

ORIGINAL ARTICLE

The Law of Contempt of Court in Malaysia: Considering Reforms

¹A.Vijayalakshmi Venugopal and ²Kamal Halili Hassan

¹PhD Graduate, Faculty of Law, Universiti Kebangsaan Malaysia

²Faculty of Law, Universiti Kebangsaan Malaysia

A.Vijayalakshmi Venugopal and Kamal Halili Hassan: The Law of Contempt of Court in Malaysia: Considering Reforms

ABSTRACT

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. There are many uncertainties and inconsistencies in contempt of court in Malaysia. These include the definition, procedures and sentencing limits. This results in the courts having contempt powers, but these powers being quite uncertain and inconsistent in many aspects. This article uses a doctrinal analysis method in analysing the law on contempt of court in Malaysia. It proposes reforms to some aspects of the law of contempt of court.

Key words: Malaysia, contempt of court, judicial discretion, law, judges' role

Introduction

The law of contempt of court is integral to the administration of justice system. It is critical to support an orderly and effective administration of justice and is intended to sustain the public's confidence in the legal system (Miller 2000; Chesterman 1997). It is important to appreciate why these roles are so important and how this law is directly linked to these objectives. This law involves an exercise of judicial discretion. This power is entrusted to judges in every court and is a heavy responsibility. It is therefore important to examine how this discretion is exercised and what are some of the important factors that should influence the exercise of this discretion (Edises 1978; Henchy 1982). This law is often imposed upon parties in cases before the courts. As such, it should not be surprising that among the parties involved, many cases of contempt of court relate to lawyers and their role as officers of the court. Judges have used this law to clarify this role and punish abuse of this significant responsibility of lawyers in conducting cases before the court. These principles are contained in various statutes and even more numerous cases. There are many uncertainties and inconsistencies in contempt of court in Malaysia. These include the definition, procedures and sentencing limits. Because of such uncertainties, there have been varied approaches adopted and decisions made by courts on contempt of court offences. This article will propose reform to the law of contempt of court in Malaysia.

Theoretical Framework:

Supporting an Orderly and Effective Administration of Justice:

The law on contempt of court is inextricably bound to the administration of justice. Walker (1991) observed that contempt of court is aimed at 'protecting' the public's interest in the administration of justice. These two concepts have also been described as a subset of the other, such as by D'Ascoli (2007) who categorises contempt of court as an example of an offence against the administration of justice. Chesterman (1997) writes that generally, any conduct that interferes with the administration of justice by the courts potentially constitutes a contempt of court. A common description of contempt of court is that it is intended to 'protect' the administration of justice such as described by Balia Yusof Wahi J of the High Court in *Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd* [2009] 3 AMR 738 that courts have an inherent jurisdiction to ensure the proper administration of justice and 'protect' the integrity of the judicial process. Lowe and Sufrin

(1996) and Rashid (2010) write that contempt of court plays a critical role in 'protecting' the administration of justice.

It is submitted that this description of 'protecting' the administration of justice can be misconstrued. Contempt of court can be used to punish unfair abuse of the courts and judges such as 'scandalising the court'. Judges using this form of contempt of court power often have to clarify that this power is not given to vindicate the judge's personal reputation, but rather to maintain the public's confidence in the integrity of the courts. For example, Clyde LP in *Johnson v Grant and Others* (1923 SC 789) noted that it is petty and misleading to view this offence as merely offending the courts' dignity. It is actually challenging the supremacy of law (Mehrotta: 2002). It is submitted that the contempt of court also being to 'protect' the administration of justice may be misinterpreted to mean the judges can use this power to punish those who insult them, but it is instead intended to maintain confidence in the legal system. Contempt of court has long been a power given to all judges to wield in order to hold accountable those who assault the system of justice.

This power has been entrusted to the courts to be used sparingly, to punish only when the level of discourtesy has exceeded reasonable criticism. This is a fragile balance for the courts to uphold, but it is also to ensure that the courts are effective, as if the public does not believe that the courts are useful, then, the courts may be reduced to decorative structures in the landscape - familiar, but empty, a source of architectural interest but juridical disappointment. It is, therefore, suggested that it may be better described to emphasise the intention of this law as 'supporting' rather than 'protecting' the administration of justice. It is not intended to be a shield against all criticism. There must be sufficient integrity in the legal system to command and deserve respect. This law merely supports this integrity by ensuring that any comments, including criticisms, are made with due courtesy and merit.

The administration of justice should be orderly. Edises (1958), for example, referred to the administration of justice being orderly and decorous. Watkins (1967) observed that an impartial and effective administration of justice necessitates orderly procedures of trials and hearings. Henchy (1982) similarly wrote that contempt of court is intended to prevent undue obstruction or interference with the operation of the administration of justice. This means that parties who appear before the courts to present their cases should be permitted to do so in accordance with the applicable rules of procedure for the trials, without undue or unfair obstructions. Steve Shim CJ of the Federal Court in *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604 observed that contempt of court is a means that enables the courts to take action to prevent or punish conduct that tends to generally obstruct, prejudice or abuse the administration of justice, or in relation to a particular case. Peevy (1979) wrote that contempt of court arises from common law to prevent obstructions or abuse of the judicial process. Walker (1991) explained that contempt of court is intended to ensure an effective administration of justice. Cohen (1971) writes that without the power to punish for contempt of court, law and justice would become emasculated and meaningless - law and justice would be lifeless abstract concepts. Contempt of court is a vital part of keeping a legal system effective. The courts are not intended to merely be 'advisory bodies' (McBride, 2003). Litigants who take the trouble to seek the assistance of the courts are doing so for an effective resolution of their dispute - not a fireside chat. It is submitted that it is vital for a system of administration of justice to be orderly and effective and that these ideals are critically supported by contempt of court. The righteousness of a legal system arises from all the courts' decisions, not just on contempt of court, but the latter provides significant support to the legal system. It forms part of and is directly linked to what the legal system stands for.

This highlights the important responsibility that a judge has to often be mindful of, that of ensuring a smooth and fair process in the case before the court at the time and also punishing parties who conduct a trial in an inappropriate manner. For example, the courts have used contempt of court to hold accountable various parties in a case for improper conduct, from lawyers and their clients failing to attend trial without a valid excuse such as in *Lai Cheng Chong v Public Prosecutor* [1993] 3 MLJ 147; members of the audience disrupting the proceedings as in *Public Prosecutor v Lee Ah Keh & Ors* [1968] 1 MLJ 22.; interfering with or obstructing the work of court officers such as an Official Assignee in *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* [2000] 7 MLJ 667 or Receiver/Manager in *Chow Sooi Cheng v Trans-Global Agencies Bhd & Ors* [2003] 6 CLJ 369.; and abusing the legal process as in *HSBC Bank Malaysia Bhd (formerly known as Hongkong Bank (M) Bhd) v Tirathrai Sdn Bhd (formerly known as T. Jethanand Sdn Bhd)* [2009] 7 MLJ 168..

Another important factor that a legal system should have is that it should be effective. The legal system in a society is only useful if it is effective. As the Law Reform Commission of Canada (1978) explained that one measure of society is the effectiveness of its system of justice. As such, it is typical and necessary to 'protect' the judicial system by classifying conduct that challenges judicial institutions or endangers the fair and impartial administration of civil and criminal justice as criminal offences. McBride (2003) similarly observed that it is important and noble to maintain an orderly and effective administration of justice. The courts must have the power to enforce its judgments and demand due respect from those who come before the courts.

A number of forms of contempt of court are used to support the effectiveness of the legal system. For example, when a party is punished for contempt due to their failure to fulfil the terms of a court order, this is

intended to ensure that when a court of competent jurisdiction issues a court order, it will be fulfilled. Otherwise, the court order becomes a useless piece of paper. A party's efforts in persuading the court to issue the order also becomes futile if a party who does not fulfil the terms of the court order escapes with impunity. The courts have explained that even if a person believes that the court order was not validly given, it should still be fulfilled until the court order is set aside by the court. A similar rationale applies when the court recognises that it can be contempt of court for breaching an undertaking given to court in such cases as *Messrs. Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239., *Tommy Thomas v Peguam Negara, Malaysia & Other Appeals*[2001] 3 CLJ 457. and *The New Straits Times Press (M) Bhd & Ors v Ahirudin bin Attan*[2008] 1 MLJ 814. This is to ensure that if anyone gives an undertaking to the court, it will be fulfilled as an important obligation.

A court's judgment being fair depends on parties presenting relevant truthful evidence in court. As such, failing this duty can result in liability for contempt of court such as due to intimidating litigants as in *Lee Ngan Fatt & Anor. v Tham Hua Kong & Ors*[2005] 1 CLJ 826. or intimidating potential witnesses as in *Achieva Technology Sdn Bhd v Lam Yen Ling & Ors*[2009] 8 MLJ 625; false testimony as in *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71, concealing a document as in *Cheah Cheng Hoc v Public Prosecutor*[1986] 1 MLJ 299 and making false statements in affidavits as in *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors*[2009] 3 MLJ 191. The court's judgment is unlikely to be useful if it is not fair as it not based on relevant and truthful evidence.

Judges' Role as Guardians of the Law, Justice and the Public's Confidence in the Integrity of the Legal System:

The formal legal system is a staple feature of most modern societies. The system, in itself, is merely a complex series of procedures and practices. The real structure and prestige of the legal system is not just in its buildings or offices, but primarily, in its personnel. Among all its personnel, the office that probably is the most visible embodiment of the legal system for the public is the judge. A judge is a visible representation of the legal system - Benjamin Whichcote reiterated wrote that a judge is the law speaking. Therefore, when a judge acts in his professional role, his conduct reflects on the legal system - Philo wrote that a judge should bear in mind that when he or she tries a case, he or she is also on trial.

Judges are bound by the Judges' Code of Ethics 1994 which apply to their conduct throughout their period of service. Apart from other specific ethical duties, section 3(1)(d) of the Judges' Code of Ethics 1994 imposes an obligation on a judges to not to conduct themselves dishonestly or in such a manner which brings the judiciary into disrepute or discredit. This is an extremely broad duty. The breach of any of these ethical obligations can subject the judge, even of the Federal Court, to the risk of being removed from office. A great deal is expected of a judge, perhaps too much. C.K.G. Pillay (1985) wrote that a judicial officer's life is not easy as too much is expect of the judicial officer. C.K.G. Pillay (1985) went on to quote Professor Jafré's comments that a judge is expected to pronounce the law, be a prophet, have the wisdom of Solomon, the moral vision of Isaiah, the analytic power of Socrates, the intellectual creativity of Aristotle, the humanity of Lincoln and the impartiality of the Almighty. It is submitted that these are extremely high ideals for anyone to measure up to.

Whether such expectations are fair or not, judges too, are subject to scrutiny regarding their professional behaviour. Judicial decisions and comments are often reported and highlighted by the media. Therefore, judicial remarks can affect the public's regard and respect for the legal system. Since the law on contempt of court is intended to uphold the integrity of the legal system, judges exercising this power should be all the more concerned that their decisions and comments in such cases do not invite public ridicule. The Right Honourable the Lord Mackay of Clashfern (1994) wrote that most of the cases heard are in open court and judgments are given publicly. As such, each judge is often before the public. There is thus, plenty of material in the public domain which can be used to evaluate judicial performance.

Every judge has a heavy responsibility - to uphold justice. No matter who brings a case before the court, no matter what issues are involved, no matter how many people are affected by the dispute, each litigant comes to court asking for justice. The judge faces the unenviable task of sorting through countless arguments, principles and ideas to arrive at what is hoped is the fairest solution for the parties involved and as a precedent for future cases. Hastie (1973) comments that judges understand and are professionally dedicated to the rule of law and the effective functioning of judges as authoritative representatives of the legal order. The abstract idea of justice may be clear. However, deciding how justice should apply in the facts of a particular case is far from clear. M.A. Hafeez Siddiqui (1970) wrote that judges are guardians of legality. The judiciary undertakes to solve complicated problems, which, like a spider's web, if one strand is adjusted, this can result in a complex pattern of adjustments running through the whole web.

Hastie observed that a judiciary is required in any society that has progressed to the stage of settling disputes by peaceful decisions rather than combats between the disputants - the courts do not serve to run society, but rather, to prevent society from running wild. It is suggested that judges play an increasingly

significant role in upholding justice for society as more and more cases are taken to courts for a fair settlement of disputes. Contempt of court stems from the need to uphold the integrity of the administration of justice. Tremblay (1991) wrote that contempt of court is intended to ensure the integrity of the judicial system and protect the rights of parties who are on trial. It is submitted that this is a very important function of this law and one that is a fragile balance to achieve. Integrity is subject to conflicting interpretations from the parties in each case to others commenting on cases. It is the judges' heavy responsibility to try and uphold the integrity of the legal system to the best of his or her opinion of what this requires.

A legal system, to a certain extent, depends on its public image to be useful. If people believe that the legal system is corrupt and partial, many would not seek its protection, rendering the legal system futile. The law on contempt of court empowers judges to punish discourtesy and disrespect of the legal system by anyone, be they lawyers or not, before the court or not. If people are dissatisfied with judgments or particular judges, they should pursue the appropriate means and channels of expressing their criticism, not by casting broad and unfair slurs indiscriminately. The legal system must be useful, but also believed to be so. Milton (1970) wrote that the administration of justice requires, not only that there should be a fair and impartial determination of proceedings, but also that the parties to those proceedings believe that they have received such an adjudication of their interests. Fernando (2005) also clarifies that contempt of court exists to protect the public rather than the glorification of the judiciary.

Even the Supreme Court in *Attorney-General v Arthur Lee Meng Kuang* [1987] 1 MLJ 206, noted the need to protect the dignity and integrity of the 'superior courts' in the interest of maintaining public confidence in the judiciary. It is submitted that this need extends not only to 'superior courts', but also to all courts. Tilford (2002) wrote that the courts' moral authority comes from the public, and the courts could not properly function without this support. A common rationale for the law on contempt of court is to maintain the public's confidence in the legal system. Chinnock and Painter (2003) explain this further. They write the public interest served by contempt of court is the parties' right to a fair trial before a court of law. This is fundamental in a free society governed by a civilised system of justice, a basic tenet of such a society, and critical to the assurance of public faith in the rule of law and the proper administration of justice. The law of contempt of court supports this by providing punishing misbehaviour that undermines a fair trial, resulting in disrespect for the rule of law, and causing a lack of public confidence in the administration of justice.

There will always those who criticise the legal system. To some extent, this is inevitable with nearly every trial resulting in at least one party losing the case. Hastie (1973) wrote that adversary litigation, involving government or private individuals, always has two sides. As such, the courts will decide against half of those who contest lawsuits. Inevitably, there will be losers and their supporters, who may express their dissatisfaction with the courts' decisions not in their favour. Hastie (1973) observed that it is often more popular to condemn the courts rather than to support them. However, Hastie warned that widespread and continued denunciations and manifestations of the lack of confidence in the judiciary can have 'catastrophic' consequences for the functioning of society. It is submitted that the courts have the power to lawfully enforce justice. If people do not use this method and seek their own redress against those who have wronged them, it can result in further unlawful and unfair behaviour.

Definition Of Contempt Of Court:

There does not appear to be any authoritative definition of the scope of contempt of court in Malaysia, either in a statutory or judicial form. It may be surprising to note that although the term 'contempt of court' is mentioned in a number of statutes, many of which dealing with the sentencing limits discussed above and rules of procedure for such cases, none of these statutes specify a definition of the power itself. Low Hop Bing (2010) wrote, "Our Federal Constitution, Acts of Parliament or other written laws do not define the phrase 'contempt of court'. It is essentially a common law phenomenon." It may also be surprising to note that after over 180 years of reported cases on contempt of court in Malaysia, there still does not appear to be a consistent definition of this concept quoted by judges, despite this concept being focussed on in over 120 reported cases. There therefore, appears to also be a lack of judicial accord in a common definition for this area of law. This is not to say that there are no definitions available. Many authors and judges have sought to define this law, focussing on a number of central concepts. Some definitions have focussed on the motive for such offending conduct, other definitions on specific issues involved in this law and other definitions still on the broad functions of this law.

Keller (1967) wrote that, "Contempt of court has been defined as any conduct that, in law, constitutes an offence against the authority and dignity of the court." While these definitions are helpful in appreciating the purpose of such law, such definitions leave the courts with a broad discretion to exercise. Gomez (2002), on the other hand, wrote that "... the objective sought to be achieved when applying the law of contempt. It is to prevent any interference and to protect the confidence that the public must have in the administration of justice." Das (1986) similarly explained, "The purpose of a contempt jurisdiction in the Courts is to ensure that the administration of justice is not obstructed or interfered with, and to ensure that litigants may confidently seek

redress through the courts of law.” These definitions link two broad functions of this law - interference with and to protect the confidence in the judicial system.

Whether this law is to achieve both or either of these functions, as Das went on to clarify, “What constitutes interference with the administration of justice is not easy to identify, and perforce, would vary with the circumstances of each case.” This again helps to clarify other basic functions of this law, but still leaves the courts with a broad discretion. Radensky (1956) focussed on the purpose of contempt law being to punish “ ... one whose conduct tends to bring the authority and administration of the law into disrespect or disregard; or otherwise tends to impede, embarrass or obstruct the court in the discharge of its duties ... ”. This definition seems to link the functions discussed above from enforcing the courts’ authority, preventing interference with the courts’ administration of law and supporting the public’s confidence in the court system. It is submitted that these definitions appear to be able to clarify what the courts are trying to achieve in the exercise of this power, but leave the courts with an exceedingly wide discretion. The courts may use these functions in almost any situation - as Chauncey (1881) wrote, as far back as in 1881, “The power of the superior courts to punish for contempt is, at common law, unlimited, save by the definition of the term ‘contempt of court;’ extending to everything so denominated, whether in presence of the court or elsewhere, direct or constructive ... The exercise of this power lies solely in the discretion of the judge ... ”. It is submitted that this is still true over 230 years later, and even broader, since this power is not limited to only superior courts. Judicial discretion, then, does not appear to be restricted by any authoritative definition of contempt of court. The courts may select from a wide range of definitions, one that is conducive to the case at hand, since the definitions tend to be broad, giving the court considerable scope to interpret when the court should act to achieve any or all of these functions.

The courts in a number of cases (such as *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1993] 4 CLJ 177, p 180, Syed Ahmad Helmy J of the High Court in *IJM Corporation Bhd v Harta Kumpulan Sdn Bhd (No. 2)* [2008] 8 CLJ 308, p 334 and Low Hop Bing J of the High Court in *Arab-Malaysian Prima Realty Sdn Bhd v Sri Kelangkota-Rakan Engineering J.V. Sdn Bhd & Ors* [2000] 2 CLJ 632) on contempt of court by disobeying a court order have stated that a specific mens rea is not required. Even in contempt in the face of the court, Donovan LJ of the Court of Appeal in *Attorney-General v Butterworth and Others* [1963] 1 QB 696, p 726 stated, “ ... an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere.” These statements were quoted in the Malaysian cases of *T.O. Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, by the Federal Court and *Jasa Keramat Sdn. Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577, by the Court of Appeal. It is submitted that such a definition may be misleading for contempt law as the courts still have the discretion to consider conduct as constituting this offence, even if the offending party may not have specifically intended to commit the offence. Motive can certainly be a relevant factor for the courts to consider under this law, but the lack of a clear motive may not, by itself, deny judges their discretion to use this law. Some definitions have focussed instead on specific issues involved in contempt law. These include free speech and disobeying court orders. It is submitted that these issues can be involved in contempt law, but do not necessarily reflect the full scope of this law.

Contempt in the face of the court can be more diverse - it can involve comments made to a judge as in *Karam Singh v Public Prosecutor* [1975] 1 MLJ 229; disposing of the subject matter in a pending proceeding in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577; or failing to attend court when the case was called for hearing as in *Dr. Leela Ratos & Ors v Anthony Ratos s/o Domingo Ratos & Ors* [1997] 1 MLJ 704. In the latter two cases, actions and the lack thereof gave rise to contempt proceedings, not just comments. Contempt of court by disobeying a court order typically involve positive actions prohibited by a court order or omissions in failing to comply with actions required under a court order. For example, as in *T.O. Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 and *Chai Tze Foh & Anor v Asia Fishing Industry Pte Ltd* [1977] 2 MLJ 195 by interfering with the use of a factory and removing assets therein in breach of a prohibitory order; and in *Hong Leong Finance Co Bhd lwn Lee Geng dan Satu yang Lain* [1990] 3 MLJ 474 and *Syarikat M. Mohamed v. Mahindapal Singh & Ors* [1991] 2 MLJ 112, where contempt of court was raised for failing to disclose particulars required under a court order. The first two cases involved contempt of court through actions and the latter two cases involved omissions. Therefore, contempt of court does not ubiquitously involve free speech alone. Some definitions focus on the broad functions of contempt of court.

Power To Punish For Contempt Of All Courts:

It would seem that all courts have the power to punish for contempt of itself. This power may be specifically granted by statute, or from the inherent power of the courts. Therefore, this law is relevant to all courts.

Paragraph 26 in the Third Schedule in the Subordinate Courts Act 1948 states that the Magistrates’ and Sessions Court have the power to punish for contempt of court to such an extent and in such a manner as may be prescribed by the rules of court. Section 13 of the Courts of Judicature Act 1964 and Article 126 of the Federal

Constitution empower the High Court, Court of Appeal and Federal Court to punish any contempt of itself. Order 23 of the Rules of the Special Court 1994 empowers the Special Court to punish any contempt of itself.

Section 58(1) of the Industrial Relations Act 1967 provides that the Industrial Court can punish stated forms of contempt of court. Section 25(1) of the Native Courts Enactment 1992 (Sabah) and section 23(1) of the Native Courts Ordinance 1992 (Sarawak) provides these courts with the power to punish contempt of itself. Some courts have been specifically empowered by statute to punish contempt of itself. These courts would be the Magistrates' Court; Sessions Court; High Court; Court of Appeal; Federal Court; Special Court; Industrial Court; Native Courts of Sabah and Sarawak; and syariah courts in the federal territories of Kuala Lumpur, Putrajaya and Labuan and the states of Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Selangor, Terengganu, Sabah and Sarawak. Some courts, on the other hand, have not been specifically authorised to punish for contempt of itself. These courts would be the Penghulu's Court, Court for Children, Labour Court and Syariah courts in the state of Perlis. However, it would seem that these courts would still have the inherent power to punish for contempt of court.

Edgar Joseph Jr. F.C.J. in *R Rama Chandran v. Industrial Court of Malaysia & Anor.* quoted I.H. Jacob's (1970) explanation of the inherent jurisdiction of courts. Jacob explained that in addition to a statutory jurisdiction, each court also has an inherent jurisdiction: "The source of the statutory jurisdiction of the court is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law ...". As such, every court is granted the jurisdiction to act, by statute, and by its very nature as a court of law. Jacob went on to define the scope of a court's inherent jurisdiction in the following terms: "... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." Therefore, each court has a broad discretion in terms of its inherent jurisdiction, though this jurisdiction is limited by statute. As far as the courts' inherent jurisdiction to punish for contempt of court, Edgar Joseph Jr. F.C.J. in *R Rama Chandran v. Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147 referred to the 'superior court's' inherent jurisdiction to punish for contempt. Abdul Malik Ishak J. of the High Court in *Asia Pacific Parcel Tankers Pte. Ltd. v. The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652 referred to 'the courts' having an inherent jurisdiction to punish for criminal contempt. It is submitted that the inherent power to punish for contempt being restricted in these observations to 'superior courts' and 'criminal contempt' only were relevant to the specific context of the observations at the time and do not reflect the full scope of the courts' inherent jurisdiction to punish for contempt.

Recommendations For Reform:

Defining Contempt of Court:

The Bar Council's proposal for a statute on contempt of court included a Memorandum. The title of this Memorandum itself recognised the importance of defining contempt of court - 'The Memorandum on the Need to Define the Law of Contempt and to Provide for Certainty in its Application and Enforcement' (Chew, 2011). The preamble to their proposed Contempt of Courts Act 1999 also specifically included this objective - "An Act to define Contempt ...". The definition in section 3 of this proposed Act appears to be similar to section 2 of the Contempt of Courts Act 1971 in India. Contempt of court is similarly divided into 'civil' and 'criminal' contempt, though in the Bar Council's proposal, it is stated that "... save for the purpose of categorising types of contempt no other distinction shall be recognised between the two types of contempt and the standard of proof for establishing contempt of either type shall at all times be that of beyond reasonable doubt." This qualification seems to recognise that this distinction can be misleading and serves no other purpose than to divide the categories of contempt. With respect, it is submitted that rather than placing such a limited division on this definition, it may be clearer and less misleading to redraft the titles of this division to make this division less misleading and more meaningful.

'Civil' contempt is then defined as the "... 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 ...". This definition, like in the Indian Act, recognises two forms of 'civil' contempt of wilfully disobeying a court order and breaching an undertaking given to the court. However, it also clarifies that the court order 'disobeyed' may require a mandatory act or prohibit one. It is submitted that this definition too may not fully encompass the case law that has arisen in Malaysia in terms of the 'disobedience' not being necessary to be 'wilful'; 'disobeying' a court order may arise by an action or omission; and 'civil' contempt also including evading service of a court order. Thus, this definition may be unnecessarily strict, potentially misleading and incomplete.

The Bar Council's proposed definition of 'criminal' contempt is also similar to that in the Indian Act. This definition is that it "... 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:

(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 ...".

Part (b) of this definition certainly seems similar to the Indian Act and for similar reasons as discussed above, this part may be difficult to clearly separate and classify cases under these headings. Part (a), however, seems to be different from that provided in the Indian Act. Does this part indicate that parties could make any insulting and disrespectful comments to the judge and court in any discourteous manner as long as the party could prove that the comment was truthful? For example, is a judge who may be of generous proportions, of considerable experience with a receding hair line expected to countenance a party who addresses the judge in open court as being 'fat, old and bald'?

There is no conjunctive stated between parts (a) and (b), thus it is unclear if these parts are intended to be separate or joined. If separate, such a comment as above may need to be tolerated and a mini trial to prove the validity of the comments may be even more embarrassing and insulting for the judge in question. If the parts are joined, then why would they need to be separated into parts (a) and (b)? Such a comment may be valid under part (a), yet violate part (b). Would that then mean that comments that are true, but still interfere with the course of any judicial proceeding or administration of justice still amount to contempt of court? If so, perhaps part (a) may be superfluous since whether the comments were truthful or not, they can amount to contempt of court if they violate part (b).

This definition of 'criminal' contempt still can make it difficult to classify cases on contempt of court under these limited headings. This may also in turn, make it difficult to find relevant cases when the categories of contempt are so broad. Even with more specific categories developed in Malaysian cases, it can still be difficult to classify these cases. This problem may be exacerbated by having much broader categories. Shukriah Mohd-Sheriff (2010) wrote that "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." With respect, it is submitted that would be possible, and even desirable, to define contempt of court that has arisen in Malaysian cases with further precision.

It is submitted that a clearer and more meaningful definition of contempt should include the purpose of this law to remind the judges that this purpose should be violated before this power is used; it should include clear and separate categories of contempt to help judges clarify under which category the contempt case falls for easier cross-reference between cases; the categories should not be exhaustive to give the courts the flexibility to establish further categories should the need arise in the cases before them; and the conjunctive for these categories should be 'and/or' since these categories can overlap.

The following definition of contempt of court is proposed: 'Contempt of court refers to where the administration of the legal system or course of justice is interfered with or obstructed by any party in any way, such as through omissions, actions, gestures and/or comments. The forms of contempt of court include failing to fulfil a court order, evading service of a court order, breaching an undertaking to court, scandalising the court, sub judice, contempt in the face of the court, and/or interfering with the work of court officers. This definition is not intended to limit the scope and application of contempt of court, but rather, to provide some guidance on what is commonly involved in this offence.'

Failing to fulfil a court order, evading service of a court order, breaching an undertaking to court are quite specific and clear, but the further forms are less clear. It is submitted that rather than clarifying the latter parts in this definition, these terms are clarified by cases. Rather than putting too limited a definition of these terms, judges could refer to case law for further elaboration on these terms, which would be easier once cases are clearly identified under these categories. What is intended is to have a definition that is simple to understand and apply, which clarifies the scope of contempt, but still does not unduly restrict the courts' discretion in identifying further categories of contempt, should the need arise.

Clarifying the Categories of Contempt of Court:

There is a great deal of ambiguity and inconsistency in the categories of contempt of court specified by Parliament, judges and authors of textbooks and articles. In order for lawyers and judges to find cases of similar facts to refer to as guidance in contempt of court cases, it is important for such cases to be categorised in a clear and consistent manner. The basis for the categories proposed in this section is from Malaysian contempt of court case law.

The first challenge is to clarify misleading labels of categories. The first of these misleading labels is that of 'civil' and 'criminal' contempt. As has already been discussed, using these labels for the categories of contempt can be extremely misleading as it relates to a basic distinction of law itself, but is not consistent with the

common features of this basic distinction, particularly when all contempt of court cases should be proven beyond reasonable doubt and are quasi criminal. As such, it is submitted that dividing contempt of court into 'civil' and 'criminal' contempt may be more misleading than helpful to describe contempt of court cases as they have developed under Malaysian law. The categories can be presented without this prior division of 'civil' and 'criminal' contempt.

Another misleading label is that of 'disobeying' a court order. This is the most common form of contempt of court in the reported cases before the syariah and non-syariah courts. The term 'disobeying' the court order implies an intentional action which is not required by the courts - the contempt need not be intentional or by an action alone (it can be committed by omission). As such, it is suggested to use the term 'failing to fulfil' a court order as this term more clearly includes an action or omission, intentionally committed or not.

The second challenge is to clarify curious categories that have been developed by the courts. This includes contempt in the face of the court record. There is no authority provided for this category and there is only one (1) case so far under this category. It may not be necessary to have a separate category for contempt of court that was not committed in the face of the court as this can be covered by the categories of contempt other than contempt in the face of the court and even for the latter, the courts have clarified that they are more concerned with punishing inappropriate behaviour rather than being too strict on whether the behaviour was exhibited in the face of the court or its near proximity. Even the facts of the only case under contempt in the face of the court record could have been punishable under the other categories of contempt, and thus, it may not have been necessary to create this separate category of contempt of court.

Another curious category of contempt created by the courts is interference with the due administration or course of justice. This category has already been used in three (3) cases and since it was created by the courts of highest authority in Malaysia, namely the Court of Appeal and Federal Court, it is likely that more cases may also use this category. It is submitted that using this category for contempt cases may clarify the courts' purpose in using this law, but may not clarify which form of contempt is involved. As such, it may be clearer to use the more specific categories of contempt of court rather than this broad term.

It has not been definitively clarified if there is a new category of contempt of court by judges. An application for this has been made, but this issue has yet to be fully settled by the higher courts. It is submitted that if judges disregard their sworn duties to uphold the law or interfere with the administration of justice, this issue may be better suited to be investigated in disciplinary proceedings against the judge rather than contempt of court in open proceedings. Standards of professional conduct for the judiciary are important and should be upheld. However, this is typically done in disciplinary proceedings and not in open court.

Section 18(1) of the Contempt of Courts Act 1999 proposed by the Bar Council states that any "... Presiding Officer 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." However, it is also provided in this section that in lieu of these proceedings, the complainant shall file a statement of complaint with the Chief Justice who will appoint a committee of 3 judges of greater experience, if possible, to the Presiding Officer to hear the complaint. These proceedings will be stayed until the committee has made its finding. It is not clear why or when proceedings under this Act are appropriate against judges after the committee makes its findings on the case. Are the committee's findings subject to an appeal - if so, before whom and which court should hear the case? Can the court overturn the committee's findings? It may be clearer and more suitable to hear such cases under disciplinary proceedings alone.

Shukriah Mohd-Sheriff (2010) also agrees that a judge should not be punished for contempt of court, but that such proceedings are more suited to subjecting the judge to disciplinary proceedings for breaching the Judges' Code of Ethics. She wrote that, "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." The confidence in the judiciary is certainly a concern, though confidence in the judiciary may still require that the judges are still subject to investigation if their professional standards of conduct are violated, even if this investigation does not take place in an open courtroom.

Not all aspects of contempt law may be appropriate to apply to judges. For example, the rules of procedure for contempt proceedings are not stated as being applicable to a judge; should a judge not hear any further proceedings until he or she purges the contempt; and should a judge be fined or imprisoned for contempt of court. It is not submitted that judges should be immune from violating these standards of professional conduct, merely that the appropriate proceedings for such cases should be disciplinary rather than contempt proceedings.

Another challenge is for judges to clarify under which category of contempt a case falls. Judges have not always made this point, which may be difficult when the categories are not clear. Once the categories are clarified, judges may find it easier to categorise such cases and this would help other lawyer and judges identify cases of similar facts to refer to when future contempt cases arise. This is particularly important when applying the relevant principles applicable to contempt cases fairly and deciding an appropriate sentence by comparing similar cases.

It is proposed that the forms of contempt of court be stated to include failing to fulfil a court order, evading service of a court order, breaching an undertaking to court, scandalising the court, sub judice, contempt in the face of the court, and/or interfering with the work of court officers. These forms are stated to be non-exhaustive by the word 'including' these forms, thus allowing judges to further extend such forms as necessary. Each of these forms would be further defined.

Failing to fulfil a court order could be defined as, "failing to fulfil a court order' includes where a party subject to a court order issued by a properly constituted court fails to comply with the terms of the court order;". This definition is intended to clarify that any party subject to any court order may be punished by contempt of court for failing to adhere to the terms of the court order. The words 'failing to fulfil' are intended to clarify that this can arise by an omission or positive action.

Evading service of a court order could be defined as "evading service of a court order' includes where a party evades or attempts to evade being served with a court order applicable to the party;". Again, it is emphasised that any party can be guilty of this contempt. That party can also be found to be in contempt if the party evaded or even attempted to evade service of the court order. Breaching an undertaking to court could refer to "breaching an undertaking to court' includes where a party gives an undertaking to a properly constituted court and then fails to comply with the undertaking so given;". This again applies to any party, any undertaking and where the undertaking is given to any court, as long as the party fails to comply with the undertaking given, again by an omission or positive action.

Scandalising the court could refer to "scandalising the court' includes where a party is discourteous to any properly constituted court or the office of any judge, whether by omission, action, gestures, comments, or in any other way;". Any party may commit this form of contempt as long as it has the effect of being discourteous to any court or judge in any way. The ways specified in the definition are intended to be examples rather than limiting the methods by which this offence can be committed.

Sub judice could refer to where "sub judice' includes where a party, whether by omission, action, gestures, comments, or in any other way, tends to prejudice the course of pending judicial proceedings;". Again, the focus is on the effect of the offence rather than the method by which this effect is achieved or even whether this effect was intentional. It is intended to give the courts the discretion to consider whether to punish the party involved, as long as it is reasonable to believe that it has this effect, whether or not the party involved realised or intended it.

Contempt in the face of the court could refer to "contempt in the face of the court' includes where a party in any way obstructs, or interferes with any judicial proceeding in a court's presence or in connection with such a judicial proceeding;". Again, the focus is on the effect of the obstruction rather than the intention of the party committing this offence. This can take place in a court's presence or in connection with a judicial proceeding. The former is typical of contempt in the face of the court and the latter is intended to include the singular case of contempt in the face of the court record.

Interfering with the work of court officers could be stated to refer to "interfering with the work of court officers' includes where a party obstructs, hinders or interferes with the work of any officer appointed by any court in the proper discharge of such officer's duty;". This definition is not intended to limit the party who can commit this offence, the method by which this offence is committed, the level or type of court officer or the type of work involved.

It is acknowledged that these definitions of the forms of contempt of court proposed are quite general and does lack some clarity. However, the range of ways contempt of court has arisen in the reported cases thus far makes it desirable for a statute to have inclusionary rather than exclusionary definitions of the forms of contempt of court. This is intended to provide some guidance on how these forms of contempt of court typically arise, but still leave some discretion to judges to adapt and extend these forms as necessary.

Clear and Consistent Rules of Procedure for Contempt Proceedings:

Having clear rules of procedure for contempt proceedings are very important for a number of reasons. Firstly, it's importance is emphasised by the number of contempt cases that have dismissed by the courts when the rules of procedure are not complied with. Secondly, it's importance has been recognised and the lack of clear rules lamented by a number of syariah judges in contempt of court cases before the syariah courts. Thirdly, the rules of procedure are important to inform the applicant and alleged contemnor what steps to take in such proceedings rather than these parties not knowing what to do in such significant proceedings. Fourthly and perhaps most importantly, the rules of procedure are important to ensure that the rights of the parties involved in the contempt proceedings are protected.

It is also important for the rules of procedure to be consistent. Consistent rules of procedure are necessary to ensure that similar proceedings are conducted in a similar manner to ensure fairness in such proceedings. When a party interferes with the administration of the legal system, it is submitted that it should not matter which court is involved. Consistent rules of procedure should be provided for contempt proceedings before any court.

It is also important to provide clear rules of procedure for summary and non-summary contempt proceedings. The former proceedings may be shorter, with fewer rules of procedure, but it is still important to clarify what such rules are to ensure that the rights of the parties are protected, particularly when the court often plays unusual and multiple roles in such proceedings and a sentence is imposed after an abbreviated trial. A step by step guide should be provided for both forms of contempt proceedings. Currently, even Order 34 of the Subordinate Courts Rules 1980 and Order 52 of the Rules of the High Court 1980 which are the most detailed procedures specifically provided for contempt proceedings seem to focus more on non-summary contempt proceedings and this only applies to the Magistrates', Sessions and High Court. It is submitted that a careful and thorough review of these procedures should be conducted, which should then extend to all courts and include separate procedures for summary contempt proceedings.

For summary contempt proceedings, a number of issues should be clarified in the rules of procedure. These issues include when such proceedings should be instituted, such as only when it is urgent to act swiftly to maintain order in the courtroom; how these procedures should differ from non-summary contempt proceedings; the maximum period of detention awaiting the conclusion of the summary contempt proceedings; whether a charge is required and if so, in what form (such as must it be in writing; should it be read to the alleged contemnor and the contemnor asked to plead; and how specific should the allegations in the charge be); the rights of the alleged contemnor (such as the right to be heard before punishment is imposed; the right to call witnesses in his defence; and the right to legal representation); and whether such a case must be reviewed by a higher court, even if even if no appeal is made to ensure that such an unusual procedure is warranted and has been conducted fairly. Shukriah Mohd-Sheriff (2010) writes that "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." This distinction may not be necessary as, as has been previously discussed, summary contempt proceedings are neither limited to contempt in the face of the court nor have they been necessary in all contempt in the face of the court cases. As such, this form of proceedings need not be limited to this category of contempt.

Rules of procedure should also be provided for appeals on contempt cases. When a contemnor can face stiff fines and terms of imprisonment for contempt of court, it can be important to appeal such decisions to ensure that these harsh punishments were fairly imposed, particularly in summary contempt proceedings where the traditional procedures are not followed. The rules of procedure should then provide the rules for how such an appeal should be conducted. In *Tiger Powerhitz Sdn Bhd v Guinness Anchor Marketing Sdn Bhd*[2003] 1 MLJ 314, the court took into account a 15 month delay by the plaintiff in filing the contempt application. This may imply a limitation period for filing the application although the court did not clearly make this rule. The Bar Council was also in favour of a limitation period for contempt proceedings initiated by an application of a party or on the court's own motion.

The Bar Council proposed a limitation period of 6 weeks from the date the contempt is alleged to have been committed in section 23 of the Contempt of Courts Act 1999. However, if the contempt was concealed by fraud or mistake, the limitation period would begin from when the complainant discovered or could have discovered the contempt with reasonable diligence.

It is submitted that there should not be a limitation period for contempt proceedings. If the administration of the legal system or the course of justice has been interfered with or prejudiced in any way, the courts should not lose their discretion to consider such a transgression purely because it was not brought to their notice within a specific time. If the court feels that the applicant's good faith is in question because of the inordinate and unexplained delay, the court would still have the discretion to dismiss the proceedings. Therefore, it is argued that the delay in bringing the issue to the courts' notice should be a factor for the court to weigh whether the alleged contemnor deserves to be punished despite the delay, but should not bar the court from this determination simply because of the delay.

The rules of procedure to be applied in contempt proceedings can be based on Order 34 of the Subordinate Courts Rules 1980 and Order 52 of the Rules of the High Court 1980, which has also been adopted in a number of contempt cases before the syariah courts. Additionally, there are also further rules of procedure proposed by the Bar Council in their Contempt of Courts Act 1999 which should be adapted since the different procedure proposed is based on the categories of 'civil' and 'criminal' contempt, which may not be valid categories or a valid way to distinguish between non-summary and summary contempt proceedings.

Extending Sanctions to Other Relief Including Damages and Wasted Costs:

The only sanctions provided by statute for contempt of any court are fines and/or imprisonment. As discussed in chapter 5, the courts have imposed other sanctions for contempt of court including cautions and discharge; paying the costs of the application; expunging the affidavit the lawyer undertook to file; and striking off a lawyer's name from the rolls. The most commonly imposed of these other sanctions is to use an order for costs as an additional penalty. These cases indicate that the courts are not limited by the sanctions provided in statutes for contempt of court. Rather than leaving these sanctions to the courts' discretion alone, it is submitted

that Parliament should recognise that the courts' have the power to impose more than just fines and/or imprisonment for contempt of court.

It is proposed that another relief the courts may provide for contempt of court can be damages. This remedy was previously provided under English law such as in 1293 in the case of William de Sadington, as discussed in chapter 2. It is suggested that damages should also be considered by the court as another sanction available for contempt of court. For example, in cases where a party has committed contempt of court for failing to fulfil a court order or breaching an undertaking, this delay in fulfilling the court order or performing an undertaking may have resulted in the party for whose benefit the court order or undertaking was made suffering a loss, which can be ordered to be compensated by the contemnor.

This relief has not been granted in Malaysian contempt of court cases. Nevertheless, it is suggested that it could be a useful remedy for the courts to consider in such cases and could further help the courts do justice between the parties in the case. Imposing a fine may help the complainant feel vindicated that the contemnor's contempt of court has been punished, but damages can help compensate the complainant for any financial loss the contemnor caused by the contempt of court. The courts should have the discretion to decide which sanction is appropriate in a contempt of court case. A complainant who has suffered a significant financial loss due to the contempt of court may want more than just to feel vindicated.

It would be clearer and more consistent with what the courts have imposed in contempt of court cases for Parliament to recognise that the courts have the power to impose other sanctions besides fines and/or imprisonment. Since the courts have used other sanctions, it is no longer accurate for Parliament to limit the sanctions available in contempt of court cases to just these two traditional sanctions. These traditional sanctions have certainly been used by the courts in contempt of court cases, and are the most commonly used sanctions in such cases when sentences are imposed. However, it is inaccurate and inconsistent with the courts' practices to state that the courts are limited to these sanctions alone. It can even be desirable for the courts to consider other sanctions to do justice in the case.

Consistent Sentencing Limits for Contempt Cases:

As has been previously discussed, statutes have a number of different approaches on the issue of the maximum sentences courts can imposed in contempt of court cases. For some courts such as the High Court, Court of Appeal, Federal Court and Special Court, these courts are expressly given the power to punish for contempt, but with no maximum sentence provided; and for other courts such as the Penghulu's Court, Court for Children and Labour Court, these courts are not given the express power to punish for contempt and there is no maximum sentence provided for such cases by statute, but these courts, like all courts, would have the inherent power to punish for contempt.

Another approach provided for the Second Class Magistrates' Court, First Class Magistrates' Court, Sessions Court, native courts in Sabah and Industrial Court. These courts are limited by a maximum sentence for contempt of court. In the Magistrates' and Sessions Courts, the maximum sentences provided are higher according to the courts' authority. The maximum sentence provided extends to a fine and/or imprisonment, except for the Industrial Court where imprisonment is only available for default of paying the fine.

The maximum sentences for contempt of court before the syariah courts differ according to the territory or state and the form of contempt committed. In the native courts in Sabah and the Industrial Court, the maximum sentences are also limited by stated forms of contempt, whereas, in the Magistrates' and Sessions Courts, the maximum sentences are stated according to the court rather than the form of contempt involved. The maximum sentences for each court differs greatly from no maximum sentence provided (with or without the express statutory power to punish for contempt) to maximum sentences provided according to the hierarchy of the court, geographical jurisdiction of the court and form of contempt involved. The type of maximum sentences provided, when such sentences are expressly provided, extend to fines and/or imprisonment separately and/or the latter in default of the former. Statutes, thus, have taken a wide variety of approaches on the issue of the maximum sentences provided for contempt before various courts. The maximum sentences are not always clearly and certainly not consistently provided.

It is submitted that these variations may be understandable in light of the different times the relevant statutes were passed, the concern of giving lower courts equal sentencing powers as higher courts and the limitations of a state legislative body passing a statute extending to beyond its borders. However, it is submitted that this is still an unnecessarily complicated and unfair situation. Lower courts are traditionally given lower powers of imposing sanctions than higher courts in civil and criminal cases. For example, the Subordinate Courts Act 1948 empowers a Second Class Magistrates' Court to award damages in a civil case to the extent of RM3,000 in section 92, whereas, section 90 extends this amount to RM25,000 for a First Class Magistrates' Court. Similarly, section 89 empowers a Second Class Magistrates' Court to impose imprisonment for not more than 6 months, a fine not exceeding RM1,000 or both in a criminal case, whereas, section 87 extends this to

imprisonment for up to 5 years, a fine not exceeding RM10,000, whipping of not more than 12 times or a combination of these sentences.

This approach is more justified as the complexity of the civil case and the seriousness of the criminal offence allegedly committed differs according to the hierarchy of the court. However, in contempt of court cases, any court may face contempt of court cases in any form and in any level of seriousness. Thus, it is less justifiable for different courts to have different maximum sentences provided for what could be similar offences. Additionally, a more serious contempt of court could even take place in a lower court, making it possibly unfair for the lower court to have a more limited sentencing power.

It should be recognised that the distribution of contempt of court cases differs from the traditional administrative jurisdiction of the courts for civil and criminal cases. While it may be justifiable for the lower courts to have more limited powers of imposing sanctions in civil and criminal cases, this may not be equally fair for contempt of court cases. If the concern is entrusting higher sentencing powers to junior judges, their imposition of sentences could always be checked on judicial review and appeal by higher courts. The High Court has revisionary jurisdiction under sections 31-33 and supervisory jurisdiction under section 35 of the Subordinate Courts Act 1948 over any subordinate courts' decisions in civil and criminal cases on the application of a party or on the court's own motion. The High Court can use this jurisdiction to review the imposition of any penalty, particularly severe penalties in contempt of court cases before the lower courts to check that this power has been exercised in a fair and justified manner.

It is submitted that different courts should not have different maximum sentences provided for contempt of court cases as such cases can occur in any court, in any form of contempt, in any level of seriousness. Therefore, each court should have the same sentencing power to deal with the offence as befits the facts of the case rather than the jurisdiction the court happens to have. Contempt of court is an offence against the administration of justice. It is not more severe or less severe depending on which court is involved. This is not to say that all contempt of court cases are equally severe and deserve identical punishment, but it is submitted that the courts should vary the punishments according to the merits of the case rather than the court that happened to be involved. The same contempt is not any more serious against a higher court since every court is part of the administration of justice and impugning the dignity of any of these courts can constitute an attack against the legal system. It is thus submitted that the same maximum sentences should be provided for contempt of court cases before any court.

The Bar Council proposed that the maximum punishment for contempt cases, as stated in section 25(1) of their Contempt of Courts Act 1999, would be a fine not exceeding RM2,000, imprisonment for a term not exceeding 14 days or both. This is exceedingly different from the maximum sentences provided by statute and that have been imposed by cases. Paragraph 26 in the Third Schedule in the Subordinate Courts Act 1948 may only give a First Class Magistrate's Court the power to impose a fine of RM150, but even this lower court can impose imprisonment for up to 3 weeks. Section 25 of the Native Courts Enactment 1992 (Sabah) give the power to any Native Court in Sabah to impose a fine not exceeding RM5,000 and/or imprisonment for up to 2 years. The Bar Council's proposal seems to impose a higher maximum fine than currently given to the Magistrates' and Sessions Court, but a lower term of imprisonment.

The courts have imposed a broad range of sentences for contempt of court. These sentences range from fines of RM5 *John Kee v Yap Leong Swee* (1954) SNBBSCR 57. to RM80,000 (*Dr. Leela Ratos & Ors v Anthony Ratos s/o Domingo Ratos & Ors* [1997] 1 MLJ 704) and imprisonment of 1 day mandatory (Leela's case for the 3rd contemnor) to until the contemnor purges the contempt (*William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1994] 3 MLJ 40 and *Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C. Mogarajah* [2004] 2 MLJ 241) or until the court discharges the contemnor (*Dato' Seri S. Samy Vellu v Veerasamy a/l Perumal & Anor* [1995] 1 CLJ 353); or in default of paying a fine - 3 days (*Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299) to 8 months (Leela's case). The Bar Council's proposals, therefore, are far more limited than the courts have seen fit to impose for contempt of court.

It is submitted that the Bar Council's proposal may be a bit too modest as contempt of court can be serious offence against the administration of justice. As such, the courts may need a higher sentencing power to punish such a serious offence and as a warning of how serious an offence this can be. A party facing a maximum sentence of paying up to RM2,000 and/or being imprisoned for 14 days may not be unduly deterred from committing this offence, particularly if only a fine is imposed and the contemnor is wealthy. In such a case, the contemnor may believe that insulting or impugning the court is worth the financial penalty the contemnor could easily afford, even if a few days in prison were attached, particularly if the imprisonment was only in default of paying the fine. Such a response may be likely at the time the contemnor was angry or dissatisfied with the judge or justice.

If the Bar Council's concern is that the courts may impose unnecessarily harsh penalties on parties, including lawyers, this concern can be addressed by subjecting such cases to judicial review and appeals, and even allowing the Bar Council to make representations to the court in defence of a lawyer who is being cited for contempt of court as the Bar Council recommends in section 28 of their proposed Contempt of Courts Act 1999

where they suggest that the Presiding Officer must notify the Bar Council when a lawyer is cited for contempt and the Bar Council should have a right of audience and participation in the case.

If the Bar Council cannot adequately prepare a case in defence of a lawyer quickly enough such as in summary contempt proceedings against the lawyer, the Bar Council can still prepare their case in an appeal of this case. If contempt of court is to be taken seriously as a significant offence, the courts would need a significant power to sentence contemnors when the facts merit such harsh penalties.

It is submitted, putting this recommendation and the previous one together, any court may punish for contempt of court to the extent of 'a fine not exceeding RM100,000, imprisonment for a term not exceeding 5 years or both and such other sanctions or relief as the court deems fit.' This is intended to recognise the courts' broad discretion in the types of sentences to be imposed, to give the courts a significant power to punish for a serious offence and to recognise that contempt of court can be a serious offence as reflected in stiff penalties available. Hopefully, the stiff penalties provided would be a sufficient deterrent for many who may be inclined to commit this offence.

Conclusion:

The law on contempt of court is intended to ensure indispensable aims including supporting and enhancing the administration of justice and public confidence in the legal system. With the law appearing to be so variable, dependant on a judge's discretion, it can be perceived to be exercised in an arbitrary, subjective, and personal manner. If so, it can have a reverse effect from what is intended - public perception of the administration of justice being unfair, futile and vindictive, with judges abusing the power entrusted to them. There are many uncertainties and inconsistencies in the law on contempt of court. To some extent this is inevitable with the law being partly discretionary, but it may also be partly due to inadequate reliance on the advice, concerns and warnings expressed in other cases on contempt. There is actually a substantial body of case law and statutory provisions to restrict and guide this discretion. Judges should fully take advantage of these valuable resources. Judges should be mindful of the responsibility bestowed with this power, how this power can restrict significant rights such as the freedom of speech and the press and the range of alternative laws to punish similar conduct. Contempt of court should only be used sparingly when the situation demands nothing less. In such extreme situations, the judges should have the wisdom and experience to use this power carefully, judiciously, conscientiously and fairly. The law on contempt of court in Malaysia is in need of reform. In order to assist the judges in using this power as it is intended to be used, the law must be made clearer and more consistent so that judges can benefit from the wisdom of this law developed over so many centuries, refined by so many minds and supported by so many ideals integral to the legal system itself.

References

- Chauncey, C.C., 1881. 'Contempt of court' 29(5) *American Law Register* 289
- Chesterman, M., 1997. 'Contempt: In the Common Law, But Not the Civil Law' 46(3) *International and Comparative Law Quarterly*, 521.
- Chew, S.Y., 2005. *Project Management Demystified - Saturday, August 06, 2005, Contempt of Court, Current Trends in Malaysian Public Law Contempt of Court: Freedom of Expression and Rights of the Accused*<http://projectmanagementsm.blogspot.com/2005/08/contempt-of-court.html> (19 May 2011).
- Chinnock, W.F. & M.P. Painter, 2003. 'The law of contempt of court in Ohio' 34(2) *University of Toledo Law Review* 309.
- Cohen, N.M., 'The contempt power - the lifeblood of the judiciary' (1971) 2(1) *Loyola University of Chicago Law Journal* 69
- D'Ascoli, S., 2007. 'Sentencing Contempt of Court in International Criminal Justice' 5(3) *Journal of International Criminal Justice* 735.
- Das, C.V., 1986. 'Press Freedom & Contempt of Court' 19(3) *INSAF* 61
- Edises, B., 1958. 'Contempt of court and the lawyer: the unequal combat', 18(2) *Lawyers Guild Review* 49
- Fernando, A.F.T., 2005. 'Does the defiance of an improper order of injunction amount to contempt of court - a case study of contempt vis-a-vis freedom of publication from the Seychelles' 31(1) *Commonwealth Law Bulletin* 45
- Gomez, J., 2002. 'Contempt of court - freedom of expression and the rights of the accused' 3 *MLJ* ccxli,
- Hafeez Siddiqui, M.A., 1970. *Judicial methodology - a treatise on the art of judgment-writing*, The All Pakistan Legal Decisions, Lahore, India, Preface.
- Harun ur Rashid, 2010. 'Contempt of Court', *The Daily Star* (Bangladesh), 25 August 2010 <http://www.thedailystar.net/newDesign/news-details.php?nid=152088>.
- Hastie, W.H., 1973. 'Judicial role and judicial image' 121(5) *University of Pennsylvania Law Review* 947, 948.
- Henchy, S., 1982. 'Contempt of court and freedom of expression' 33(4) *Northern Ireland Legal Quarterly* 326

- Jacob, I.H., 1970. 'The Inherent Jurisdiction of the Court' 23 *Current Legal Problems* 23
- Law Reform Commission of Canada, 1978. 'Contempt of court - offences against the administration of justice' 20(1) *Canadian Journal of Criminology*, i, 1
- Low Hop Bing, 2010. 'Contempt of court: the procedure' 5 *CLJ* i
- Lowe, N. & B. Sufirin, 1996. *The Law of Contempt*, 3rd Edn, Butterworths, 1996, p 7S. Walker, 'Freedom of speech and contempt of court: the English and Australian approaches compared' 40(3) *International and Comparative Law Quarterly* 583
- McBride, S.P., 2003. 'The collateral bar rule and rule 26 protective orders: overprotection of judicial discretion' 35(3) *Arizona State Law Journal* 1029
- Mehrotra, V.K., 2002. *V.G. Ramachandran's Contempt of Court*, 6th Edn, Eastern Book Company, India.
- Miller, C.J., 2000. *Contempt of Court*. UK: Oxford University Press.
- Milton, J.R.L., 1970. 'A cloistered virtue' 87(4) *South African Law Journal* 424.
- Pillay, K.G., '1985. Judiciary at work (re-examined)' 18(3) *INSAF* 43
- Radensky, J.H., 1956. 'Contempt: direct and indirect contempt - what constitutes immediate view and presence' 7(3) *Hastings Law Journal* 312
- Shukriah Mohd-Sheriff, 2010. *The contempt power: a sword or a shield? A study of the law and practice of contempt of court in Malaysia*, PhD Thesis, Durham University, UK.
- The Rt. Hon. the Lord Mackay of Clashfern, 1994. *The administration of justice*, The Hamlyn Trust & Stevens & Sons Limite.
- Tilford, R.J., 2002. 'S. v. Mamabolo: post-trial speech in post-apartheid South Africa' 10 *Tulane Journal of International and Comparative Law* 445
- Tremblay, G.R., '1991. Contempt of court in the 90s' 16(1) *International Legal Practitioner* 14: 14.
- Walker, S., 1991. 'Compelling journalists to identify their sources: the newspaper rule and necessity' 14(2) *University of New South Wales Law Journal* 302
- Watkins, C.G., 1967. 'The enforcement of conformity to law through contempt proceedings' 5(2) *Osgoode Hall Law Journal* 125