administration of justice. Advocate number 5 would like the distinction to be abolished because ‘they share the same principle and the punishments to be meted out are similar’ and it is quite captivating when Advocate number 6 stated in the questionnaire that ‘if it is to be abolished, it should be done by legislation’.

The issue on the abolition of the categories of civil and criminal contempt has been elucidated and explained further in the interview. According to Judge number 2 from the interview, the existence of civil and criminal contempt arises because of the two branches of law – civil and criminal. The defiance of the court order in civil action will commence by way of civil action, thus, Order 52 RHC 1980 will be applicable. The applicant has to apply for leave as a threshold procedure before proceeding to file a motion for committal order. Whereas, when contempt is *in facie* the court, the court must be able to deal with it instantly. This view was supported by Advocate number 2 of the interview.

Judge number 2 of the interview was of the opinion that the division between civil and criminal contempt will continue because the parties need to know where the action originates despite the sanction or measure of the punishment to be imposed by the court. In the end it is still the same. This situation is like common law and equity; the two exist although the water does not mix, they do not merge but the ultimate result is the same that is the administration of justice. Similarly in the case of contempt of court, be it civil or criminal, the result is still the same. Advocate number 2 of the interview is also in agreement, as he said that the distinction should be maintained because the procedures and the type of evidence

used are different in civil and criminal contempt. The distinction is helpful to the nature of contempt.

The impression gained from the answers is that the categorisation of contempt as has been practiced in England is well accepted in Malaysia. The respondents agreed that the distinction between the two types of contempt has become blurred in terms of sentencing, however the idea to abolish the distinction altogether is not affirmatively concurred. As proposed by Advocate number 6 of the questionnaire, ‘if it is to be abolished, it should be done by legislation’ shows that legislating the law would address the ambiguity and provide clearer guidance to all legal actors in the system.

(b) Standard of Proof

TABLE 4.11: Questionnaire: Standard of Proof in Contempt Cases

Question 10: The Standard of proof for establishing contempt, civil or criminal, is “beyond reasonable doubt”- do you agree?			
Respondent	Agree	Disagree	Do Not Know
Judicial Personnel	7	-	-
Advocates	9	3	-
Prosecutors	5	-	-

Table 4.11 shows question 10 of the questionnaire relating to the standard of proof in contempt cases. This question was asked in order to gauge the opinion of the respondents on the matter, although the law on this has somehow settled. The reason for asking this is to show that contempt is *sui generis* and civil contempt is treated as quasi-criminal.

The respondents were given three options of answers to choose from ‘agree, disagree, do not know’. The majority of the respondents from the three groups agreed that the standard of proof is ‘beyond reasonable doubt’ due to the fact that contempt entails penal punishment i.e. imprisonment.

Nevertheless, a small minority took a view that the Malaysian courts were inconsistent in approaching this issue. This view was advanced by the advocates. Advocate number 8 expressed his view that the standard of proof should depend on the nature of contempt i.e. less serious for civil contempt. It is also dependent on the situation or facts of the case. If it is contempt in the face of court where the act is an obvious obstructive act then the contemnor does not need the burden to prove his intent beyond reasonable doubt as his act is an obvious contemptuous act.

The answers above could be an indicator that this issue needs to be revisited, as firstly, civil and criminal contempt should not merge and secondly, different tests and standards are used for different contempt cases, even though the Malaysian courts stated that the law is settled.

(c) Test of Liability for Publication Contempt

The question on the test of liability relates to publication contempt, namely *sub judice* comment and publication that scandalises the court. It intends to identify what are the test and the degree of risk of interference sufficient to constitute publication contempt. The question also seeks to identify what the respondents think should be the acceptable test for publication contempt. Three options were provided for the respondents to choose from ‘inherent tendency’ or ‘real risk of prejudice’ or to provide other tests that they might think suitable. The answers are set out in Table 4.12 below.

TABLE 4.12: Questionnaire: Test of liability for publication contempt

Question 11: The Proper test to determine what amounts to contempt ought to be-			
	‘inherent tendency’	‘real risk of prejudice’	other
Judicial Personnel	1	5	-
Advocates & Solicitors	3	9	-
Prosecutors	1	4	-

The Malaysian courts have applied a less strict approach as seen in *Murray v Hiebert*.⁸⁷³ The position in Malaysia as of now is that it is not necessary for the court to prove affirmatively that there is a real risk of interference with the course of justice in the proceedings in question by reason of the offending statement. It is enough if it is likely or tends in anyway to interfere with the proper administration of justice – even if the degree of risk of interference is remote. The test as it stands today is rejected by the majority of the respondents. The risk of interference should be of a practical reality and must be backed by a specific fact and fully supported by way of evidence and not just a flimsy idea or thought.

The majority of all the respondents, regardless of their profession, believed that the appropriate test should be the test of ‘real risk of interference’ as they probably perceive that more weight would be given to the interest of the public in discussing matters of public interest i.e. more safeguards on the freedom of speech and expression. This means that while maintaining the stance of the supremacy of the administration of justice over the freedom of speech and expression, it moves the balance further towards freedom of speech and expression.

(d) *Mens rea* and Strict Liability

The respondents were requested to give their opinion whether the criminal contempt of court ought to be treated as strict liability offence. The aim of this question is to gauge the respondents view whether *mens rea* is an element in constituting contempt of court. The answers from the questionnaires are set out in Table 4.13 below.

TABLE 4.13: Questionnaire: Strict Liability Offence

Question 12: Do you think that the Malaysian criminal contempt of court should be a strict liability offence?			
	Yes	No	Do not know
Judicial Personnel	4	1	2
Advocates	11	-	1
Prosecutors	1	3	1

⁸⁷³ See Chapter 3, 3.1.2.2 (ii) (b) (ii), pp. 80-82; 3.2.1, pp.93-96.

The question was followed up by a request to give the reasons for their answer. The reasons given by the respondents will be set out in detail below before trying to find common points and differences.

Judicial Personnel

- Much easier to deal with
- Yes, but so long as it is confined to where there is actual interference.
- It will cut short the procedures
- It is a strict liability just like the case administrative in nature like breaking traffic rules.
- If contempt in the face of court, it is a clear case. Then no need for *mens rea*. *Res ipsa laquitor* as the act tells that you are contemptuous. In that case, the contemnor has to apologise for the act. If he does not then he will remain in contempt. Burden of proof is beyond reasonable doubt like in any criminal offence.
- That is debatable. Cannot be strict liability. You have to find out what is the effect of the article – does it lower the dignity of the court? Will it prejudice the trial that is going to be held? Therefore, *mens rea* in that sense is important.
- No. It is not absolute. They have to explain their conducts. The only difference is in contempt in the face of court whereby everything is in the knowledge of the judge. Thus he will act as the prosecutor as well as the judge.
- Contemnor should be given right to explain

Advocates

- Defences should be available to a charge of contempt such as defence of innocent publication and distribution, and, fair and accurate report of proceedings.
- There is a need to determine *mens rea*. The contemnor must be shown to have had the mental element of guilt.
- Contemnors must be given the right to defend with any defences available to him according to the circumstances.
- The contemnor must be given a fair trial and a proper charge against him.
- Criminal sanctions may apply and so the standard should be kept high. Contempt is also a serious allegation against a lawyer as an individual because it impacts the perception of their ethics and morality.
- No, given Malaysia's record of politically motivated prosecution.
- Until Malaysia has an 'open' society with liberal allowance for free speech, strict liability makes it too easy to cite persons.
- I believe in the requirement of *actus reus* and *mens rea* in deciding the criminal liability of a person.
- It is not strict liability. Strict liability is clearly statutory like some drug cases where *mens rea* is not required. Although *mens rea* is not needed in contempt cases, it is not strict liability. For example, you are filing an

affidavit claimed to be scandalous. Then who will decide that it is scandalous?

- *Audi alteram partem* — must have the right to be heard and innocence until proven guilty.

Prosecutors

- Some judges or counsels are vindictive. *Mens rea* must be proven either of intention or knowledge.
- Test may be objective but certainly not one of strict liability.
- *Mens rea* is still the main element needed to be proved.
- It may be treated as strict liability because of no requirement of *mens rea* to be proved. In *sub judice*, when a comment is made while the trial is pending, it is contempt. However, if does not know there is a pending trial, it might not be contempt. To prove guilty mind, have to show there are knowledge and intention. If you know the case is pending though no intention to interfere, it is still contempt. If do not know the case is pending, there is likely no contempt.

The issue on the requirement of *mens rea* in constituting contempt of court and strict liability offence was further elaborated by the interviewees. Table 4.13 below shows their preference on the matter as extracted from the interviews conducted.

TABLE 4.14: Interview: Strict Liability Offence

Question 12: Do you think that the Malaysian criminal contempt of court should be a strict liability offence?				
	Yes	No	Do not know	Others
Judges	1	-	-	5
Advocates	-	5	-	-
Prosecutors	-	-	-	1

The interviews revealed that the requirement of *mens rea* and strict liability offence is debatable as shown in column ‘Others’ in Table 4.14 above. Judge number 1 gave the opinion that contempt of court cannot fall under strict liability offence. He quoted an example of publication contempt in which he viewed that at least intent to publish the alleged scandalous article needs to be proven beyond reasonable doubt. This view was supported by Judge number 3. He said: ‘The journalists are granted with freedom of speech and expression but they must exercise it with responsibility. If contempt of court is a strict liability offence, it will become a gagging order. So long as the journalist publishes the whole truth and nothing but the truth, the publication in the public interest could be a defence’.

Advocates number 1 and 3 of the interview agreed that *mens rea* applied depending on a situation. Advocate number 3 explained that in Malaysia, at present, intent as in contempt cases relates to the commission of the alleged contemptuous act which in turn interferes with the course of justice. It does not need to prove that the alleged contemnor intends to interfere with the course of justice. Advocate number 1 opined that criminal contempt as a whole should not be applied strictly. He suggested that strict liability should only be applicable as in England when the proceedings in question are active.

Prosecutor number 1 of the interview was of the opinion that the matter is debatable. He quoted an example of *sub judice* contempt when a comment is made while a case is pending. According to him, the comment made during this period would amount to contempt if the alleged contemnor knows that the case is pending although he has no intention to interfere with the due course of justice. If he does not know about the pending case, most likely there will be no contempt. Therefore, he must be allowed to defend himself.

Nevertheless, Judge number 2 of the interview maintained that contempt in general is a strict liability offence. He said: 'It is strict liability as there is no need to prove *mens rea* in the sense that once you prove the actual act or conduct then it gives rise to liability in contempt proceedings'. He further said that the principle laid down in *Murray Hiebert*⁸⁷⁴ is the principle to be applied at present until it is reversed by the Federal Court.

The answers from the samples illustrated two main lines of contention. One, mainly agreed by the majority of the three professions, is that the Malaysian criminal contempt should not be a strict liability offence while the second group opined that it is strict liability offence.

The main reason for the second group of respondents for holding that the Malaysian criminal contempt should be strict liability offence was due to non-requirement of *mens rea* in proving the contemptuous act. Once the act is a clear

⁸⁷⁴ *Murray Hiebert* (CA) (n. 267).

case of contempt and it speaks for itself, *mens rea* or the intention of the accused to interfere with the administration of justice is not an element to be proved. That makes contempt offence a serious offence.

However, this was incongruous to what the majority of the respondents thought. Although the test may be objective, it is not one of strict liability offences. *Mens rea* is still one of the elements needed to be proved, either of intention or knowledge. It cannot be treated like other statutory offences like selling poisonous food or breaking traffic rules. This group contended that *mens rea* is an element especially in publication contempt. As Advocate number 1 of the interview said; in the case where publication tends to scandalise the court, it should not straight away be held as contempt. The intention of the accused to publish the word that tends to scandalise and intention disrepute the court with his scandalising statements needed to be proved in order to constitute contempt offence. Advocate number 3 of the interview said that as to the publication contempt, the accused should be allowed to put forward a line of potential defence, such as the publication is in the public interest, innocent publication or distribution and/or fair and accurate reports. This is supported by Judge number 3 of the interview when he said that ‘courts cannot create a defence. It needs an act of Parliament for that matter’.

As discussed in Chapter 3, *mens rea* is one of the two major confusions manifest in the law of contempt. This is proven from the result of the empirical study discussed above.

(e) Contempt Proceedings: Summary Power and Summary Process

One of the unique and controversial features in the law of contempt is its committal procedure. As distinct from the ordinary proceedings, the judge has the power and the option to conduct a committal proceeding summarily. A judge himself may initiate the proceeding without requiring the Attorney General or any other interested parties to commence action. Three questions were asked relating to summary procedure. They are as follows:

- (1) Do you feel that the summary procedure is to be used only in cases of contempt in the face of court?
- (2) Do you think the courts should be allowed to initiate contempt proceedings on their own motion for any category of contempt?
- (3) Do you think that the use of summary procedure may jeopardise the alleged contemnor's right to a full and fair trial?

The questions asked endeavour to find out:

- (1) what the procedures are like at present,
- (2) when should the court exercise summary procedure,
- (3) whether the courts should be allowed to initiate contempt proceedings on their own motion for any category of contempt,
- (4) whether the summary procedure will prejudice the right to full and fair trial?

For each question, the respondents were given three selections of answer to choose from 'yes, no, do not know' and this was then followed up by a request to give reasons for their answer.

TABLE 4.15: Questionnaire: The Use of Summary Power in All Contempt Cases

Question 13: Do you think that the use of the summary power for dealing with all forms of contempt is justified?			
	Yes	No	Do not know
Judicial Personnel	4	2	1
Advocates	1	10	1
Prosecutors	4	1	-

The reasons given are as follows:

Judicial Personnel

- It is its nature. It has got to be forceful and speedily disposed with.
- The court must be armed with this power so that it can deal with any kind of contempt.
- Should be used in all types of contempt as contempt is serious offence. It must be dealt forthwith in order to give its maximum impact and to maintain the court's dignity.
- When contemptuous acts happen in straightforward cases so as not to waste time when it is a clear-cut case of contempt.
- Only in *in facie* contempt. Not otherwise.
- Summary procedure should only be used in cases where there is contempt in the face of the court and this procedure can also be used when it is

imperative to act quickly to preserve the integrity of trial which is in progress or about to commence.

Advocates

- Not with contempt outside the court.
- The summary procedure flies in the face of natural justice!
- When the act is so serious but must adhere to the proper procedures.
- The use of summary procedure extends to other types of criminal contempt will be easily abused. Therefore, there must have a safety clause like to allow any minute a stay of proceedings immediately.
- When the act is really blatant. But before the alleged contemnor can be cited for contempt he must be given an opportunity to explain.
- Only obvious cases of contempt.
- When the act is so grotesque and proper procedures adhered to.

Prosecutors

- Contempt in the face of the court because *actus reus* is already proven in that instance. In other contempt cases, it is still an allegation.
- Obvious case of contempt.
- When it seriously interferes with the administration of justice and it is needed to protect it.
-

TABLE 4.16: Questionnaire: The Use of Summary Power Only in Contempt in the Face of the Court

Question 14: Do you think that the summary power is to be used only in cases of contempt in the face of the court?			
	Yes	No	Do not know
Judicial Personnel	2	4	-
Advocates	10	1	1
Prosecutors	2	3	-

The reasons given are as follows:

Judicial Personnel

- Should be used in all types of contempt as contempt is a serious offence. It must be dealt forthwith in order to give its maximum impact and to maintain the court’s authority.
- The court must be armed with this power so that can deal with any kind of contempt.
- Summary procedure should only be used in cases where there is contempt in the face of the court and this procedure can also be used when it is imperative to act quickly to preserve the integrity of trial which is in progress or about to commence.

- Court must act immediately and instantly in contempt in the face of the court. The judge who presides must decide himself.

Advocates

- As all facts and circumstances are within the full knowledge and observation of the judge. We have to trust his sense of fairness.
- Contempt in the face of the court needs to be dealt with immediately although not necessarily severely.
- For obvious cases and only obvious cases of contempt.
- Even though it is contempt in the face of the court, it should be heard by another judge.
- The use of summary procedure extends to other types of criminal contempt will be easily abused. Therefore, there must have a safety clause like to allow any minute a stay of proceedings immediately.
- When the act is really blatant. But before the alleged contemnor can be cited for contempt he must be given an opportunity to explain.
- Must give time to prepare defence.

Prosecutors

- It is because *actus reus* is already proven in that instance.
- It seriously interferes with the administration of justice which is needed to be protected.

TABLE 4.17: Questionnaire: *Suo Motu* Jurisdiction in All Contempt Cases

Question 15: Do you think the courts should be allowed to initiate contempt proceedings on their own motion for any category of contempt?			
	Yes	No	Do not know
Judicial Personnel	4	3	-
Advocates	-	11	1
Prosecutors	4	1	-

Judicial Personnel

- Any contempt is an affront to the court and the administration of justice. If initiated by the court, it will be dealt expeditiously.
- The court must be armed with this power otherwise it will be a mockery of the court's proceedings.
- Not always. It would be better for Attorney General to initiate in order to avoid prejudice and bias.

Advocates

- Only in contempt in the face of the court.
- Should be limited to contempt in facie only.
- The Attorney General should move the court in contempt ex facie.

Prosecutors

- Perhaps, more apparent in contempt in the face of the court.

Tables 4.15, 4.16 and 4.17 show the results from questions 13 to 15 of the questionnaire relating to the use of summary procedure in contempt cases. The questions were designed to explore the respondents' knowledge of the procedural aspect of contempt of court and also to acquire their views on the correct procedure for contempt cases.

From the answers given in the three questions above, it can be summarised that the majority of the respondents thought that summary procedure should only be used when contempt is *in facie* of the court and when the conducts are so grotesque. In this circumstance, it is imperative for the court to act quickly and to cite the contemnor instantly so that the trial in progress and the due administration of justice as a whole will not be prejudiced. In cases of contempt *ex facie*, the matter should be left to the Attorney General or to the aggrieved party to initiate contempt proceedings. The court can invoke its *suo motu* jurisdiction only in *in facie* contempt. On the other hand, the minority opined that courts should be able to exercise summary procedure in all cases of contempt because contempt cases involve the act seriously interfering with the administration of justice. This was the view held by Judicial Personnel and Prosecutors.

Regarding the exercise of summary power of contempt, the advocates expressed their concerns as to the tendency of abusing summary procedures by the presiding judge. They stressed that those summary procedures fly in the face of natural justice that is the right to a fair trial, thus, at least, the alleged contemnor should be given an opportunity to explain, time to prepare for defence and the right to a legal representative of his own choice. Therefore, when the court encounters a serious contemptuous case in its presence and in the exercise of its summary power instantly, the court must not deprive the alleged contemnor from the safeguards mentioned above.

The respondents were also requested to share what they think of the courts initiating contempt proceedings on their own in all types of contempt cases. The majority of the respondents in the questionnaire agreed that courts may initiate contempt proceedings *suo motu* only in cases of contempt in the face of court when the conduct is so serious and grotesque.

The interviews with the judges, advocates and prosecutors gave more detailed explanation on the procedural aspects of contempt of court. The interviewees were asked to share their knowledge of the procedures. Questions 13 to 15 of the questionnaires were also asked but the main focus during the interview was asking the interviewees to explain further the proper procedural aspect of contempt of court.

In the interview, the question regarding the procedures of contempt of court at present was asked. Judge number 2 explained that in ‘contempt in the face of court, court must be able to deal with it instantly. In the case of scandalising the court and *sub judice* comment, there are two ways it can be done. Firstly, the court can act on its own by summoning the alleged contemnor to show cause. Secondly, the Attorney General can act in the public interest and bring the alleged contemnor to court. There must be a proper affidavit by way of civil proceedings. When the judge initiates, this is the part where the court takes a positive role by giving the ‘show cause notice’. This may not be the most ideal situation because the court may be seen as partisan’. The explanation by Judge number 2 was confirmed by Judges number 3, 4, 5 and also Advocate number 2. From the answers, the role of the Attorney General in contempt cases is questionable. As stated, the Attorney General may move the court in contempt matter but in the present procedures as provided in Order 52 RHC 1980, it does not spell out when the Attorney General should initiate the proceedings. Prosecutor number 1 viewed that ‘when there is an interest to defend the judiciary and administration of justice. That is the duty of the Attorney General as the custodian of public interest’.

The interviewees were asked when summary power should be exercised. The majority answered that conduct that is an obvious, serious and blatant attack on the administration of justice such as contempt in the face of court can be dealt

with by the court instantly by invoking courts' *suo motu* jurisdiction. In other types of contempt, it is still summarily dealt with but it is for the Attorney General or other relevant parties to initiate the committal proceedings. The alleged contemnor will then be summoned to court to show cause why he should not be cited for contempt. Although, contempt of court is dealt summarily, Advocate number 3 reserved that summary contempt procedure must be used sparingly and with caution. In furtherance of his view, Judge number 3, Advocate number 2 and 4 opined that the procedures should be fair and rules of natural justice should be safeguarded. Therefore, charge should be clearly framed and the alleged contemnor should be given sufficient time and opportunity to explain himself or to prepare defence. Above all, the right to full and fair trial must be accorded to the alleged contemnor. Another point highlighted by Advocate number 4 of the interview is that in contempt in the face of court, it is preferable for the matter to be decided by another judge in order to avoid bias. He supported the proposal by the Bar that a matter should be placed with the Chief Justice to arrange a hearing before another judge unless the alleged contemnor opts to be tried before the same judge where the alleged contemptuous act occurred.

Judge number 2 of the interview further added that 'in the exercise of this summary power, it is an absolutely essential virtue to remain calm, cool, collected and concerted and be 'as sober as a judge'. He said that to lose one's temper is to lose one's proper sense of judgment. The judge should be patient, prudent and wise. According to him, a sober judge shall not allow any adverse circumstance to obstruct or hamper the proper exercise of his judicial duties.

In addition, the respondents were asked in the questionnaire to share their views whether summary procedures may jeopardise the alleged contemnor's right to a full and fair trial. The result is in Table 4.18 below.

TABLE 4.18: Questionnaire: Right to a Full and Fair Trial

Question 16: Do you think that the use of the summary procedure may jeopardise the alleged contemnor's right to a full and fair trial?			
	Yes	No	Do not know
Judicial Personnel	2	4	1
Advocates	7	2	3
Prosecutors	1	4	-

From the answers given above, there were 10 respondents who agreed and 10 who disagreed that the use of summary procedures may jeopardise the alleged contemnor's right to a full and fair trial. A further 4 respondents were unsure. Therefore, there are an equal percentage of the respondents of the same opinion. The reasons given by the respondents are laid down as follows:

Judicial Personnel

- Even though it is dealt summarily, the contemnor's right to be heard is always given.
- Even it is known as summary procedures, aggrieved party can always put forward their defence. The contemnor can purge the contempt. The court decision is can be appealed.
- There is a right of appeal to correct any injustice.
- Contempt is a serious matter. To deal with it summarily is not justified. Sufficient time and opportunity to answer must be given.

Advocates

- The trial may be prejudiced because the presiding judge before whom the alleged is committed is the interested party in the outcome of the decision. Therefore, he should not act as a judge, jury and witness. The hearing should be before a different judge.
- Judges must not be allowed to let their emotions derail justice.
- That is why it should be resorted to most sparingly.
- It is not the procedure that denies rights of person, but the whole thing depends on the persons involved.
- It is your conduct throughout the entire proceedings that is relevant. If a litigant acts contemptuously, he should be punished.

Prosecutors

- Only when it is not properly used, when all the rights and safeguards are denied.

From the reasons given by the respondents, it can be summarised that summary procedures may not jeopardise the alleged contemnor's right to full and fair trial if

the proper procedures are followed. In order to accord the alleged contemnor with the full and fair trial, his right to be heard must always be given, considering that contempt is dealt with summarily. Besides that, the right to appeal against the decision is granted to every contemnor as a safeguard. This notion is upheld by the judicial personnel and prosecutors.

On the other hand, Advocate number 1 of the questionnaire was of the opinion that summary procedure will jeopardise the alleged contemnor's right to a full and fair trial, for if it is summarily done, it will be heard by the same presiding judge before whom the contemptuous act was committed. 'The presiding officer before whom the alleged contempt is committed may be prejudiced as he is an interested person in the outcome of the decision and therefore he should not act as judge, jury and witness. The hearing should be before a different judge'. Another interesting point added by Advocate number 8 of the questionnaire is that it is not the procedure that denies rights of person but the whole thing depends on the person involved. The advocate pointed out that summary procedure might jeopardise the alleged contemnor's right if the judge is not being fair. Above all, it is the judges' perception and attitudes that determine the matter.

The clue hinted at by the respondents is that failure to follow the proper procedure can be fatal. To a certain extent, the advocates are having doubts whether contempt should be dealt summarily because the alleged contemnor will be heard before the same judge where the alleged contemptuous act had occurred. As suggested by this group of respondents, the matter should be heard by a different judge. If so, contempt procedures will no longer be summary. Their concern rested on the presiding judge being judgmental. However, that cannot be the sole reason, as the conduct of the parties involved in the entire proceedings is also a contributing factor.

The answers provided by the sample regarding the summary procedures reveal that there is no standard parameter in contempt proceedings. The present practices received a lot of comments and criticism due to those uncertainties and ambiguities.

(vii) The Ethical Conduct

Contempt sanctions are usually imposed against lawyers who misbehave in the courtroom. The ethical behaviour of the lawyers is questioned. There are at least two points to ponder. First, the effectiveness of contempt sanction is questioned in ensuring proper conduct of lawyers. Secondly, it questions the ability of the Malaysian Bar as well as prosecution's self disciplining in dealing with their members' ethical conduct.

(a) The Effectiveness of the Contempt Sanctions in Controlling Proper Behaviour of Lawyers

Question 17 of the questionnaire was posed to the respondents which seeks to evaluate their opinion on the effectiveness of the contempt power and sanctions in controlling proper behaviour and conduct of lawyers. The question is: 'Do you think that contempt sanctions are effective in ensuring proper conduct of lawyer?' This question was also extended to the interviewees.

In the questionnaire, three selections of answers were given to the respondents to choose from 'effective, not effective, do not know' and was followed up by a request to give the reasons for their answer. Table 4.19 sets out the answers as follows:

TABLE 4.19: Questionnaire: Contempt Effectiveness in Controlling Lawyers' Conduct

	Effective	Not Effective	Do Not Know
Judicial Personnel	5	1	1
Advocates	4	8	-
Prosecutors	5	1	-

The majority of the respondents, with some exception by the advocates, considered contempt sanctions as an effective means of ensuring lawyers' proper behaviour. On the other hand, some advocates who answered in contrast to the majority, demonstrated a strong minority who think that contempt power is not the sole means in ensuring the proper conduct of lawyers. Respondents were next

asked to state their reasons for choosing the options provided. The list of their reasons is as follows:

Judicial Personnel

- Court must have this power to punish contemnor for their misconduct.
- It is because court is in control of the proceedings.
- Without contempt power how come the court will maintain its dignity.
- Will face the criminal punishment i.e. imprisonment.
- Will effect the lawyers' reputation.
- Never use it but people should know that courts have this power.
- This is subjective; it depends on the individual judge. One, who is very strict & fair, will be very effective.
- The court has duty in disciplining lawyers.
- Not wise to be used too widely. Lawyers should be trained to behave and conduct themselves with demeanour required.

Advocates

- The use of this power is sometimes abused.
- If used sparingly and appropriately.
- If properly used. Use against lawyers must be balanced with needs of right to criticise fairly and to speak out.
- Lawyers act not according to fears but according to the limitations set by the law. Contemptuous or not is not determined by the lawyer but actually by the presiding judge.
- If it is done properly and bona fide. Because lawyers reputation are everything. A lawyer held for contempt clearly indicates some ethical or moral doing on his part. Their reputations will be affected.
- As far as advocates are concerned, it is the embarrassment of being cited and losing the gravitas that the litigating public experts.
- Lawyers are also subject to disciplinary proceedings.
- Lawyers can be struck off the Roll.
- To a certain extent it is effective, especially for the proper lawyers; but there are always rogues in every profession.

Prosecutors

- No one wants to be punished unnecessarily.
- When it is used as a last resort.
- Courts must have power to enforce judgment and protect administration of justice from any interference.
- Courts can discipline the lawyers.
- Easily abused and arbitrary.
- The Bar's duty for its members ethical conduct.

The judicial officers and prosecutors advanced their views that contempt power must reside in courts so that the courts have some kind of means of controlling professional misconduct. It is part of courts' duty to maintain good discipline amongst the lawyers. Nevertheless, this power must never be abused and it must be exercised rarely or as a last resort.

This view was further supported by the interviewees as can be seen in Table 4.20 below.

TABLE 4.20: Interview: Contempt Effectiveness in Ensuring Proper Conduct of Lawyer

Judge number 2	Contempt sanction is one of the ways to ensure proper conduct of lawyers but self-restrain on their part would be more effective. Nowadays, we have more than 13 000 lawyers and the background of the lawyers, their educational qualifications, their attitude in life, and the values which they adhered to in the way of conducting with other people. All these things play a very important part as to whether a person appearing in court is likely to commit contempt or not.
Advocate number 1	Lawyers by nature are not contemptuous of the court. What happens nowadays seems to be seen by somebody as contempt. For example, somebody makes a little remark about the court, there will be somebody who will go and make a police report to say that that is contempt. This is unnecessary. That is the reason why contempt law would become so uncertain.
Prosecutor number 1	Court can discipline lawyers by way of contempt sanction but it is the fundamental duty of the Bar for its members' ethical conduct.

It can be concluded from the reason given by Judge number 2 of the interview that people should know that the power is there, it can be used although is rarely being used. This idea is supported by a notion that there is a possible criminal punishment waiting and it would cause embarrassment to lawyers to be cited for contempt, as this indicates their ethical value is at stake. However, Judge number 2 opined that the most effective way to ensure the lawyers' proper conduct is none other than the lawyers themselves. It is self-restraint of their part that is most important. This idea is supported by the notion that professional ethics and values are best controlled within the profession itself. This notion was supported by Prosecutor number 1.

On the other hand, a point advanced by Advocate number 1 is that although there are errant and rogue advocates, lawyers by nature are not contemptuous of the court. It again depends on the judge and their interpretation of such acts as whether they amount to contempt or otherwise. This advocate held that the power is easily abused by the judge and it is arbitrary. It can be deduced from his point that contempt sanctions may be one of the effective ways in controlling lawyers' ethical conduct if it is not fraught with abuse.

The impression from the sample is that contempt power is essential and effective to control misdemeanours but it has to be resorted to as the last option when other means fail. Besides, the Malaysian Bar, for instance, has disciplinary power over advocates.

(b) The Effectiveness of Self-Disciplining Ability

As some issues in contempt relate to professional misconduct, questions relating to the effectiveness of the self-disciplining ability of the Malaysian Bar and Prosecution office were posed to respondents and interviewees.

(i) The Malaysian Bar's Self-Disciplining Ability

TABLE 4.21: Questionnaire: Effectiveness of the Malaysian Bar's Self-Disciplining Ability

Question 18: How effective do you think the Malaysian Bar's self-disciplining ability is in dealing with improper conduct of its members?

	Effective	Not Effective	Do Not Know
Judicial Personnel	1	4	2
Advocates	7	3	2
Prosecutors	-	3	2

Table 4.21 shows the results from the questionnaire of the respondents' perception in the effectiveness of the Malaysian Bar's self-disciplining ability. The results show that the majority of the respondents, with the exception of advocates, are concerned with the ineffectiveness of the Bar in disciplining its members. The reasons given by them are as follows:

Judicial Personnel

- Many of young lawyers are lacking in their ethical values.
- The Bar has no control over the conduct of its members.
- The Bar will only act when there is a complaint thus too slow in taking action.
- To punish people of your own kind is quite difficult.

Prosecutors

- Sometimes the punishment is too lenient.
- It is not effective as the Disciplinary Board cannot deal with the misbehave lawyers as they have personal interest.
- Slow proceedings and sanctions are not to deter people. Only reprimand.
- There are advocates still in active practice though were charged with criminal offences.

The majority of respondents perceived that the Bar's ability to control its members' ethical conduct is ineffective. The answers relayed by the judicial personnel and prosecutors show that the lack of ethical behaviour among advocates, especially young advocates, is due to the Bar itself. It was alleged that the Bar fails to carry-out its duty, and to a certain extent, does not practice what it preaches. The respondents raised concerns of bias for the profession's and its members' interests. The disciplinary process is slow and cumbersome, and aside from this, the mechanism is under-resourced.

On the other hand, there were seven advocates who positively claimed that the Bar's self-disciplinary structure is effective in controlling the behaviour of its members. According to Advocate number 1 of the questionnaire, the advocates are governed by the LPA 1976 and Legal Practice & Etiquette Rules 1978 which encompass lawyers' conduct to the court, client and other lawyers. The Act and the Rules set out the guidelines for the conduct and the procedures and punishment if there is any breach of the ethical behaviour of the advocates. This reflects that the Bar takes a strong stand. Should anybody breach any of these rules they are reported straight away to the Disciplinary Board. Advocate number 3 of the questionnaire also appeared satisfied with the way the Bar deals with its members' conduct at present. He based his opinion on his own personal experience in defending cases before the Disciplinary Committee. Furthermore, he said that the punishment meted out by this Board to errant lawyers including striking off the Roll has been an effective deterrent. However, it has to be borne in

mind that having Rules and enforcing them are two different things altogether. This was the concern forwarded by Prosecutor number 1 of the questionnaire.

In the interview, the same question was put to the interviewees. The results are displayed in Table 4.22 below.

TABLE 4.22: Interview: Effectiveness of the Malaysian Bar’s Self-Disciplining Ability

Question 18: How effective do you think the Malaysian Bar’s self-disciplining ability is in dealing with improper conduct of its members?

	Effective	Not Effective	Do Not Know
Judicial Personnel	1	5	-
Advocates	3	1	1
Prosecutors	1	1	2

Table 4.22 shows the results from the interviews. The majority of the interviewees expressed the same concern: the ineffectiveness of the Malaysian Bar’s self-disciplining ability in ensuring its members’ ethical conduct. Judge number 3 was of a view that the standard of the Bar has fallen tremendously. According to him, the Bar Council has lost its focus and seems to neglect the standard of the profession. Judge number 2 of the interview noted that how far the Bar vigorously exercised the power will depend on the school of thought prevailing at the Bar.

Nevertheless, one interesting aspect is brought up by Judge number 3 of the interview when he referred to ethics teaching in law school. The lawyers-to-be should be taught about professional ethics before they go out and practice. These young lawyers, who are in practice less than 7 years, according to Advocate number 4 of the interview, are referred to as “Yuppies” short for “young urban professional” because they are labelled as having more interest in getting clients and sometimes have tendencies to compromise with the basis of professional ethics.

There is one good point advanced by Judge number 5 of the interview. He said, ‘If the judge encounters lawyer’s misconduct in his courtroom, he can report the

matter to the Bar. Judges are duty bound to report to the Bar. This is also one of the duties of the Bench in ensuring the dignity of the profession. If the Bar has lost its direction, it will reflect and affect the dignity of the Bench too. The Bar and the Bench work together. The Bar is the Bench's wing. The atmosphere that the Bar and the Bench work in is open to public viewing. So the Bench cannot have any member of the Bar misbehave. The Bench is supposed to police the Bar's conduct in that sense'.

(ii) The Malaysian Prosecutions' Self-Disciplining Ability

TABLE 4.23: Questionnaire: Effectiveness of the Malaysian Prosecution's self-disciplining ability

Question 19: How effective do you think the Malaysian Prosecutions' self-disciplining ability is in dealing with improper conduct of its members?

	Effective	Not Effective	Do Not Know
Judicial Personnel	1	2	4
Advocates	1	1	10
Prosecutors	5	-	-

Table 4.23 shows the result of the respondents' views on the ability of Malaysian Prosecution's self-disciplining ability in controlling its members' ethics and discipline. It is interesting to note that most of the respondents – judicial personnel and advocates – were unsure on the Prosecutions' self-disciplining ability. Advocates number 8, 9 and 11 of the questionnaire expressed their doubt on the matter as they have no idea how the Attorney General's Chambers handle the issue of misconduct of its own staff.

Prosecutors agreed on the effectiveness of their office's self-disciplining ability as mentioned by Prosecutor number 1 of the questionnaire that 'if you fall out of line, you lose your job'. In order to get a better idea on this matter, during the interview, judges, advocates and prosecutors were asked the same question. The majority of the judges and advocates were unsure on the prosecutions' self-disciplining ability. Some of the judges and advocates expressed their doubt as to whether the Attorney General would take action against his inferiors.

Prosecutor number 1 of the interview explained that when there is a complaint against a Deputy Public Prosecutor, a complaint will be forwarded to the Attorney General. The Deputy Public Prosecutor will be served with a ‘show cause notice’. If later his gross misconduct has been proved, he will either be reprimanded or transferred.

Hence it can be concluded from the results derived from questions 18 and 19 that it is the tendency of the people from their own profession to say that theirs is rather effective.

(iii) The Judges’ Ethical Conduct

Question number 20 in the questionnaire, ‘Do you think judges should be subject to contempt laws?’ was put to the respondents in the questionnaire and in the interview. The respondents were asked to rate their perception on the possibility of taking contempt action against judges. The choices of ‘yes, no, do not know’ were provided. The question was designed to gauge ideas on the best method to govern judges’ ethical conduct. The idea of subjecting the judges to contempt laws was sparked during the trial of Anwar Ibrahim in 1998 when one of Anwar’s counsel initiated contempt proceedings against the presiding judge for his alleged vulgar and contemptuous words against the counsel.

The results from the questionnaire are shown in Table 4.24, whereas the results from the interview are provided in Table 4.25 below.

TABLE 4.24: Questionnaire: Should judges be subject to contempt law?

Question 20: Do you think judges should be subject to contempt laws?			
	Yes	No	Do Not Know
Judicial Personnel	-	7	-
Advocates & Solicitors	8	4	-
Prosecutors	1	4	-

TABLE 4.25: Interview: Should judges be subject to contempt law?

Question 20: Do you think judges should be subject to contempt laws?			
	Yes	No	Do Not Know
Judicial Personnel	1	5	-
Advocates & Solicitors	3	2	-
Prosecutors	1	1	-

The samples were also requested to state their reasons for their answers. The answers given by the respondents in the questionnaire, as well as in the interview, are set out in detail before finding common points and differences.

Judicial Personnel

- If at all there are errant judges, they will be dealt with under the Judges' Code of Ethics.
- Judges' duty is to dispense justice. Any wrongdoing will be meted out by Code of Ethics.
- Immunity should not be compromise.
- Disciplinary action can be taken against judges by Chief Justice.
- If a judge would commit an act that would be contemptuous, he is unfit to be a judge. There can be no occasion that he is to be protected if he acts in contempt.
- First of all we have to find the facts as to what the judge has done to warrant a citation of contempt against him. If the judge is doing his duties in the course of judicial proceedings then the law is very clear, Section 14 of the Courts of Judicature Act 1964 is very clear that the judge is judicially immune. That immunity is all progressive, it covers everything. I do not think there could be any contempt proceedings against judges. If a judge can be cited for contempt you can find no judges wanting to sit. Lawyers are officers of the court, they have been called to the Bar by the court and they have to follow decorum in court. Judges have the Code of Ethics; we will try to hear with every patience, every competence & we are going to do to the best of our ability as all the judges do. Unless there are facts that justify the citation of contempt and unless the law is changed then there can be proceedings initiated against the judge.
- The judges are sitting in the court where they are the masters. We did with very limited exceptions but those exceptions are not supported by statute, at most they are supported by common law but with common law except for in India. Say for example, the judge were to fall asleep throughout the proceedings, you cannot cite him for contempt. Unless of course the judge goes down to the Bar table and gives the lawyer the biggest punch in town, then it may not be proper for him to see him up there. We have the Code of Ethics and we adhere to the Code of Ethics. So I would say that as of now no judge should be subject to the law of contempt. We follow closely to English law. But what happens to India

we do not know may be it best to confine it to Indian environment. As well as for Malaysia, I do not think this can be applied in whatever context.

- It is a good idea weighing the way they behave nowadays. However, the problem of enforcement – who will charge them? Will the Attorney General do it?

Advocates

- This will check and act as deterrent for some judges who are carried away by their own pre-conceived prejudices and wrongly believe that flexing their muscles would result in speedy conclusion of the trial at the expense of justice. In India, a judge is liable for contempt of his own court or of any other court in the same manner as any other individual is liable.
- If there is interference of justice by the judges.
- Judges cannot be above the law and cannot abuse their power.
- Of course! Witness the conduct of Tun Abdul Hamid Omar as tribunal chairman in the case against Tun Salleh Abbas.
- Why not? A lot of judges misbehave too.
- I think a judge should be subject to contempt laws if he behaves himself in a way that is contemptuous in his own court. I think somebody should charge him. But I am not sure this is something that we want as a statutory provision. In India there are cases where a judge can be cited for contempt. In Malaysia, Fernando brought a claim against the judge to cite him for contempt due to the words addressed to Fernando by the judge. This is among the cases to support that.
- No. If a judge is corrupt, evil or stupid they should be removed (and jailed for the first two qualities) not subject to contempt.
- This will destroy the sanctity and reputation of the bench.
- It is a bit draconian. We have Judges' Code of Ethics and tribunal under Art. 125 of the Federal Constitution, and also Judicial Appointment Commission.
- There is a larger issue that is the public confidence in the judiciary and the security of tenure of the judge. The judge must be independent and he must know that he is not subject to criticism, penal punishment for actions that he has done. He may take position because he knows the law better. If we extend it to judges, it will create much dispute to the whole framework of our legal society which is the separation of power and integrity of the judiciary. Judges are serious; the authority figures which have the authority to send a man to death, authority to say that you can be a bankrupt. If we were to bring judges to contempt, people would disregard the system and not be sure where will it all end up after that. Federal Constitution provides for a tribunal. Thus, a proper hearing should be carried and if found to be misbehaving, he should be removed. If contempt, the judge will go back to the Bench, go back to his job. Can he go back?

Prosecutors

- Because they represent the court.
- Lodge a complaint to the Chief Justice. Code of Ethics rules.
- Code of Ethics is sufficient to cover the judges' conduct although it is not very detail.
- One court can be held for contempt of another court. Thus judges can be liable for contempt in his own court.

The idea of subjecting judges to contempt law received negative response from most of the respondents, especially judicial officers, prosecutors and a small number of advocates. However, the majority of the advocates perceived the issue positively.

There are two main lines of argument. The first group, which mainly consists of advocates, embraced the idea that judges should be subject to contempt laws in the same manner as any other individual is liable considering certain actions by some judges are deemed unethical and violate the judges' obligations of impartial conduct. Certainly the judges have to maintain decorum and adherence to the Code of Ethics requisite for keeping the administration of justice unsullied. However, there are judges who tend to defy this and are sometimes even portrayed as abusing their powers. Therefore, any violation of the sanctity of the administration of justice either by those who administer it or by those for whose benefit it is administered should be visited with penalty. Contempt law is seen to be a deterrent for these judges. Moreover, they argued that in India, a judge is liable for contempt of his own court or of any other court in the same manner as any other individual is liable.

Nevertheless, the other set of argument held by the majority is that judges should not be subject to contempt law. The reasons are, firstly, they enjoy judicial immunity which protects judges and other judicial officers from lawsuits being brought against them for official conduct in office. In Malaysia, judicial immunity is spelt out in Section 14 CJA 1964. According to Judge number 1 of the interview, that immunity is all progressive. It covers everything and cannot be compromised. Secondly, judges' ethical conduct is governed by the Judges' Code of Ethics. Any wrongdoings or unethical behaviour will be meted out by the Code.

They viewed that if the judges are found to misbehave, Article 125 of the Constitution will come into the picture. A tribunal will be appointed to carry a proper hearing. If he is found guilty of judicial misbehaviour, he would be subjected to removal from his office. Furthermore, the issue relating to enforcement was echoed once again. It was raised by Judge number 5 of the interview. He said: 'If judges would be subjected to contempt law, what would the procedures be like? Who will initiate contempt proceedings? Will the Attorney General do it?'

This group of respondents also pointed out there is an even a larger issue that needs to be considered, namely public confidence in the judiciary. Judges are the authority figures and if the law of contempt is extended to judges it would probably create much dispute to whole framework of the legal society. The confidence in the judiciary will be at stake and if to bring judges to contempt, there is a tendency that people will disregard the system. For this group, to hold a judge for contempt is not a good idea.

(viii) Should the Law of Contempt be Legislated?

The focal point of this question is to evaluate the respondents' opinions on the possibility of placing the law of contempt in Malaysia in a statutory footing. This issue was put forward weighing the existence of a specific statute in India and England, governing the law of contempt that able to guide the process, procedures and implementation of a proper contempt practice. It was interesting to find out that the sample hints in the new direction in the law of contempt of court in Malaysia. Judicial officers, advocates and prosecutors are generally in agreement with the idea of legislation.

The results from the questionnaire and interview appear in Table 4.26 and 4.27 respectively as follows:

TABLE 4.26: Questionnaire: Legislating the Law of Contempt

Question 21: The law and the procedure for contempt of court in Malaysia should be defined by the statute – do you agree?

	Agree	Disagree	Do Not Know
Judicial Personnel	5	1	1
Advocates	10	1	1
Prosecutors	3	2	-

TABLE 4.27: Interview: Legislating the Law of Contempt

Question 21: The law and the procedure for contempt of court in Malaysia should be defined by the statute – do you agree?

	Agree	Disagree	Do Not Know
Judicial Personnel	1	5	-
Advocates	4	1	-
Prosecutors	2	2	-

The results derived from both tables show that the majority of the respondents, especially the advocates, felt that the law needs a new dimension. The majority viewed that on the whole, contempt law needs clarity in terms of definition and procedures to punishment. The reasons given by the respondents in the questionnaire and in the interview are listed below in verbatim.

Judicial Personnel

- Clarity.
- So that there is greater certainty, clarity and less risk of falling victim to variable judicial ‘creation’ of categories or scope of contempt.
- So we can have uniformity throughout the court and everyone can read, understand and be alert to the written provision.
- Give more clear meaning. Set the rules and regulations. Provide for standard punishment.
- Malaysia has no legislation. It is useful for Malaysia to have one. This is because at present we apply common law, so the position of newspapers and other persons are still unclear especially in the area of criminal contempt. By having the Act it may be useful to have the exception for newspaper to publish matters of public interests. Public interest could be a defence of the charge of contempt. With regard to the jurisdiction and power of contempt, certain tribunals should be given such power. These issues can be done by the Act. The advantage of having the law regulated is that the chance of unhappy judges abusing contempt power would be less. The Act is in compliance with Art 10 (2) (a) of the Federal Constitution. This provision expressly speaks of Parliament’s right to pass law governing contempt of court. Art. 10 (2) (a) prima facie seems

to confine to regulate freedom of speech and expression, however Parliament has power under List 1 to make laws relating to offences. Thus, it can in the exercise of that power deal with contempt of court, both in the sense to defend the integrity of the order passed and in the integrity of the procedure.

Advocates

- There is no stipulation anywhere what conduct amounting to contempt of court and the range of punishment for it. These are governed by common law rules. There is a wide discretion on the judiciary to determine what contempt is. Perception and approaches vary from judge to judge. This uncertain situation is unacceptable to lawyers and litigants, especially where the punishment is criminal in nature. It is another compounded by local variation of contempt law.
- A Contempt of Court Act will precisely lay down what amounts to a contemptuous act. It will restrict the scope of contempt powers that is now vested with the judges. It will protect the public and lawyers. It will encourage lawyers to discharge his duty fearlessly without having to face constant threat of committal proceedings.
- Bar Council has proposed this to set down safeguards and to standardise procedures.
- For clarity and regularly revised. So Malaysian judges don't start making up their own rules as they are prone to do.
- The Bar Council has submitted to the government a draft Act but the government does not seem to be interested in.
- The procedure and the punishment may be. But not the instances of contempt as lawyers and their clients may be expected to invent ways which are as yet unknown!
- Because this would mean careful debate about this subject; public scrutiny and a reasoned law-assuming Parliament is up to it.
- For easier manhandling.
- Good because it ensures that the party who is going to be charged especially in criminal offence is fully aware of the nature of the charge, the consequence of the charge and the procedures. Codification-you put in place a missionary or framework to reduce the chances of abuse on the part of the judiciary.
- We need certainty.
- Once you have it legislated, you will know exactly what and when it is contempt. You will know exactly where the line is drawn. It would be easier for the judge to codify.

Prosecutors

- So all will know what an offence is and what is not.
- To avoid uncertainty.

The answers reveal the concern of the respondents in regard to the tendency of abusing contempt power by judges. By having the law legislated it could reduce chances of abuse triggered by unhappy judges. Judges apply common law contempt which results in variable perceptions, among others, on what amounts to contemptuous conduct. The Act serves the purpose of clarity, greater certainty and uniformity in the application of contempt of court in Malaysia. By having a statute on contempt law, defence could be made available and this jurisdiction could be extended to tribunals too. However, Advocate 8 of the questionnaire has a reservation on this idea as he viewed that only procedure and the punishment may be put on statutory footing not the instances of contempt. This is because lawyers and their clients may be expected to invent ways which are as yet unknown.

In contrary, few respondents, especially from judicial personnel, hesitate regarding the idea of legislation. Their reasons are provided below.

Judicial Personnel

- The statute to deal with the law & procedure will be cumbersome. Judges are competent enough to formulate the procedure.
- First of all we have the substantive law of contempt as in Subordinate Courts Act, Court of Judicature Act and Federal Constitution. Contempt of court is essentially a common law phenomenon. It brings out the desire of the court to maintain law and order in the course of justice. So therefore, it is still very much of common law development. In terms of procedure, Order 52 of the Rules of High Courts is very clear cut. It has spelt out very clearly and in great detail what is expected of the judge exercising this jurisdiction to do. To say that we do not have enough law is not very true. We have a necessary procedural and substantive law to take care. The codification of the law cannot take care of every part of the law of contempt. It has to be supported by the common law judgment; still it goes to common law again. But I think what the Bar Council is going to do is to put a clause to cite judges for contempt. If that is the situation then it would be chaotic. The moment you decide to cite a person or judge for contempt instead of doing justice you are doing contempt cases every day. So those are the circumstances they have to consider. Of course whether or not it will come into reality it depends to the legislature. But I think the present law should be sustained.
- The common law that we have now is sufficient.

Advocates

- It will be too restrictive, denying discretionary power of the judge. It will also deny the independence of judiciary.
- I am very worried of codification in the sense that, again it depends on the judiciary. Look at our Constitution for example some people now interpret it to completely ignore the Constitutional convention. Constitutionally, how we do it; I have discretion, I decide my discretion.

Prosecutors

- It looks easy but there will be another act or conduct that may not be covered.

This group of respondents held that the law as applied at present is sufficient as it provides for procedural as well as substantive law. The prime reason for codification of the law of contempt is to get away from uncertainty and ambiguity due to the discretionary and flexibility approaches by the judges since contempt of court is a common law phenomenon. It will keep developing, thus codification is arguable to be able to take care of every part of the law of contempt. Even though the law is in a statutory form, in practice, the courts will fall back on common law for interpretation. Interpretation may vary and frequently it has to be supported by the common law judgments.

The power to punish for contempt is the judicial power to inflict a penal sentence for the offence. There is always a possibility and tendency of this power being abused by unhappy judges. This is also among the reasons for the Bar to come out with the proposition of codifying the law of contempt. Besides to serve for clarity and certainty in the application of the law of contempt, the comprehensive codification will also reduce chances of abuse by the judges.

4.4 OVERVIEW OF THE MAIN ISSUES AND OPTIONS FOR REFORM BASED ON LAW AND EMPIRICAL RESEARCH

As already seen in Chapter 3, the unfettered discretion and unrestricted jurisdiction in punishing contempt by the judges have contributed to the uncertainties in the law and practice of contempt of court in Malaysia. The law

and practice of contempt as it is now need to be well-defined. The Bar proposed codification of the law and as a result the law and procedure of contempt of court will be defined clearly. The Act will serve as guidelines to the legal actors, the press and to the public. While this thesis asserts that placing the law in statutory footing is important, it has also acknowledged that it could not be done overnight. Therefore, it is suggested that the judges should also shift their paradigm, attitudes and approaches in dealing with contempt.

4.4.1 Defining and Classifying Contempt

The Sanyal Committee in India, when considering the codification of the law of contempt in India, revealed that the difficulties and vagueness in the law of contempt starts at the definition stage itself. Contempt is a broad concept thus it is not possible to attempt neat and clear-cut classifications of the branches of contempt, as there is a possibility of new types of contempt arising in future. Nevertheless, in India, the Act attempts to give a characteristic definition to contempt of court by dividing it into several categories and the elements or ingredients to constitute contempt of each category are listed down. This is the approach in England whereby the Act defines publication contempt that may fall under the strict liability rule.

The Bar proposed to define contempt by the method of dividing contempt into classified headings. This method of classification does not define contempt precisely but anything more precise is impossible. Therefore, the definition of contempt as provided for in the Proposed Act is more like the characteristic definition.

4.4.2 Civil Contempt

Civil contempt or contempt by disobedience is a less controversial area of contempt of court in Malaysia, although there is an issue of overlapping between civil and criminal contempt. As seen from the empirical result, the distinction between the two should be kept and contempt is regarded as *sui generis*. Civil

contempt is treated as quasi-criminal. Due to this, the Bar Council proposed the criminal standard of proof for civil contempt that is ‘beyond reasonable doubt’.

The Bar proposed to define civil contempt as ‘wilful disobedience of any judgment or any order requiring a person to do or abstain from doing a specified act or any writ of habeas corpus or wilful breach of an express undertaking given to Court on the faith of which the Court has given its sanction’. The injection of the element of ‘wilful’ makes relevant to the state of mind of the contemnor. Thus, with this new law, mere disobedience without a wilful element is not sufficient to constitute contempt. This is the practice in all of the common law jurisdictions discussed above.

4.4.3 Contempt in the Face of the Court (*in facie*)

Contempt *in facie* has a great variety of conduct as seen in reported cases in Malaysia. It ranges from trivial to extremely serious cases. In Malaysia, filing an affidavit which the court perceived as scandalous and non-attendance of the court amount to contempt in the face of court that warrants summary punishment.

In this type of contempt, the summary powers are used in their most dramatic form. The Courts are condemned for being too quick to invoke summary power even in those cases that are not extremely serious. Some of the criticisms of the existing proceedings are that the judge appears to assume the role of prosecutor and judge in his own cause, that the practice lacks safeguards in the sense that it deprives the alleged contemnor of a clear and distinct charge and also denies him his right to legal representation, and the contemnor usually has little or no opportunity to defend himself or make a plea in mitigation.

The Bar proposed to define contempt in facie as provided in the Proposed Act as ‘it is contemptuous if any person in the presence of the court engages in any conduct that substantially interferes with or obstructs the continuance of the proceedings’. There is a geographical element in the definition of this type of contempt in which it mentions ‘in the presence of the court’. Further, the act must

be serious enough to justify use of the contempt sanction as the Act uses the word 'substantial'. Therefore, it is suggested that a person can be cited for contempt in the face of court when he committed the serious misconduct in the presence of the court that substantially interferes with the continuance of the proceedings. The 'presence of the court' means before the court, within the judge's sight and hearing. The Act does not explain whether it could extend to misconduct outside the courtroom but within the court's precinct where the alleged contumacious act is within the personal knowledge of the court. By looking at this provision and considering the reason for this proposal, among others is to avoid summary contempt power being exercised for filing pleadings and complaints against presiding officers.

In England, the USA, Canada and New Zealand, the geographical element is significant. In general, conduct must be in the presence of the court, seen by the judge's own eyes and within his personal knowledge. Then only he can punish summarily. Nevertheless, in England, it extends to conduct that occurs within the precinct of the court which interrupts the proceedings of the court. In all common law jurisdictions discussed above, concern is with the seriousness of the act that interferes with the court's process and the administration of justice in general.

The Proposed Act also responded to the criticism of the frequent use of summary power by judges, by suggesting that a judge should be required to refer the matter to the Chief Justice for an arrangement for the case to be heard by a different judge. However, option is given for the alleged contemnor to choose to be tried before the same judge where the alleged contemptuous act took place.

The result of the empirical study reveals that the court must be allowed to initiate contempt *suo motu* and to exercise summary procedure instantly in cases of contempt in the face of court when the conduct is so serious and grotesque that it substantially interferes with the continuance of the proceedings. Therefore, it is concluded that the present practice, whereby the judge deals with contempt in the face of the court himself, should continue. This is because in most cases the presiding judge will have seen or heard the incident himself and will be aware of other relevant factors. He is in the best position to know how to deal with it. The

threat of immediate punishment is a more effective deterrent to such grievous, severe and serious misconduct than a threat to refer the case elsewhere.

To safeguard this, the judge should always ensure that the alleged contemnor is explained with clarity and specifically the charge or the nature of the conduct complained. He should be given an opportunity to deny or explain himself. If the alleged contemnor denies but the judge finds that the matter is worth pursuing, then the judge has to ascertain the facts and if it is criminal offence, he can refer to the prosecuting authorities.⁸⁷⁵ In the course of summary proceeding before the judge, the alleged contemnor must be afforded the opportunity to give evidence and to call and cross-examine witnesses.⁸⁷⁶

4.4.4 Contempt By Scandalising a Court or a Judge

The offence of contempt by scandalising in Malaysia prohibits a scurrilous abuse of a judge acting as a judge or of a court and attacks upon the integrity or impartiality of a judge or court.⁸⁷⁷ This offence extends to conduct as well as publication that may ‘scandalise’ a court or a judge. This branch of contempt is criticised as it affects the right to freedom of speech and expression. This is because the test of liability to commit a contemnor for contempt by scandalising the court is lenient i.e. the words complained of had to possess an ‘inherent tendency to interfere with the administration of justice’. Thus, to commit the alleged contemnor it is sufficient that he acts in such a way that the administration of justice is apt to be brought into disrepute by his conduct or publication, irrelevant of his intention to cause the same.

The Bar proposed to give a new definition to contempt by scandalising. The Act redefined this branch of contempt as ‘publication or act done which is falsehood and is intended to bring a court into disrepute’. This new defined criminal offence has injected the requirement of higher liability test and also a proof of intention. It requires proving the element of falsehood, thus the risk must be serious, real and

⁸⁷⁵ *Morris* (n. 235)

⁸⁷⁶ *Zainur Zakaria* (FC) (n. 186).

⁸⁷⁷ *Arthur Lee Meng Kuang* (n. 1); *Manjeet Singh Dhillon* (n. 8).

present danger so that the administration of justice, the judiciary or judges, will be brought into serious disrepute. Moreover, it has to prove that the contemnor intended or desired by the publication or his act, to bring a court into disrepute.

The new law proposed by the Bar is in conformity with the standard applied in the USA, Canada and England. In the first two jurisdictions, the liability test is even higher than in England. In the USA and Canada, it has to prove that the publication presents real and clear danger to the administration of justice. In England, there must be 'real risk of prejudice as opposed to remote possibility'. The higher test imposed balances the right to free expression and its restriction by way of contempt of court.

It is also significant as it encourages the judiciary to withstand criticisms. The Malaysian courts should not 'defend' themselves from 'attack' on the notion that it attacks the fabric of the society.⁸⁷⁸ The problem with this argument is that the harm complained of is difficult to show and is only assumed.⁸⁷⁹ Since the harm is not proven, there is no compelling reason to restrict such publication through contempt of court.⁸⁸⁰ Public criticism, in fact, may help the judiciary 'up to the mark'.⁸⁸¹

4.4.5 Contempt By *Sub Judice* Comment

This branch of contempt involves publication, media and the case which is still ongoing and under the court's deliberation. Under this regime, contempt by *sub judice* comment attracts strict liability due to the proposition that a court or parties under legal proceeding and their witness should not be subjected to any undue influence, intimidation, coercion or any kind of pressure from extraneous sources.

In Malaysia, contempt by *sub judice* comment receives criticism, especially after the case whereby a Canadian reporter was committed for three-month imprisonment for publishing an article relating to a case on trial that scandalised

⁸⁷⁸ Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 Monash Law Review 209, pp. 210-211.

⁸⁷⁹ Clive Walker, 'Scandalising in the Eighties' (1985) 101 Law Quarterly Review 359, p. 381.

⁸⁸⁰ Ibid.

⁸⁸¹ Cyrus V Das, 'Press Freedom & Contempt of Court' (1986) 19 INSAF 61, p. 66.

the court and was *sub judice*.⁸⁸² It is criticised, as it lies in uncertainty because it affects the press. It is a lack of a clear definition of the kind of statement, criticism or comment which will be held to amount to contempt. The Court in *Murray Hiebert* applies a lenient test i.e. ‘It is enough if it is likely or it tends in any way to interfere with the proper administration of justice’. This has limited and smaller the scope of the right to freedom of speech and expression.

The Bar Council, inspired by the position in England that defines publication contempt under the strict liability regime, proposes to redefine this branch of criminal contempt of court by redefining the test of contempt and by limiting the time during which the press is at risk. Thus, the Proposed Act recommended a new definition to *sub judice* comment that is ‘publication or act done which interferes with the due course of any judicial proceedings’ and provide the requirement of ‘substantial risk’ of serious prejudice. It makes significant changes to the current law which is based on the test of a ‘mere possibility’. This Act proposes that the publication must present a substantial risk so that the prejudice to the litigation is serious in order to be contemptuous.⁸⁸³ The risk must be a *practical risk* and not *theoretical risk*⁸⁸⁴ and will seriously impede or prejudice the course of justice in the judicial proceedings. The empirical result shows that the majority of the respondents supported that the degree of risk of interference should be, at least, a minimal or small risk, in contrast to the ‘inherent tendency’, as currently applied. Although there is no detail discussions in the questionnaires and interviews on the test of ‘substantial risk of serious prejudice’ as applied in England under Section 2 (2) CCA 1981, it can be derived from the response of the majority of the respondents that they prefer to have a higher degree of risk of interference than the remote possibility. The Proposed Act also attempts to deal with this issue by specifying the trial is ‘*sub judice*’ when the proceedings in question have commenced and are ‘*active*’ at the time of the publication.

⁸⁸² *Murray Hiebert* (n. 267).

⁸⁸³ Section 4 (2) of the Proposed Act reads as follows:

This Part applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded.

⁸⁸⁴ *AG v Guardian Newspaper Ltd.* (n. 483).

Furthermore, the Proposed Act under Section 8 (2) proposed to introduce a ‘public interest’ test as equivalent to Section 5 CCA 1981. It provides that, even if there is a real risk of prejudice to a trial in question, it cannot be treated as contempt if the publication is incidental to the trial in question. The ‘public interest’ test calls for the balancing of the interest in the administration of justice and the interest of discussion of matter of public interest, which move the balance further towards freedom of speech and expression.

Another issue of concern in relation to contempt by *sub judice* comment is relating to innocent dissemination. A person in charge of distribution of foreign publication may find himself liable to punishment for contempt on the ground that the foreign publication distributed by his agency contained offending matter in relation to certain pending proceedings even though he might have been absolutely unaware of the contents.⁸⁸⁵ The Proposed Act deals with this issue by making available a defence of innocent publication or distribution. Therefore, there is a complete defence to a charge of contempt for a distributor to prove that he had no reasonable grounds for believing that the publication that he had distributed contained offending matter.

4.4.6 Practice And Procedure

The existing summary procedures have been the subject of substantial criticisms as highlighted in Chapter 3. The summary procedure has been criticised as it lacks the usual safeguards that apply to criminal offences generally. Those safeguards have been identified as the presumption of innocence, the rule against bias and the right to a fair hearing. It has been suggested that the power of the presiding judge to institute proceedings where it appears to him that contempt has been committed and to determine liability, reverses the presumption of innocence. Judicial officers determining liability for contempt in the face of court in particular, gives rise to a reasonable apprehension of bias on the part of the judge. Furthermore, the ability

⁸⁸⁵ See *Wain* (n. 317), where a Singapore High Court held that the printers and distributors had no knowledge of the existence of the offending article but neither lack of intention nor the defence of innocent dissemination is available to them if what is printed is in fact a contempt of court. This case was referred to by the High Court in *Murray Hiebert* (n. 267).

of the presiding judge to rely upon his own perceptions raises concerns as to the adequacy of such perception as a basis for determining guilt.

The empirical result shows that the majority of the respondents believed that summary power of punishment should be retained with the judge. The judges can only punish *instanter* contempt in the face of the court. In other types of contempt, it should be by way of motion as in Order 52 RHC. Taking into consideration these competing considerations, the concerns regarding the frequent use of contempt summary power by judges and also the empirical study, the alternatives for reform of procedure for contempt offences are:

- (1) retain the existing summary procedure, or
- (2) apply the proposal by the Bar, or
- (3) introduce a hybrid procedure.

It is suggested that a hybrid procedure should be introduced modelled by the existing procedure under Order 52 RHC and the Proposed Act by the Bar.

As regards civil contempt, it is noted that this area is of least controversial compared to criminal contempt. Therefore, it is suggested that the procedure under Order 52 RHC should be retained.

There should be two different procedures to deal with criminal contempt. As regards to contempt in the face of the court, summary procedure should remain available when the alleged contemptuous conduct has occurred in the presence of the presiding judge and the judge considers that the alleged contempt offence presents an immediate threat to the authority of the court or the integrity of the proceedings in progress. A contempt offence may be tried by the presiding judge or the alleged contemnor may elect to be tried by another judge. This is different from the proposal in Proposed Act in which the presiding judge should refer the matter to the Chief Justice to set for a trial by a different judge unless the alleged contemnor chose to be tried before the same presiding officer. It is proposed to deviate from the Bar's proposal because the serious contempt that occurs in the presence of the judge within his personal knowledge is best handled by him. It

should be made explicit the need for the charge to be adequately particularised and for the right of the contemnor to be heard and to call witnesses. The guidelines laid down in *Bok Chek Thou* should be taken into consideration.⁸⁸⁶

Where the court proceeds to determine a contempt offence summarily, the court shall inform the accused of the nature and particulars of the charge, allow the accused reasonable opportunity to be heard and to call for witnesses. If necessary the court may grant an adjournment for that purpose. After hearing the accused, the court determines the charge and gives reasons for that determination and makes order for punishment or discharge of the accused.

Order 52 RHC does not provide the maximum limit of punishment. The sanctions and punishment are determined by the courts. The Proposed Act introduces the maximum limit of punishment. It is suggested the court will impose a punishment of imprisonment for a term, not exceeding fourteen days or with fine not exceeding RM 2,000 or with both. However, it is noted that the maximum limit of punishment is too low and it would defect the purpose of being punitive and deterrence. Thus, it is suggested that the maxima for contempt conviction would be imprisonment of one month or a fine of RM 5,000.

Consideration should be given to adopting a uniform procedure for dealing with contempt out of the court. It is suggested the Attorney General or the aggrieved party will apply for a leave to move the court. Once the leave is granted, an application for committal supported by an affidavit verifying the facts will be filed in court. Then this application and affidavit will be served as a 'charge' on the alleged contemnor. He is informed with the particulars of the charge and is allowed to answer the claim against him.

However, in situations where the alleged contemptuous act is serious and neither the Attorney General nor the aggrieved party applies to commit the alleged contemnor, the court can act *suo motu*. Here, applying the current procedure under Order 52 r. 1B RHB is suggested. The alleged contemnor will be served personally a formal notice to show cause why he should neither be committed to

⁸⁸⁶ *Supra.* (n. 369).

prison nor fined. The notice should detail the alleged contemptuous act containing the actual words and particulars of the actual conduct of the alleged contemptuous act. Once the notice is served on him, he has to appear before the court to show why he should not be committed for contempt. He is allowed every opportunity to make his defence. If the court is not satisfied with his explanation, the court may proceed to commit him. The court will fix the hearing of the matter. Nevertheless the alleged contemnor may apply to be heard before a different judge.

4.4.7 Ethical Conduct

In the Proposed Act, the Bar Council includes suggestions for contempt against the Presiding Judge. The provision provides that a Presiding Judge is liable for contempt in his own court or any other court in the same manner as any other individual is liable. This issue needs to be addressed as the result of empirical research reveals that it is not appropriate to subject judges to contempt law as they should be dealt with by their Code of Ethics.

The majority of interviewees, especially those from judiciary, thought that the best to govern their conduct is the Judges' Code of Ethics. Although the Code is not comprehensive and detailed, it is sufficient. Apart from the Code of Ethics, the Constitution also provides that a judge can be removed from office in accordance with Article 125 of the Malaysian Constitution. Article 125 (3) provides that a judge could be removed on the ground of any breach of any provision of the code of ethics prescribed under Article 125 (3A) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office. In this matter there is an even a larger issue that needs to be considered: public confidence in the judiciary. Judges are the authority figures and if the law of contempt is extended to judges it would probably create much dispute in the whole framework of the legal society. The confidence of the judiciary will be at stake and if one were to bring judges to contempt, there could be a tendency that people may disregard the system. Thus, to hold a judge for contempt is not a good idea.

With regards to the ethical conduct of the lawyers, respondents agreed that contempt sanction can be used to control lawyers' conduct in the courtroom but it cannot be used as a sword of Damocles. As one of the judges in the interview viewed that 'contempt should be like a headmaster's unused cane. The cane is there but needs not be used'. At the same time, the ethics and etiquette of the lawyers should be controlled within the profession itself. It is worth noting the opinion of one of the respondents when he said that the most effective way to ensure the lawyers' proper conduct is none other than the lawyers themselves. It is self-restraint on their part that is most important.

4.4.8 The Judges and the Contempt Power

The power of contempt is a power which a judge must have and exercise in protecting due and orderly administration of justice. In Malaysia, it is agreed that the judges should not be deprived of such power. This is shown in the empirical result.⁸⁸⁷ However, the Bar views this power as fraught with possible abuse and misuse. The discretion permitted to judges in determining what is contempt and how to punish it has led some the Bar to argue that the contempt power gives too much authority to judges. Therefore, it is suggested the contempt power is used sparingly and when necessary, in an exceptional circumstance.⁸⁸⁸ Judge number 5 of the interview shared his view that 'contempt should be like a headmaster's unused cane. The cane is there but needs not to be used'. He was in opinion that there is a power to invoke for contempt but it does not need to be used often.

The judges also play important role in maintaining and preserving public confidence in the judiciary and the administration of justice as a whole. The judges during the proceedings are also at 'trial'. Therefore, they have to keep their temper and remain their composure. As Judge number 6 of the interview said that it is an absolutely essential virtue for the judges to remain calm, cool, collected and concerted and be 'as sober as a judge'. If a judge is to lose his temper, it is like he is losing his proper sense of judgment.⁸⁸⁹

⁸⁸⁷ See Chapter 4, 4.3.3.3 (iii), pp. 233-235.

⁸⁸⁸ *Jaginder Singh* (n. 10).

⁸⁸⁹ See Chapter 4, 4.3.3.3 (iv), pp. 235-239.

As seen from the discussion on the potential foundation for reform, it is suggested that the judges should exercise their creativity and to strive in conformity with the development of the law of contempt of court in other developed common law jurisdictions. In the era of globalisation and the protection of human rights, the national judiciary should refer to the international human rights law as one of the tools of interpretation. The judges should be more pragmatic, rather than confining themselves within the 'four walls'.

4.4.9 Codification: Serves as a Guideline for the Legal Actors

This research undertakes to answer the research question: 'Does Malaysia need to have its contempt laws in a statutory form?' in order to overcome the uncertainties in the said area of law. It is undeniable that the court's power to punish for contempt is a necessary tool to protect the authority and integrity of the judicial process. Since it developed in the hand of the judiciary the contempt power is vulnerable to abuse. Clarity in this area of law is required and codifying the law is one of the best possible solutions to this issue. It is concluded that to place the law in an Act of Parliament is a good idea for the sake of clarity and greater certainty. The empirical result reveals that the majority of the respondents succumbed to the idea of codifying the law.

Chapter 5

Conclusion

5.1 SUMMARY AND CONCLUSIONS

The recent practice of contempt of court in Malaysia demonstrates arbitrariness due to the unrestricted jurisdiction of the courts in punishing contempt. The Malaysian law of contempt is a common law phenomenon and the courts have inherent power to punish contempt. Chapter 3 reveals that the Malaysian judges have unfettered discretion in determining contempt cases. As a result of this unfettered discretion, inconsistencies can be seen in determining what conduct amounts to contempt, application of *mens rea*, the mode of trial and the penalty that can be imposed. As a result of this, contempt of court has a potential conflict with freedom of speech and expression.

Freedom of expression as guaranteed under Article 10 of the Constitution is not absolute as it can be restricted by contempt of court on the basis of the protection of the due administration of justice. Most criminal contempt cases involve a balance between the right of a fair trial on the one hand and the right to freedom of expression on the other. It is the judiciary which performs the task of reconciling freedom of expression with the administration of justice. In Malaysia, while balancing the two interests, it is often found that the speech value is being lowly protected. The Malaysian contempt law has resulted in a ‘chilling’ of free speech. This is evident in the matter of prejudicial publication on cases which are pending. The *actus reus* can be fulfilled if it is shown that the publication in question has created a tendency that the proceedings in question might be prejudiced. This means that the publication may amount to contempt even if the possibility of interference with the proceedings is remote and that the contemnors will be punished for the tendency of perceived evil of their conducts even though the perceived evil could not and would not materialise.⁸⁹⁰ This test targets at protecting the administration of justice but not at protecting the fairness of proceedings. A mother country, from which the Malaysian law of contempt

⁸⁹⁰ *Murray Hiebert* (n. 267).

derived from, has undergone changes and developed its law of contempt to give a greater protection to free speech. The CCA 1981 introduces various liberalising factors, such as the liability test of ‘substantial risk of serious prejudice’ and the public interest protection, with the intention of moving the balance further towards freedom of expression while maintaining the standpoint of the supremacy of the administration of justice over free expression.

This study observes that the judges and their judicial approaches are the major contributors to the uncertainties in law and practice of contempt of court in Malaysia. This observation is highlighted in Chapter 3 and is supported by the empirical results tabled in Chapter 4.⁸⁹¹

The contempt power is a power which a judge must have and exercise in protecting due administration of justice. As shown in the empirical result, the judges should not be deprived of such power.⁸⁹² However, the Bar views this power as fraught with possible abuse and misuse. The discretion permitted to judges in determining what is contempt and how to deal with it led the Bar to argue that judges are given too much authority. Even though there was a suggestion for the judges to use this power sparingly and when necessary,⁸⁹³ they are found to be too quick to draw the sword and too often to use the shield. It is agreed that the judges are vested with contempt power in order to protect the due administration of justice. Nevertheless, the judges also play important roles in maintaining and preserving public confidence in the judiciary and the administration of justice. Therefore, by using the contempt power to chill free speech, the purpose and function of the judges to maintain and preserve public confidence in them may be defeated.

Having considered the anomalies in the law and practice of contempt of court in Malaysia and the potential foundation for reform, two alternatives are suggested to resolve these uncertainties. Firstly, the judges should change their attitude and

⁸⁹¹ Chapter 4, 4.3.3.3 (iv), p. 239.

⁸⁹² Chapter 4, 4.3.3.3 (iii), pp. 233-235.

⁸⁹³ *Jaginder Singh* (n.10).

approaches in contempt of court, and secondly, the law and procedures for contempt should be placed in an Act of Parliament.

5.1.1 The Judges

Chapter 3 gives the background of the Malaysian law of contempt of court and highlights the main areas of concern in this area. As mentioned above, the judges are the main reason of the material issue. This can be seen through their attitude and approaches to contempt of court. Since the Malaysian contempt law is based on common law and there is no written law on the subject matter, by virtue of Section 3 CLA 1956, the judges may refer to English contempt cases. Nevertheless, the courts have to observe the cut-off period, that is, only the English common law decided before 7 April 1956 can be used as a binding authority for the courts. The cases decided after the said date are only persuasive in nature. The courts, in referring to English cases and other foreign materials as persuasive authorities, have to consider suitability of the local conditions. As noted, the Malaysian courts in most contempt cases refuse to follow the current development of contempt law of England and other counterparts, and have repeatedly justified taking a different approach from these counterparts on the basis of 'local conditions'.

Chapter 3 discusses that the common law of contempt of court in Malaysia has failed to give an adequate protection to free speech. The Malaysian courts have failed to consider the development in other Commonwealth jurisdictions, at the very least, the development of the common law itself. The refusal to follow the development of contempt law in other common law jurisdictions is solely because of 'local conditions', a proviso which is provided in Section 3 CLA 1956 as mentioned above.

The Malaysian courts have failed to clarify how the conditions are different and why such differences are relevant. The phrase 'local conditions' has been used in a number of cases to justify stricter approach adopted in Malaysia without explaining what conditions in Malaysia that should differentiate it from other

common law jurisdictions that adopted a more liberal approach. For instance, in the case of *Manjeet Singh*, it was stated that it was necessary to ‘take a stricter view of matters pertaining to the dignity of the court’ because of local conditions. However, the majority judgment failed to explain the reasons for the different local conditions that would justify their stricter approach. The reference was made to *The Straits Times Press*⁸⁹⁴ and *SRN Palaniappan*⁸⁹⁵ - the cases which were decided in 1949.

In *The Straits Time Press*, the refusal to follow the development in England, apart from the state of emergency in Malaya, the development of press, the general standard of education and the composition of the general public in Malaya at that time, in 1948, were not comparable to England.⁸⁹⁶ In *Palaniappan*, considering the emergency state in Malaya, it was essential that the confidence of the community in the judiciary and the administration of justice by the courts should be sustained at the highest pitch.⁸⁹⁷ However, it has to be borne in mind that when the courts decided on *Manjeet Singh* the state of emergency in 1948 is nowhere in sight, Malaya has received its independence and now is known as Malaysia, the press and general standard of education did not remain the same at the level achieved in 1948-1949. The people are now more cultured and literate. The local conditions changed and the justification in 1948 cases is no longer valid today. Furthermore, the sensitivity of the Malaysian courts is another reason given by the Court in *Manjeet Singh* in deviating from the decision of *ex parte Blackburn*. The judges have to take note that the law of contempt by scandalising the court as in *Manjeet Singh* has fallen into desuetude in England.

Another justification given by the courts for not following the liberal approach of English cases is that of Section 3 CLA 1956. Section 3 provides that only English common law as administered in England on or before 7 April 1956 is applicable in Malaysia. Therefore, the cases after the effective date are not binding and are only persuasive. Nevertheless, the judges should not treat this provision as barring the courts from referring to the later and recent English authorities. As noted in

⁸⁹⁴ *The Straits Times Press* (n. 287).

⁸⁹⁵ *SRN Palaniappan & Ors* (n. 288).

⁸⁹⁶ *The Straits Times Press* (n. 287), p. 82.

⁸⁹⁷ *SRN Palaniappan & Ors* (n. 288), p. 248.

Chapter 3 and 4, the common law in Malaysia should not be stagnant as it should develop with the development of time and place. The judges should not hide behind Section 3 in not following persuasive authorities from England.

In considering the development of contempt of court in other common law jurisdictions, with a main reference to England, it is noted in Chapter 4 that the post-1956 English authorities, in particular post-1981 are adequate in protecting free speech.⁸⁹⁸ Enhancing free expression in the administration of justice would aid in developing confidence in impartial justice as this would also aid in moving towards a more mature system.

Therefore, in finding the best possible solution to resolve the anomalies in the law of contempt of court in Malaysia, it is suggested that the judges should refer to foreign materials as a catalyst in construing the Malaysian law of contempt. The judges need to realise that the local conditions change and the principles of law develop with the passing of time.

By looking at the development in the foreign jurisdictions, it is obvious that the tradition and approaches are varied and to the certain extent, differed. The law of contempt develops differently from country to country as the evolution of jurisprudence is different and the judges who hail from different background and cultures do not share the same perceptions. However, this should not be a hindrance or irrelevant. This is because the pool of authorities from various places could give influential ideas. The comparative law or foreign materials enrich the options available to the judges. Examination of a foreign solution may help a judge to choose the best local solution.⁸⁹⁹ Moreover, it is also argued in Chapter 4 that the Malaysian courts have been referring to foreign materials for a long time and are institutionally capable of doing it. When the Privy Council was the final appellate court in Malaysia, there has been a pool of foreign cases in the courts. The courts have been dealing with comparative law and it is acknowledged that

⁸⁹⁸ *AG v Guardian Newspapers* (n. 429). As mentioned above, the CCA 1981 introduces various liberalising factors with the intention of moving the balance further towards freedom of expression while maintaining the standpoint of the supremacy of the administration of justice over the free expression.

⁸⁹⁹ *Supra.*, (n. 160).

the courts already have some ideas in dealing with foreign materials as the basis of interpretation. In fact, the departure from the Privy Council gives an opportunity to the courts to exercise their creativity with the exposure of comparative law in expanding the scope of interpretation.

Having said that, the judges should not confine themselves within the four walls. They should look and go beyond. The judges should shift their paradigm, their attitude; and approach the matter pragmatically. They should strive for uniformity and consistency with other developed common law jurisdictions and should also be in line with the international standard for the protection of human rights.

Another point to consider in relation to the judges is the frequent exercise of the contempt power. The empirical study shows that the respondents agree that the judicial contempt power is necessary as a mechanism to protect the administration of justice from any interference. However, the frequent use of such power is perceived by lawyers as being misused by the judges. The judges are perceived as too quick to draw their 'sword' against the alleged contemnors.

Additionally, the respondents, in the empirical study, were asked whether the contempt sanction is an effective tool in controlling lawyers' behaviour. The majority of the respondents agreed that it is an effective tool towards unabashed and insolent lawyers. This is because the contempt sanction would cause embarrassment to lawyers being cited for contempt as this indicates that their ethical value is at stake. Nevertheless, the contempt sanction should only be invoked when the misconduct is grotesque, as it should not be used to suppress advocacy.

However, according to some respondents, the contempt sanction is not the only tool to control lawyers' behaviour and ethical conduct. The respondents pointed out that in some cases of misconduct, the court should refer the misbehaving lawyers to their professional bodies. With regard to the advocates, the judge can write a complaint to the Disciplinary Board which in turn will investigate the complaint and later will hear the matter. The Disciplinary Board may impose punishment ranging from a fine to striking the person off the Roll. Nonetheless the

empirical result shows that the majority of the respondents, with the exception of the advocates, perceived the Bar's ability in controlling its members' ethical conduct is ineffective. The respondents raised concerns of bias for the profession and its members' interests. Although there are rules and regulations that set out the guidelines for the conduct, the procedures and punishment for any breach of the ethical behaviour of the advocates, in practice the disciplinary process is slow and cumbersome. Having rules and enforcing them are two different things altogether. As regards to ethical conduct, the words of Judge 2 of the interview are echoed when he said that the most effective way to ensure the lawyers' proper conduct is none other than the lawyers themselves. It is self-restraint on their part that is most important.

Notably, the judges are vested with the contempt power and to use it as a tool of controlling lawyers' behaviour and conduct. However, they should not be too quick to use this power, especially the summary power, to cite the alleged contemnor for contempt. This is because the summary power is opened to abuse as it can deprive the alleged contemnor of a clear and distinct charge and also his best possible defence. More importantly, punishment being meted out on the spot usually precludes the alleged contemnor from seeking legal advice or representation. In this context, the judges should only exercise the power when necessary and only when the misconduct is grotesque. The person's right to a fair trial and the right against bias should be safeguarded.

5.1.2 Codification

Another mechanism which was suggested by the Bar Council and which received a positive feedback from the majority of the respondents in the empirical study, is to place the law of contempt of court in an Act of Parliament. The empirical study reveals that the minority of respondents held back on the idea of codification. They pointed to the fact that it is difficult to lay down hard and fast rules in circumstances where the types of contempt that may be committed are unpredictable. Nevertheless, it is argued that this concern is largely illusory. In response, it can be stated that codification in other areas of law has been achieved

without adverse effect. Indeed, codification of contempt law has taken place in India and the UK. Compared to Parliament, the judges are limited in the amount of law which they can create. They can only create or change the law when the case is taken to court. This would not be a problem with Parliament as the law making process is that of Parliament.

The codification is argued to bring greater certainty to the identification of the basis for liability and clearer guidance to participants in judicial proceedings. As of now, the basis of contempt of court varies without apparent justification. In addition to common law, the law and procedural vehicle to deal with contempt are found in various places namely in the Constitution, the CJA 1964, the RHC 1980, the SCA 1948, the SCR 1980, the Penal Code and the CPC. By replacing the existing law of contempt with statutory offences, uniform standards could be introduced for all courts.

Therefore, the Bar's Proposed Act can be taken as a model for reform. The Bar has carried-out a thorough study on the law of contempt in preparing the Proposed Act. The uncertainties in the law and application of contempt of court in Malaysia have been brought to the Bar's attention. In preparing the Proposed Act, the Bar assigned a Committee which consisted of advocates who are senior, learned and experienced in this area. Apart from this, the Committee had carried a thorough comparative study of law and practice of contempt of court in other jurisdictions especially in England and India, considering that these two jurisdictions have moved towards codifying their law.

The Proposed Act is suggested to be made applicable to all courts in Malaysia including the Industrial courts. The Act gives a characteristic definition of contempt of court. Contempt is placed under five major categories. In each kind of contempt, the Act contains the element or ingredients to constitute contempt. Civil contempt is defined as 'wilful disobedience of any judgment or any order requiring a person to do or abstain from doing a specified act or any writ of habeas corpus or wilful breach of an express undertaking given to the Court on the faith of which the Court has given its sanction'. Under this new law, the element of 'wilful' is injected which connotes that there is a need to prove that the alleged

contemnor has wilfully or deliberately disobeys the order. Thus, under this new proposed law, mere disobedience without wilful element is not sufficient to constitute civil contempt.

Criminal contempt is defined as ‘publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any act whatsoever which is a falsehood and is intended to bring a Court into disrepute, or interferes with the due course of any judicial proceedings or obstructs the administration of justice in any other manner’. There are three classes of action which have been classified as criminal contempt *ex facie*.

The first category is ‘any publication or act done which is a falsehood and is intended to bring a Court into disrepute’. This new definition corresponds to the common law offence of scandalising a court or a judge. Under this new law it is required to prove that the content of the publication is false and the alleged contemnor has intention to publish the material which contains false information that disrepute the administration of justice. The second category is ‘publication or act done which interferes with the due course of any judicial proceedings’. This new branch of criminal contempt deals with prejudicial publication that interferes with a particular proceeding. This new law resembles Sections 1 and 2 (2) CCA 1981 under which England has recognised the rule of strict liability where the publication creates a substantial risk so that the course of justice in the proceedings in question will be seriously impeded or prejudiced. It applies only when the proceedings are active at the time of the publication. The third category is a catch-all provision and intends to cover the residuary cases of contempt not expressly covered by the definition in Section 3 (3) of the Proposed Act. It deals with ‘publication or act done which obstructs the administration of justice in any other manner’.

The proposed offence of contempt in the face of court provides that it is committed when a person in the presence of the court engages in any conduct that substantially interferes with or obstructs the continuance of the proceedings. The Bar Council proposes retention of the common law offence of contempt in the

face of court but with some modifications. It is limited in its physical scope when it is only confined to the misconducts in the presence of the court.

As regards *mens rea*, the Proposed Act intends only publication or an act done which interferes with the due course of justice of any active judicial proceedings as strict liability offence. For civil contempt and contempt in the face of the courts, only *mens rea* in relation to contemptuous act is needed. However, to constitute contempt under the new law of scandalising contempt, *mens rea* beyond the intention to disrepute or scandalise the courts is required. Therefore, the criminal contempt of court will not be treated as strict liability offence.

The Proposed Act also creates defences. Defences of innocent publication or distribution, fair and accurate report of proceedings are placed in the Proposed Act. Section 8 (2), which resembles Section 5 CCA 1981, provides that a publication made as part of a legitimate discussion of matters of public affairs or public interest is not to be treated as contempt if it is incidentally resulted in a serious interference to particular legal proceedings. This is one of the measures to protect media freedom.

The Act also provides the procedure to be applied. For contempt in the face of the court, the contempt offences are tried by a different judge but the alleged contemnor may elect to be tried before the same presiding judge before whom the alleged contemptuous act has been committed. Where the court proceeds to determine a contempt offence a formal notice should be served and should also have a clause that informs the alleged contemnor of his right to file a defence and to a legal representation. For criminal contempt in general, the Proposed Act allows the court and other parties, namely the Attorney General and the aggrieved party, to initiate the proceedings on the matter as the provision uses the expression of 'when it is alleged' and 'upon its own view'. If it is found that a person has committed an alleged contemptuous act, the court has to serve on the alleged contemnor a charge in writing containing the actual words and particulars of the actual conduct of the alleged contemptuous act. Once the charge is served on him, he is allowed every opportunity to make his defence to the charge. The new procedures, especially procedure to deal with contempt *in facie*, provide sufficient

safeguards against the rule against bias, presumption of innocence and the right to a full and fair trial.

The Proposed Act tackles the issue of the maximum punishment that can be imposed. Appropriate maxima for contempt conviction would be imprisonment for a term, not exceeding fourteen days or with a fine not exceeding RM 2,000 or both. The Proposed Act recommends that there be comprehensive rights of appeal in relation to contempt cases.

Although the Bar has proposed a Contempt of Court Act and in fact had submitted it to the government, thus far, it has not received any feedback from the government. The Proposed Act, in fact, bears a strong resemblance to the CCA 1981. It is known that the CCA 1981 was introduced as partly in response to the decision of the ECtHR in the *Sunday Times* case. One might argue that if the Proposed Act is introduced, it would mean that the ECtHR case, in particular the *Sunday Times* case would have a strong influence on the Malaysian law, not just through the case law but via a statute. The opponent to the idea of codification might argue that the Proposed Act should not be passed into law as it is influenced by the ECHR - a regional treaty to protect human rights and fundamental liberties in Europe. However, as argued in Chapter 4, there are attempts by non-European lawyers to argue cases decided by the ECtHR in their own national law due to the reason that the ECHR is regarded as sophisticated instruments for the international protection of human rights.⁹⁰⁰ Since the ECHR is treated as sophisticated instruments, it is an advantage to make it as a reference. Although on its face, the ECHR is not binding outside Europe, if the Proposed Act which is influenced by the ECHR case is to be introduced, it will open up the avenue for the Malaysian judges to give consideration to the foreign and international materials in interpreting domestic law of contempt. On this point, at least, the interpretation should not go below the European standard.

As noted, the Proposed Act intends to move the balance further towards freedom of expression while maintaining the standpoint of the supremacy of the

⁹⁰⁰ *Supra.*, (n. 577).

administration of justice over free expression. The test of liability that requires a ‘substantial risk of serious prejudice’ and the public interest ‘defence’ are amongst the example of liberalising factors and elements in the Act. The Proposed Act attempts to balance the use of the ‘sword’ and the ‘shield’ by the judges. The judges may use the contempt power, for example, to deal summarily with misconduct in the presence of the court, and they may also use the contempt power as a shield by putting a restriction to the public from discussing matters when there is a real case reported or pending. In this context, the contempt power is used as a shield to chill a person’s right to freedom of expression. The sword is double-edged – it protects the administration of justice from unfair attack and it also protects individuals from unfair attack from the judiciary.

The Proposed Act attempts to balance the two interests i.e. the protection of the administration of justice and freedom of expression, and it is suggested that the greater freedom of expression is allowed via the Proposed Act. The greater the freedom of expression is allowed the more confidence the public will have in the judiciary. The public will have the respect for and confidence in the courts’ capacity to fulfil the function as the proper forum for the settlement of legal disputes and for the determination of a person’s guilt or innocence. Thus, the judge will only be allowed to strike his sword when it is urgent and imperative to act and/or when there is a ‘substantial risk of serious prejudice’ to the administration of justice.

If the Act were to be introduced, it would allow a greater protection of free speech than what we have now. Having said that, the absence of a statute must be a matter in need of urgent reform given the uncertainties outlined in this thesis. Even if the Bar actively presses their case, but without a political will and responses from the government, the chance of the Act to be introduced is slim. Assuming that the Proposed Act is not introduced, there is a tendency that the judges will dismiss a case from a foreign jurisdiction on the ground of suitability of ‘local conditions’. At this juncture, the lawyers arguing the case before the court have to play their role to persuade and draw the attention of the judges to these foreign materials as the persuasive authorities. An attention should also be drawn to the facts that the legal culture of resistance towards foreign materials as

persuasive authorities is slowly eroding in some areas of civil liberties as seen in *Adong bin Kawau*.⁹⁰¹

In short, it may be concluded that the anomalies in the Malaysian law of contempt of court can be overcome by placing the law in an Act of Parliament. Nevertheless, since legal reform is an arduous task in which it is unrealistic to expect a revision of a law to bring about the desired changes overnight, it is also suggested that the change should first come from the judicial personnel. As noted in this study, the judges and their judicial approaches are the main reasons that cause the uncertainties in the law and practice of contempt of court in Malaysia. Their refusal to follow the current pace and development of contempt of court in other common law jurisdictions on the basis of 'local conditions' to a certain extent has a significant impact on the freedom of speech and expression in Malaysia. The reluctance to strive for uniformity with these jurisdictions can be seen in the area of contempt by scandalising. The species of this offence of contempt of court often regarded as having fallen into desuetude in England, has continued to be imposed in Malaysia. Contempt by scandalising plays its role as a sword as well as a shield for the judges against any scandalous and abusive comments and criticisms against them. Hence, to overcome the inconsistencies in the judicial approach of contempt of court, as suggested in this study, the judges should shift their paradigm and attitudes when dealing with contempt. It is time for the judges to withstand criticism and to stop using contempt of court to chill freedom of speech. It is worth celebrating the view of the USA Supreme Court in *In re Little*,⁹⁰² which states:

[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

⁹⁰¹ See *supra.*, (n. 591).

⁹⁰² *In re Little* (n. 473) p. 555.

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APPENDIX A

**The Proposed Contempt of Court Act 1999
(Refer to the Hardbound copy of the thesis)**

APPENDIX B 1: JUDGES

RESEARCH QUESTIONNAIRE

A Study of the Law and Practice of Contempt of Court in Malaysia

The abovementioned research undertakes to study the current law and practice of contempt of court in Malaysia.

The attached questionnaire seeks to find out about the law and practice of contempt of court from the perspective of the key players in the Malaysian legal system, namely, judicial officers, lawyers and prosecutors.

All the responses will be treated in the strictest confidence and the data collected will be stored in anonymous form. The findings of this research will only be used for academic purposes as part of doctoral studies at Durham University, United Kingdom.

It is realised the great pressures on your time and thank you in advance for taking the time to look at and respond to this questionnaire. I would appreciate it if I can receive the returned questionnaire within **21 days** from the date of receiving the same, to this address:

Shukriah Dato' Mohd Sheriff
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
P.O. Box 10, 50728 Kuala Lumpur.

Or to the following email address;

shukriahresearch@yahoo.co.uk.

If there is any queries or would like further information, please feel free to contact me at any of the following emails: shukriah.mohd-sheriff@durham.ac.uk , shukriahs@iiu.edu.my, shukriahms@yahoo.co.uk.

Best wishes,

Shukriah Dato' Mohd Sheriff
PhD Research Student,
Durham Law School, Durham University, UK.
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(Lecturer, Ahmad Ibrahim Kulliyah of Laws,
International Islamic University, Malaysia.
<http://www.iiu.edu.my/laws/directory.php>)

QUESTIONS

(Please tick (✓) in an appropriate box)

1. Gender: () Male () Female

2. Age: () 20-30 () 31-40 () 41-50 () 51-60 () Above 60

3. Profession:
 () Federal Court judge
 () Court of Appeal judge
 () High Court judge
 () Sessions' Court judge
 () Magistrate
 () Advocate & Solicitor
 () Prosecutor
 () Other _____

4. How long have you been in this profession?
 () Less than 1 year
 () 1-5 years
 () 6-10 years
 () 10-20 years
 () More than 20 years

5. Have you ever cited a person for contempt of court?
 () Yes
 () No

Please give a brief summary of the reasons for being held in contempt.

6. In your opinion, what are the main reasons for lawyers being cited for contempt?

7. (a) Do you agree that the existence of the law of contempt is to ensure that court orders are obeyed?
 Agree
 Disagree
 Do not know

Please give a brief summary of the reasons for your answer.

- (b) Do you agree that the purpose of the law of contempt is to ensure that the administration of justice is not interfered with?
 Agree
 Disagree
 Do not know

Please give a brief summary of the reasons for your answer.

- (c) Do you agree that the purpose of the law of contempt is to protect the right to fair trials?
 Agree
 Disagree
 Do not know

Please give a brief summary of the reasons for your answer.

8. Do you agree that the dichotomy between criminal and civil contempt of court is almost imperceptible due to the broad concept of contempt of court i.e. any conduct which interferes with the administration of justice may amount to a contemptuous act?
 Agree
 Disagree
 Do not know

Please give a brief summary of the reasons for your answer.

9. Should the distinction between civil and criminal contempt of court be abolished?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

10. The standard of proof for establishing contempt, civil or criminal, is "beyond reasonable doubt"- do you agree?

Agree

Disagree

Do not know

Please give a brief summary of the reasons for your answer.

11. The proper test to determine what amounts to contempt ought to be-

the act or publication *is likely or tends* to interfere with the proper administration of justice

or,

real risk of prejudice

or,

other:

12. Do you think that the Malaysian criminal contempt of court should be a strict liability offence?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

13. Do you think that the use of the summary procedure for dealing with all forms of contempt is justified?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

14. Do you think that the summary procedure is to be used only in cases of contempt in the face of the court?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

15. Do you think the courts should be allowed to initiate contempt proceedings on their own motion for any category of contempt?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

16. Do you think that the use of summary procedure may jeopardise the alleged contemnor's right to a full and fair trial?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

17. Do you think that contempt sanctions are effective in ensuring proper conduct of lawyers?

- Effective
- Not effective
- Do not know

Please give a brief summary of the reasons for your answer.

18. How effective do you think the Malaysian Bar's self-disciplining ability is in dealing with improper conduct of its members?

- Effective
- Not effective
- Do not know

Please give a brief summary of the reasons for your answer.

19. How effective do you think the Malaysian Prosecutions' self-disciplining ability is in dealing with improper conduct of its members?

- Effective
- Not effective
- Do not know

Please give a brief summary of the reasons for your answer.

20. Do you think judges should be subject to contempt laws?

- Yes
- No
- Do not know

Please give a brief summary of the reasons for your answer.

21. The law and the procedures for contempt of court in Malaysia should be defined by the statute-
do you agree?
 Agree
 Disagree
 Do not know

Please give a brief summary of the reasons for your answer.

22. If there is anything you would like to add or comments you wish to make, please do so in the
space provided below.

THANK YOU VERY MUCH FOR YOUR PARTICIPATION

APPENDIX B2: LAWYERS

RESEARCH QUESTIONNAIRE

A Study of the Law and Practice of Contempt of Court in Malaysia

The abovementioned research undertakes to study the current law and practice of contempt of court in Malaysia.

The attached questionnaire seeks to find out about the law and practice of contempt of court from the perspective of the key players in the Malaysian legal system, namely, judicial officers, lawyers and prosecutors.

All the responses will be treated in the strictest confidence and the data collected will be stored in anonymous form. The findings of this research will only be used for academic purposes as part of doctoral studies at Durham University, United Kingdom.

It is realised the great pressures on your time and thank you in advance for taking the time to look at and respond to this questionnaire. I would appreciate it if I can receive the returned questionnaire within **21 days** from the date of receiving the same, to this address:

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If there is any queries or would like further information, please feel free to contact me at any of the following emails: shukriah.mohd-sheriff@durham.ac.uk , shukriahs@iiu.edu.my, shukriahms@yahoo.co.uk.

Best wishes,

Shukriah Dato' Mohd Sheriff
PhD Research Student,
Durham Law School, Durham University, UK.
<http://www.dur.ac.uk/law/postgraduate/pgresearch/>

(Lecturer, Ahmad Ibrahim Kulliyah of Laws,
International Islamic University, Malaysia.
<http://www.iiu.edu.my/laws/directory.php>)

7. (a) Do you agree that the existence of the law of contempt is to ensure that court orders are obeyed?
() Agree
() Disagree
() Do not know

Please give a brief summary of the reasons for your answer.

- (b) Do you agree that the purpose of the law of contempt is to ensure that the administration of justice is not interfered with?
() Agree
() Disagree
() Do not know

Please give a brief summary of the reasons for your answer.

- (c) Do you agree that the purpose of the law of contempt is to protect the right to fair trials?
() Agree
() Disagree
() Do not know

Please give a brief summary of the reasons for your answer.

8. Do you agree that the dichotomy between criminal and civil contempt of court is almost imperceptible due to the broad concept of contempt of court i.e. any conduct which interferes with the administration of justice may amount to a contemptuous act?
() Agree
() Disagree
() Do not know

Please give a brief summary of the reasons for your answer.

9. Should the distinction between civil and criminal contempt of court be abolished?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

10. The standard of proof for establishing contempt, civil or criminal, is "beyond reasonable doubt"- do you agree?

Agree

Disagree

Do not know

Please give a brief summary of the reasons for your answer.

11. The proper test to determine what amounts to contempt ought to be-

the act or publication *is likely or tends* to interfere with the proper administration of justice

or,

real risk of prejudice

or,

other:

12. Do you think that the Malaysian criminal contempt of court should be a strict liability offence?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

13. Do you think that the use of the summary procedure for dealing with all forms of contempt is justified?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

14. Do you think that the summary procedure is to be used only in cases of contempt in the face of the court?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

15. Do you think the courts should be allowed to initiate contempt proceedings on their own motion for any category of contempt?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

16. Do you think that the use of summary procedure may jeopardise the alleged contemnor's right to a full and fair trial?

Yes

No

Do not know

Please give a brief summary of the reasons for your answer.

17. Do you think that contempt sanctions are effective in ensuring proper conduct of lawyers?

- Effective
- Not effective
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Please give a brief summary of the reasons for your answer.

18. How effective do you think the Malaysian Bar's self-disciplining ability is in dealing with improper conduct of its members?

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- Not effective
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Please give a brief summary of the reasons for your answer.

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Please give a brief summary of the reasons for your answer.

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Please give a brief summary of the reasons for your answer.

22. If there is anything you would like to add or comments you wish to make, please do so in the
space provided below.

THANK YOU VERY MUCH FOR YOUR PARTICIPATION