

Judicial Approaches in Balancing Freedom of Speech and Contempt of Court in Malaysia

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Abstract: Freedom of speech is guaranteed under Malaysian Constitution, although such freedom is not absolutely un-curtailed. It is subject to certain limitations such as on grounds of national security, public peace or morality. One limitation of freedom of speech that is outside the limitations provided in the constitution is contempt of court. Contempt of court is a power entrusted to every court by statute or part of the inherent jurisdiction of the court. This power extends to the courts hearing and even initiating contempt actions, recognising forms of contempt, ensuring proper compliance with rules of procedure applicable to contempt proceedings and if appropriate, punishing those who offend these standards. These principles are contained in various statutes and even more numerous cases. This study adopts a doctrinal method analysis on contempt of court in Malaysia. It examines the judicial approaches adopted by Malaysian courts in balancing freedom of speech and offences related to contempt of court.

Key words: Malaysia, freedom of speech, contempt of court, judiciary, Malaysian constitution

INTRODUCTION

Malaysia being a federal state anchors its legal system on its constitution. The federal constitution provides various powers and jurisdictions to the government, judiciary and executive and to a certain extent freedom to the people. Article 4 (1) of the Federal Constitution declares that “This constitution is the supreme law of the Federation and any law passed after Merdeka (Independence) Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.” Part II of this ‘supreme law’ relates to fundamental liberties. Section 2 of the Human Rights Commission of Malaysia Act 1999 clarifies that the term ‘human rights’ refers to the fundamental liberties enshrined in Part II of the Federal Constitution. Both of these statutes, thus, recognise the importance of the rights specifically given in this part of the Federal Constitution which includes the ‘the right to freedom of speech and expression’ (Aziz Bari, 2004).

Article 10 (1) (a) of the Federal Constitution declares that every citizen shall have the right to freedom of speech and expression, subject to Articles 10 (2), (3) and (4). Article 10 (2) (a) specifically states that the right of freedom of speech and expression given in Article 10 (1) (a) may be restricted by Parliament by law, “as it deems necessary or expedient to provide against contempt of court”. Even when declaring this basic right, therefore, it was not intended to be absolute and contempt of court

was intended to be a specifically recognised limitation. The limitation of contempt of court has since been extended to that as provided by Parliament and also the courts. Constitutionally, freedom of speech is enjoyed by the people of Malaysia but there are limitations including giving comments or criticism towards the courts or judiciary. The law of contempt of court is to ensure that there will be no interference in judicial proceedings and respect for the judiciary. However, the law of contempt of court can also at the same time curb freedom of speech as criticism towards courts or judiciary will be bordering on contempt offences.

Theoretically, freedom of speech and expression is commonly acknowledged as an important right. Van Niekerk (1981) described a person’s freedom of expression as “one of man’s most cherished freedoms”. Radhakrishnan wrote, “Freedom of speech is an important human right.” Ahmad (2009) wrote, “In my view, freedom of speech is more important than democracy for democracy does not necessarily guarantee freedom of speech the first step to the creation or onset of a greater democracy and equity is always the phenomenon of letting the people’s voice be better heard”. This right, however, is subject to restrictions. Gomez writes, “It must be recognized that freedom of speech and expression is the most important fundamental right, all other rights are dependent on it. It also must be recognized that there must be some restriction to that freedom to maintain public order. But most importantly, the freedom of

expression must be protected at all costs, in the arena of justice. The only restriction permissible is where there is a real risk of prejudice to the administration of justice”.

How contempt of court restricts the right of freedom of speech is a common focus of researchers in Malaysian law including Ibrahim (2001) and Chew (2001). Contempt of court can restrict a person’s freedom of speech. However, this restriction is limited by a few issues.

Firstly, the speech restricted by this law must relate to the legal system. As Van Niekerk (1981) wrote, “Seen and analysed against the legal value of legal free speech, there can be little doubt that the contempt institution still constitutes one of the most important impediments to a healthy scrutiny of the machinery of justice in the spirit of creative dissent”.

Secondly, it is basically criminal contempt of court that restricts freedom of speech. Shameem (2004) wrote that “Inevitably, in cases of criminal contempt, the interference with the proper administration of justice must be balanced with a citizen’s right to freedom of expression.” Tilford (2002) wrote, “an individual’s right to freedom of speech is subject to the qualification that the speech must not subvert the administration of justice.” Civil contempt of court tends to focus on failing to fulfil court orders and undertakings give to the court. Unless the court order or undertaking relates to the court’s restricting a person’s freedom of speech, a civil contempt of court case may not involve this right.

Thirdly, even as far as criminal contempt of court cases are concerned, not all of such cases relate to this right. The subcategory most directly linked to this right would be scandalising the court. Sub judge contempt of court would only relate to commenting on a case that was still before the courts. Contempt in the face of the court would only relate to this right if the case focused on comments about the legal system. Otherwise, this is a diverse subcategory of contempt which does not necessarily involve this right.

Fourthly, as will be discussed in greater detail later, there are many factors that the courts have recognised as being important to consider whether a comment should constitute contempt of court or not. As Segal (1969) wrote, “It is axiomatic, however, that such criticism can be helpful only if it is directed at the decision and not the judge, only if it is directed at the opinion and not the opinion writer, only if it is informed and objective criticism.” Comments about the legal system or a particular judge are not automatically contemptuous but will be weighed by the courts to consider if such comments are beyond a lawful exercise of a person’s freedom of speech.

Fifthly, even if a comment is directed at a particular judge, the comment is more likely contemptuous if it

relates to the professional capacity rather than the personal capacity of the judge. It has been written that “When a judge has been criticised for something which has no direct bearing on his judicial functions plainly his remedies should be confined to those which are possessed by the ordinary man”. This right would include suing the person for defamation.

Contempt of court can and does, restrict a person’s freedom of speech and expression as recognised in the same Article in the Federal Constitution granting this right. However, this restriction is limited by a further number of issues. It is the courts’ duty to carefully decide when a person’s freedom of speech and expression should be limited by this law. As Farrell (1994) commented, “It is important that freedom of expression is protected but not at the expense of the proper administration of justice.”

THE COURTS’ CHALLENGE IN BALANCING THE FREEDOM OF SPEECH AND CONTEMPT BY SCANDALISING THE COURT

The Supreme Court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered and Ors v S.M. Idris and Anor and Another Application* [1990] 1 MLJ 273 explained that a ‘proper balance’ must be struck between various issues. These issues are the right of freedom of speech as provided in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the court in the interest of maintaining public confidence in the judiciary. The courts have raised many issues that should be taken into account in deciding whether a comment is just fair criticism protected under the freedom of speech or whether the comment exceeds this right and is punishable as contempt of court. It is submitted that these issues include the form content interpretation of the comment motive of the person making the comment and timing of the comment.

The courts have explained that the form of comment is important. This includes not whether the comments were ‘well founded’ but whether the comments were within the limits of reasonable courtesy and good faith whether the comments were made in an open and proper manner (*Attorney-General v Arthur Lee Meng Kuang* [1987] 1 MLJ 206); the rule of relevancy in a trial is not a licence to ‘advance contemptuous statements against the court or administration of justice’ and ‘even severe criticism of what has actually occurred will be tolerated, inaccurate and misleading facts and comments will not’. The content of comment is also important. The courts have explained that any allegation of injustice or bias even if expressed in ‘respectful’ terms, ‘cannot be

tolerated' when the allegation is made to influence or exert 'pressure' on the court judicially and comments that contain attacks upon the judges in their judicial capacity (*Attorney-General v Arthur Lee Meng Kuang* [1987] 1 MLJ 206).

The interpretation of the comment would also be taken into account by the courts. This includes considerations that more important than the intention of the writer is the effect upon the reader ('ordinary man in this country') the translation of the comment by a court interpreter (as is more likely to represent the meaning the article would convey to the ordinary reader) (*Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321), rather than a translation 'put forward by one of the interested parties in an endeavour to minimise his liability' even though the comments were expressed 'somewhat injudiciously' which may conceivably 'be open to misconstruction' but is not an 'attack on the courts as to constitute a contempt' but only stems from a 'misconception of the role of the courts' (*Lim Kit Siang v Dato' Seri Dr. Mahathir Mohamad* [1987] 1 MLJ 383) whether the contempt allegation may be proven beyond reasonable doubt which may be difficult if the comment may be interpreted in different ways and the 'proper approach is to consider that article in its entirety'.

The motive of the person making the comment is also taken into account by the courts. The courts would consider if the person making the comment wanted to interfere in the course of justice by trying to harass the court to reverse its judgment due to the alleged mishandling of the case (since, there are no further rights of appeal) intended to 'bring the court into disrepute', the contemnor having a personal interest in making the comment, rather than to act in public interest comments that 'tend to bring into contempt the administration of justice'; whether the comment was a 'serious and deliberate attack upon the course of justice' whether the comment 'tended to prejudice the fair disposal of the criminal proceedings before this Court' and whether the comment was wilful and calculated with the intention of bringing the judge or administration of justice into contempt (*Attorney-General, Malaysia v Manjeet Singh Dillon* [1991] 1 MLJ 167).

The time that the comment was made could also be important, in relation to the surrounding circumstances of when the comment was made or 'local conditions'. The court noted that on the facts, the Supreme Court was newly created, need not have the same 'sensitivity' as similar courts in 'England or other countries', therefore, criticisms that are within 'reasonable courtesy elsewhere', may not have a similar finding in Malaysia. It is argued that the courts have to exercise their discretion of

choosing what to construe as contempt carefully as in this context, it affects a person's right granted by the Federal Constitution. Additionally, this category of contempt is perhaps most likely to be interpreted as judges protecting their own reputations or public image rather than the legal system since the comments giving rise to the contempt proceedings are often directed at specific judges.

The protection of freedom of speech in Malaysia has already been criticised. For example, Goodroad (1998) writes, "Limitations on freedom of speech in Singapore and Malaysia have been sharply criticized in the United States and abroad because unfettered speech freedom is considered essential to individual liberty and human dignity of all people regardless of their culture or history." This is not to say that any such limitation is necessarily unfair but that each limitation on this significant right should be necessary and desirable for the public interest. As such, when the courts' contempt jurisdiction encroaches into this right, the courts must also only do so when it is justified.

Lee (2009) similarly pointed out the importance of the courts' balancing the rights of freedom of speech and expression and contempt of court. He wrote, "In carrying out its responsibility, the court should apply a proportionality analysis and ensure, among other things that there is a rational link between the law supported by the government and the legislative objective sought to be achieved and that the law does not impair the right more than is necessary to accomplish the objective".

Lee (2009) also points out that this category of scandalising the court has "fallen into desuetude in the United Kingdom" as indicated by Lord Steyn's comment in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, delivering the judgment of the Privy Council on appeal from Mauritius that "In England such proceedings are rare and none has been successfully brought for >60 years." However, Lee states that this category "remains very much alive in Singapore". This category is also still active in Malaysia. The judges then need to be particularly careful in deciding which comments scandalise the court. This is reflected in the number of considerations that courts have raised which should be taken into account in exercising this discretion. Looking at each consideration separately, each is understandable and justifiable. However, the number of considerations which need to be applied concurrently, makes it difficult to clearly demarcate when a comment is only fair criticism and when this right is exceeded and the comment is contemptuous. It is a delicate and extremely tricky balance to achieve-one that is significant, complex and not very certain.

THE COURTS' CHALLENGE IN BALANCING THE FREEDOM OF THE PRESS AND SUB JUDICE CONTEMPT

The First Amendment to the United States Constitution provides, "Congress shall make no law abridging the freedom of the press". In Malaysia, this right is not specifically provided in the Federal Constitution but Article 19 of the Universal Declaration of Human Rights provides, "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". Section 4 (4) of the Human Rights Commission of Malaysia Act 1999 provides that "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". As such, it would seem that the freedom of the press can be indirectly recognised by law in Malaysia.

It has been highlighted that a free press is an important feature of a society. Lockhart (1987) wrote that "A free press can play a valuable and important role in promoting public respect for the law and its reform." Riefkohl (1996) also commented that "the press is important to the effective administration of justice because the press guards against miscarriages of justice and subjects the process to public scrutiny". However, his Lordship also warned that "It is unfair for the right of freedom of expression to be misused so as to prejudice a person's prospects of obtaining justice before courts or tribunals". Therefore, the courts must balance the importance of maintaining fair trials and the freedom of the press (Farrell, 1994; Cleaver, 1993). Das concluded, "If the proper balance is struck by the courts one could possibly keep the cake and eat it; in short, it would be entirely possible to have both justice served and press freedom kept".

It is argued that the media plays a critical role in society to keep the public informed about past, current and future events and plans. The media plays a vital role also in supporting the administration of justice by keeping people of aware of legal duties and violations the former to inform people what is expected of them in different situations and the latter to warn them of the risks of failing to observe their legal obligations. The media highlights the law as important aspects of daily life for everyone.

Sub judice contempt has been based on the principle that 'every person in the community, however humble his status may be is entitled to an absolutely fair trial'. Therefore, it is of the 'highest importance in the administration of justice' and 'public interest' that a case

should be decided by a judge solely based on the evidence adduced at trial and not any 'other consideration'. Abdul Hamid J of the High Court in *Public Prosecutor v Straits Times (Malaya) Bhd.* [1971] 1 MLJ 69, p 71 commented that this form of contempt requires the court to 'evenly' balance the freedom of the press and the abuse of that freedom. As such, this can be an important part of the legal system that the law on contempt of court seeks to protect.

Achieving a suitable balance between these rights can be an important and challenging responsibility. As Justice Black observed, "Free speech and fair trial are two of the most cherished policies of the civilisation and it would be a trying task to choose between them" (Cleaver, 1993). A similar distinction and interpretation challenge lies under this category of contempt of court. The courts have explained that a number of issues will be considered in deciding whether a reference to a pending case constitutes sub judice contempt. It is submitted that these issues include the form content effect and interpretation of the reference. The form of the reference is taken into account by the courts. The courts have explained that the law does not prohibit the publication of references or items of news connected with a pending case but does prohibit the publication of 'anything savouring of a discussion' of the 'rights and wrongs' of a pending case and detailed comments.

The content of the reference is also important. This form of contempt extends to more than the issue of whether the accused is guilty or not, as even comments on a point of 'minor significance' may change the significance of that point. Therefore, comments on the following aspects of the trial may amount to sub judice contempt improper motives to either the parties or lawyers concerned in the case and the credibility of the witnesses (since, this would probably significantly affect the final judgment in the case) and speculating on what evidence may be given and making a report or observations which may be untrue, misleading or damaging to the accused person. The courts have also noted that although the Public Prosecutor plays an 'indispensable role in the administration of justice in this country', a publication that embarrasses and prejudices him in his official capacity may not necessarily constitute contempt of court as the court must consider whether it involved an interference or obstruction with the administration of justice or had a tendency to do so.

The effect of the reference is also a relevant issue to consider. The courts have explained that the question is not whether the publication 'does or will' prejudice a fair disposal of the proceedings but whether it 'tends' to do so though there must be a serious, real or substantial risk

of prejudice to a fair and proper trial of the pending legal proceedings as *de minimis non curat lex* principle and as long as the comment may tend to have a 'conscious or unconscious' influence on the court. The courts also consider how the reference may be interpreted. If the researchers are found to have misunderstood the judicial proceedings that is the subject of their comments, this may be a factor to mitigate their sentence and the court may not accept the professed intentions of the parties responsible for the comments that they did not intend to prejudice the court proceedings but instead construe their intention from the words used in the comments.

A similar challenge faces the court under these two forms of contempt scandalising the court and sub judice when would comments amount to an exercise of significant legally protected rights as opposed to contempt of court. It appears to again be a fragile balance for the court to preserve, even with the factors explained above. The judges have taken the trouble to raise so many factors which they believe should be taken into account when they exercise this discretion. Though, even finding these factors is difficult as there are so many relevant cases to review and there is no single case that summarises all these factors as has been attempted here. Applying these factors is still a daunting challenge but not being aware of the factors to apply may be worse as a judge may realise the importance of this responsibility but may only consider some factors from the review of cases raised or the judge's own views. The judge may not be able to take advantage of the number of factors that have already been raised as being significant if these factors are not easily accessible. This may make the exercise of discretion more uncertain as the judge may weigh fewer factors in this delicate balance.

CONCLUSION

Freedom of speech is guaranteed under Malaysian Constitution, although such freedom is not absolutely un-curtailed. It is subject to certain limitations such as on grounds of national security, public peace or morality. One limitation of freedom of speech that is outside the limitations provided in the constitution is contempt of court. Contempt of court is a power entrusted to every court by statute or part of the inherent jurisdiction of the court. Constitutionally, freedom of speech is enjoyed by the people of Malaysia but there are limitations including giving comments or criticism towards the courts or judiciary. The law of contempt of court is to ensure that there will be no interference in judicial proceedings and respect for the judiciary. However, the law of contempt of

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