UPHOLDING THE INTEGRITY OF OUR JUSTICE SYSTEM AND BALANCING RIGHTS

A note from Indranee Rajah S.C., Senior Minister of State for Law

The **Administration of Justice (Protection) Act** was enacted by Parliament on 15 August 2016.

- The Act can be found at statutes.agc.gov.sg.
- The Minister for Law's Second Reading (2R) speech can be found at www.mlaw.gov.sg.

With the Act, the law of contempt of court is now written into statute.

Contempt of court has always existed at common law in Singapore. However it was the only non-statute based criminal law, an observation by former Chief Justice Chan Sek Keong, which prompted the review that led to the Act that has just been passed. Under the common law, there were also no upper limits on the punishment that could be meted out.

The Act:

- maintains the existing law of contempt, save for one change;
- introduces a new procedural mechanism to deal with contemptuous publications in the social media age; and
- imposes limits on the maximum punishment.

Putting contempt law into statutory form makes it clearer and defines its boundaries. This is important given the penal consequences for contempt.

PURPOSE AND INTENT

Singapore adheres strongly to the rule of law. The laws against contempt of court ensure fair and effective justice, and protect the integrity of our legal institutions. They balance free speech with an individual's right to a fair trial and ensure that court orders are complied with. All these are critical to maintaining societal order.

The law of contempt falls into four broad categories:-

- **Scandalising the Court** – this prevents baseless attacks against our judges. It protects against the erosion of trust in the Judiciary as an institution, and against the undermining of the administration of justice in Singapore.
- ***Sub Judice* contempt** – this protects a person's right to a fair trial, and disallows extraneous attempts to influence outcomes of cases when they are under consideration by the courts.
- **Interference with Court proceedings** – this prevents interference with court proceedings and subversion of justice.
- **Disobedience of Court orders** – this ensures the effective enforcement of court orders, without which you cannot have a strong justice system.

Other main Commonwealth jurisdictions have the same broad categories of contempt of court in their laws, save that the UK no longer has scandalising the court, of which more later in this Note.[1]

SCANDALISING THE COURT

Our Judiciary is the bedrock on which the rule of law is upheld. Our judges dispense justice. They are the final arbiters of rights and obligations. In adjudicating upon and resolving disputes, they perform an essential and critical role in the harmonious working of our society. The reputation of a judiciary determines the level of trust and confidence reposed by individuals and businesses in the legal system, which in turn has social and economic impact and affects how a country is viewed.

Our Judiciary enjoys a high level of trust from Singaporeans, and is well-regarded internationally. It is important that the integrity of the Courts and the judiciary as legal institutions are preserved.

Save for the UK, all other major Commonwealth jurisdictions have laws against scandalising the judiciary in one form or another.

In the UK, it was done away with because "there [was] a great deal of extremely abusive online material concerning judges"[2], and the UK judiciary had as a result lost the deferential respect it used to enjoy – a change, the Law Commission noted, was "one to be regretted"[3]. In short, the tide could not be turned back and the Law Commission was of the view that keeping the offence would not reverse the situation.

We have taken a considered decision as a matter of policy and conviction not to follow the UK path in this regard, for the reasons above, and as elaborated in the Minister's Reply speech. We have a different philosophy regarding the upholding of the integrity of our legal institutions.

We have thus retained the common law offence of scandalising the judiciary, and made one amendment to it, which is to change the test from "real risk" to "risk".

[1] See, for e.g., UK, Australia, New Zealand and Hong Kong.

[2] The Law Commission, *Contempt of Court: Scandalising the Court* (Law Com No 335, 2012) at para 71.

[3] *Ibid.*, at para 66.

Under the Act, the test for scandalising the court is if there is an intentional publication or act that:-

(i) imputes improper motives to or impugns the integrity, propriety or impartiality of any court; **and**

(ii) poses a risk that public confidence in the administration of justice would be undermined.

The test is an objective one. It is irrelevant whether the person intended to scandalise the court. It is only necessary that he/she intended to make the publication or do the act which, viewed objectively, impugns the court and poses a risk of undermining confidence in the administration of justice. This is the same as the common law, save for the difference regarding the degree of risk.

We made this change because the administration of justice is a matter of importance and we do not want *any* risk that public confidence in it will be undermined by such allegations. This does not mean that there is no recourse in the event of judicial misconduct. Should there be valid reasons to doubt the integrity, propriety or impartiality of any court, then the proper course of action would be to refer such concerns to the Chief Justice or an appropriate agency for investigation.

The question that often arises in this context is "What about fair criticism?"

The Minister clarified during the debate that fair criticism does not constitute scandalising the court.

- Commentaries by lawyers or academics criticising a judgment would not constitute scandalising the court.
- While "fair criticism" is not defined in the Act, it has been defined in existing case law to include factors such as good faith, whether the criticism is supported by argument and evidence, and whether it is respectful. Such case law will continue to be relevant in determining what is or is not fair criticism.

Defences to scandalising the Court

The Act provides that the following are defences to scandalising the court:

- Publishing contemporaneously and in good faith, a fair and accurate report of court or parliamentary proceedings.
- Making a report in good faith to the Chief Justice, Corrupt Practices Investigation Bureau or other relevant authorities about the misconduct or corruption of a judge.
- Filing in good faith any action or application in court, including applications seeking the disqualification of a judge.

SUB JUDICE CONTEMPT

Sub judice contempt balances the right of free speech with an individual's right to a fair trial. It is a fundamental principle of a fair and impartial justice system that matters under consideration by the court should not be prejudged and that court proceedings should not be prejudiced or interfered with. Nor should persons seek to influence the outcome of court proceedings other than through the proper legal process.

This is essential even in a non-jury system like ours. Judges and lawyers must be able to carry out their duties, and witnesses able to give evidence, without being unduly pressured by public opinion or subject to campaigns seeking to influence outcomes.

The *sub judice* restriction is only for a specific duration while proceedings are pending. It is a common misunderstanding that no comment at all can be made with regard to court proceedings. This is not so.

- Once the case is over, people can comment freely;
- Even while the case is pending, people can comment so long as it does not prejudge an issue and prejudice or interfere with pending proceedings or pose a real risk of doing so.

The Act defines *sub judice* as intentionally publishing any matter that:

- prejudges an issue in a court proceeding that is pending, **and** such prejudgment prejudices or interferes with the course of any pending court proceeding or poses a real risk of doing so; **or**
- otherwise prejudices or interferes with the course of any pending court proceeding or poses a real risk of doing so.

The Act defines the point at which court proceedings are considered "pending". See: S 2(2)

As with scandalising the judiciary, it is irrelevant in *sub judice* contempt whether the person intended to prejudice or interfere with the pending court proceedings. It is only necessary that he/she intended to publish the matter which, viewed objectively, prejudices or interferes with the proceedings or poses a real risk of doing so. This reflects the common law position.

(Note: The Act retains the common law test of "real risk" for *sub judice* contempt. There is no change.)

Whether a publication prejudges an issue and prejudices or interferes with pending proceedings, or poses a real risk of doing so, is for the Court to decide based on a multitude of factors, including (but not limited to) the publisher's identity and the content and extent of the publication.

Given the misperceptions surrounding this topic, the Minister clarified in his 2R Speech that the following will generally not amount to *sub judice* contempt:

- Litigants or their lawyers making statements regarding on-going cases they are involved in, so long as it does not interfere with or prejudice the proceedings, or pose a real risk of so doing.
- Public discussion of the merits or demerits of legislation, even if a trial is on-going. (Hence it would not be *sub judice* to advocate one's position on the death penalty in general while a capital trial is on-going.)
- Commentaries on a judge's decision, even if an appeal is pending.
- "Coffee shop" talk and other private discussions about an on-going case.

Defences to sub judice contempt

The Act provides that the following are defences to *sub judice* contempt :

- publishing contemporaneously, and in good faith, a fair and accurate report of court proceedings or Parliamentary proceedings.
- publishing a contemptuous statement when one did not know and had no reason to believe that court proceedings were pending at the time of the publication.

The Act provides an exception for statements made on behalf of the Government, if the Government believes that such a statement is necessary in the public interest. See: S 3(4)

The rationale for this exception is that there are often situations of public interest where the Government has to comment or provide a public statement before court proceedings end (e.g. spread of infectious disease, bank runs or matters of public order or national security). It is incumbent upon the Government to address such matters of public interest in a timely manner and the Government has regularly done so. In one or two cases, it has been alleged that statements should not have been made by the Government and the Courts have clarified the position, for example *Lau Swee Soong* [1965-1967] SLR(R) 748). (See: paras 116–126 2R Speech). The Act writes into law the current practice.

It is important to understand that this exception does not give the Government a free pass to comment on on-going cases as and how it pleases:

- first, the Government must show it believes the statement is necessary in the public interest;
- second, the Government is only allowed to state a factual account and state its position; and
- third, the Government's statement does not preclude the court from exercising its judicial power in relation to the issues in the statement.

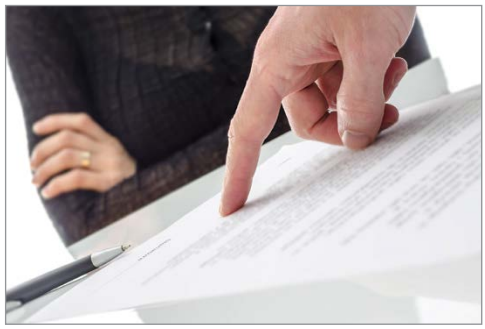
CONTEMPT BY INTERFERENCE WITH COURT PROCEEDINGS

The Act also sets out other types of contempt related to interference with court proceedings, such as:

- intentionally intimidating a witness;
- intentionally insulting or obstructing a judge in court proceedings.

DISOBEDIENCE OF COURT ORDERS

Disobedience of court orders is punishable as an offence. This is necessary as absent this, we would not be able to enforce orders of court, and the respect for the authority of the courts - on which the justice system ultimately hinges - would be undermined. People in whose favour judgements or orders are made would be prejudiced and their rights adversely affected if orders are not enforced.



Under the Act, it is contempt of court if a person:

- intentionally disobeys a court order, direction or writ;
- intentionally breaches an undertaking to the court; or

- causes or abets such breaches with the intention of causing such breach or knowing it would cause such breach.

Defences to contempt by disobedience with court orders

The Act provides that it is a defence if:

- the contemnor honestly and reasonably did not understand his/her obligations under the court order; and
- the court takes the view that he/she ought reasonably to be excused.

LIABILITY OF MEDIA/ONLINE INTERMEDIARIES

Media outlets, social media companies and other online intermediaries are not liable for contemptuous comments posted by users or readers on their online platforms if:

- they do not have editorial responsibility or control over the contemptuous material.
- they have editorial responsibility or control over the contemptuous material, but have taken due care and caution to prevent such publication.

This pegs the obligation to the degree of control such intermediaries have over the content. This maintains an open operating environment for media intermediaries and does not impose a burden on them beyond that which they can reasonably be required to undertake.

JURISDICTION

The Court of Appeal (CA) and High Court (HC) have jurisdiction to try and power to punish contempt of court committed before them and in the lower courts. The Act preserves the inherent powers of the CA and HC to act on their own motion for contempt.

Photo: Supreme Court of Singapore

The State Courts, Family Court and Youth Court have more limited jurisdiction. Save for the Small Claims Tribunal (SCT) and the Employment Claims Tribunal (ECT), they have the jurisdiction to try and power to punish contempt committed:

- in the face of those courts; or
- in connection with any proceedings in those courts.

Contempt committed in the face of the SCT and ECT would have to be tried and punished in the other State Courts, or in the HC. Contempt in the face of the court is tried by a special summary process, which is more appropriately overseen by the State Courts and HC.

PUNISHMENT

Previously, there were no prescribed limits on the punishment for contempt. The Act provides a clear framework and upper limits for such punishment.

The maximum punishments are:

- For CA or HC: fine up to S$100,000 and/or imprisonment up to three years.
- Lower Courts: fine up to S$20,000 and/or imprisonment up to 12 months.

The court can also order the contemnor to publish a notice of apology.

The court can refuse to hear the contemnor until the contempt is purged.

INVESTIGATIONS

The Attorney-General may authorise the police to exercise all or any of the investigative powers listed in Part 1 of the Schedule to the Act, to investigate a contempt of court.

NEW PROCEDURE - THE NON-PUBLICATION DIRECTION

The Act provides a new procedure for dealing with contemptuous publications – the Non-Publication Direction (NPD).

The NPD was developed in response to today's new operating environment for communications. In the age of the internet and social media, conventional enforcement methods are no longer effective. Online posts can go viral within minutes of publication. The conventional procedure of obtaining a restraining order after an *inter partes* hearing can take up to several weeks, by which time irreparable harm would have been done.

Under the new procedure:

- If the Attorney-General is satisfied it is in the public interest to do so, he can apply to court, for leave to issue a NPD against a publisher, to prevent publication of a statement which scandalises the court or amounts to *sub judice* contempt.
- The application is made *ex parte* without notice.

- The NPD can be issued to any publisher, including intermediaries (e.g. Facebook), and not just the original author. It is irrelevant whether the publisher is liable for the underlying contempt.
- If the publisher complies with the NPD and removes the statement, no action lies against him (unless he is also liable for the underlying contempt).
- The publisher or original author can apply to court to set aside the NPD. The onus is on them to show that the publication is not contemptuous. Until and unless set aside, the NPD must be complied with.
- Refusal to comply with the NPD is an offence.

The NPD provides for a fast remedy for removal of contemptuous material before widespread harm is caused.

The NPD is an alternative to prosecution. Under the common law, the choices were binary - either prosecute and bring the full force of the law down on the publisher or let it go and allow the damage to be done. The NPD provides another option, with the safeguard that the publisher/original author can apply to set the NPD aside.

OVERSEAS ACTS AND PUBLICATIONS

The Act clarifies the power of our courts to try and punish contemptuous acts or publications overseas which interfere with our justice process. This is essential given the global reach of online platforms and the ubiquitousness of the Internet.

The Singapore courts have power to try and punish contemptuous publications from overseas, whether online or in print, so long as it is distributed in, or is accessed by members of the public in Singapore.

It is a defence if the overseas publisher did not know and had no reason to believe that the publication would be accessed by members of the public in Singapore.

The Singapore courts also have power to try and punish contemptuous acts (other than publications) which take place overseas, so long as the act has a direct impact on the administration of justice in Singapore.

INTERACTION WITH COMMON LAW OF CONTEMPT

The common law rules on contempt of court continue to be in force except so far as they are inconsistent with the Act. See: S 8(3)

However, all common law defences to the heads of contempt in the Act, which are not specified as defences in the Act, have been abolished.

– Indranee Rajah S.C., Senior Minister of State for Law
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