

Any Risk Will Do – The New Law on Scandalising Contempt in Singapore

The new Administration of Justice (Protection) Act codifies a number of common law contempt of Court offences, and has attracted much debate on its potential effect of chilling public discussion and criticism of the administration of justice. This article will focus on the offence of scandalising contempt as its codification represents the most significant departure from the parameters of the hitherto common law offence established by the Court of Appeal and from the other Commonwealth common law jurisdictions.

The Administration of Justice (Protection) Bill, introduced in Parliament this year, was passed after seven hours of heated debate at its Second Reading and much controversy on 15 August 2016. The Workers' Party (WP) chief Low Thia Kiang called for a division twice, and both times, all 72 PAP MPs voted in favour of the Bill and all nine WP MPs and NCMPs against. The Bill, which was first tabled in Parliament in July, aimed to consolidate the different contempt of Court offences into statute. Under this new Administration of Justice (Protection) Act ('AJPA'), different types of conduct which constitute contempt of Court are codified. The two which attracted the most vigorous debates are: (i) making allegations of bias against the Judges or the Court, otherwise known as scandalising contempt (s 3(1) (a)); and (ii) publishing material that interferes with ongoing proceedings, also known as *sub judice* contempt (s 3(1) (b)). In particular, under s 3(1)(a), a person "scandalises the court by intentionally publishing any matter or doing any act that imputes improper motives to or impugns the integrity, propriety or impartiality of any court; and poses a *risk* that public confidence in the administration of justice would be undermined." This legislative formulation sets a lower threshold for scandalising contempt in stark contrast to the Court of Appeal's requirement of 'real risk' as articulated in *Attorney-General v Shadrake Alan*. Moreover, the maximum punishment for any kind of contempt under the Act is a fine of \$100,000, a three-year prison term, or both (section 12(1) (a)). In the *Shadrake* case, the Singapore Court of Appeal (CA) held that a sentence of six weeks' imprisonment and a fine of \$20,000 was appropriate despite there has not been an iota of remorse demonstrated by the defendant. Thus in combination, ss 3(1)(a) and 12(1)(a) arguably have a potential effect of chilling public discussion and criticism of the administration of justice. This article will focus on the offence of scandalising contempt as its codification represents the most significant departure from the parameters of the hitherto common law offence established

by the CA and from the other Commonwealth common law jurisdictions.

A Global Appreciation of Scandalising Contempt

Scandalising the Court or judiciary has been described as an "archaic title"¹ but it generally embodies "[a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority".² However, it can be a fine line between what qualifies as fair or justified criticism of the conduct of the Courts or the individual Judges in their administration of justice and what constitutes an "undue interference with the administration of justice"³ that amounts to contempt. Indeed it has been observed that "the law of contempt has been considered, not just in Singapore, but in other jurisdictions as well, to be a justifiable restriction on the right to freedom of speech".⁴

The law of contempt of Court in English common law was examined by the Interdepartmental Committee on the Law of Contempt chaired by Lord Justice Phillimore over 40 years ago.⁵ The Phillimore Report divided contempt of Court into a number of categories,⁶ but the eventual passage of the Contempt of Court Act 1981 (UK) focused only on conduct "tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so", and the "strict liability rule" applies only to "a publication which creates a substantial risk that the course of justice in the [active] proceedings in question will be seriously impeded or prejudiced."⁷ The regulation of conduct which scandalises the Court has been left largely to the interpretation of Judges in the development of the common law governing contempt of Court, but it has recently been abolished by statute in the UK after a lengthy consultative process.⁸

As Lord Diplock declared in *Attorney-General v Times Newspaper Ltd*, "[t]he provision of such a system for

the administration of justice by courts of law and **the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another.**⁹ The due administration of justice requires, *inter alia*, that citizens:

... should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and ... that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law.¹⁰

Indeed public confidence in the judiciary is a fundamental tenet of any democratic society. In Australia, it was noted that “scandalising is thriving” and “this head of contempt [is] becoming increasingly potent in Australia”.¹¹

Even in a highly pro-speech jurisdiction like the US, cogent exhortations have been advanced that “public confidence in the Court demands at least that it acts according to professional standards and adheres to principled reasoning in its decisions”.¹² US Supreme Court Chief Justice John Roberts has also referred to concerns of institutional legitimacy in explaining why the Court should avoid five-four decisions in cases “involving the most controversial questions in American politics.”¹³ It is also interesting to note that even the judiciary in the US “does not always appreciate having its own integrity questioned.”¹⁴ Academic commentator Margaret Tarkington observed that “[t]hroughout the United States, state and federal courts discipline and sanction attorneys who make disparaging remarks about the judiciary and thereby impugn judicial integrity. In so doing, courts have almost universally

rejected the constitutional standard established by the US Supreme Court in the seminal 1964 case *New York Times Co v Sullivan* for punishing speech regarding government officials.”¹⁵

The “Real Risk” Standard: What the High Court and Court of Appeal Decided

In *Attorney-General v Shadrake Alan*,¹⁶ the Singapore High Court rejected the inherent tendency test for deciding whether acts and words complained of should be held in contempt of Court, and held that the Attorney-General had to prove that the publications pose real risks of undermining public confidence in the administration of justice.¹⁷ Quentin Loh J explained that such an approach “strikes an adequate balance between the freedom of speech and the countervailing constitutional interest in ensuring that public confidence in the administration of justice does not falter as a result of scandalous publications.”¹⁸ This holding effectively departs from previous decisions of the High Court which appeared to endorse the inherent tendency test.¹⁹

Hitherto the CA has not decided on the applicable test for liability for contempt of Court on the ground of scandalising contempt; neither is there a legislative provision articulating the appropriate standard to be applied for contempt cases.²⁰ However, in considering Alan Shadrake’s appeal, the CA in 2011 made an important pronouncement:

We therefore unequivocally state that the ‘real risk’ test is the applicable test *vis-à-vis* liability for scandalising contempt in Singapore.²¹

In *Shadrake I*, Loh J found Alan Shadrake in contempt of Court for 11 of the 14 impugned statements, but the CA held that only nine of the statements were contemptuous.²² Nonetheless, the unanimous CA affirmed the sentence, and was of the view that “this is still the worst case of scandalising contempt that has hitherto come before the Singapore courts ... [and] the Appellant’s conduct merits a substantial custodial sentence”.²³ It would seem that the fine of \$20,000 and a six weeks’ imprisonment would be at the higher end of what the CA would contemplate to be the appropriate punishment for one of the worst cases of scandalising contempt. It is important to note that under s 12(1)(a) of the AJPA, one could be fined up to \$100,000 and be sentenced to a three-year prison term.

The real risk standard, as correctly pointed out by Loh J in *Shadrake I*, has been adopted in the United Kingdom,²⁴ Australia,²⁵ New Zealand²⁶ and Hong Kong.²⁷ Loh J emphasised that the law of scandalising contempt is concerned with “the potential effect on public confidence



in the administration of justice”.²⁸ However, there is always a danger that scandalising contempt will have a significant chilling effect on the citizen’s right to freedom of speech, especially when the impugned criticism of the judiciary implicates public interest in the administration of justice by the Courts.²⁹ The CA in *Shadrake III* acknowledged this tension, when it commented that:

... it should be noted that the law relating to contempt of court operates against the broader legal canvass of the right to freedom of speech that is embodied both within Article 14 of the Constitution of the Republic of Singapore ... as well as the common law. The issue, in the final analysis, is one of *balance*: just as the law relating to contempt of court ought not to unduly infringe the right to freedom of speech, by the same token, that right is not an absolute one, for its untrammelled abuse would be a negation of the right itself.³⁰

Many of the reasons proffered by the Singapore Courts in the defamation cases when reading down the ambit of the available defences, for example that the fragile ethnic and religious harmony in Singapore must be preserved to prevent the recurrence of the race riots that the country experienced in the 1960s,³¹ do not apply to contempt of Court scenarios. While earlier High Court cases in Singapore appeared to have rejected the defences of fair comment, justification and fair criticism,³² Loh J in *Shadrake I* considered a number of Australian and English cases and concluded that there is a defence of fair criticism subject to three conditions. Loh J was of the view that “it is very much in the public interest that judicial impropriety should be brought to light”³³ and that “the public should be able to debate judicial conduct”.³⁴ Acknowledging that “while it would be inappropriate to import wholesale the defence of fair comment [from defamation] into the law of contempt ... it may well be that there is in the final analysis some functional similarity between fair comment and fair criticism”, Loh J relied on the analysis of Judith Prakash J in *Attorney-General v Tan Liang Joo John* (“*Tan*”) that fair criticism does not amount to contempt of Court.³⁵ This aspect of the test for scandalising contempt has been codified as an explanatory note in the APJA, which states: “Fair criticism of a court is not contempt by scandalising the court within the meaning of subsection (1)(a).”

As Prakash J astutely observed in *Tan*, such *bona fide*, temperate and balanced criticism “allows for rational debate about issues raised and thus may even contribute to the improvement and strengthening of the administration of justice”.³⁶ Although an independent legal defence of fair criticism was rejected by the CA, Andrew Phang JA examined a number of English and Australian decisions,³⁷

as well as treatises³⁸ and law commission reports,³⁹ and concluded that “the **nature, tenor and thrust** of these statements of principle are, in our view, more consistent with the concept of fair criticism as going towards **liability** instead”.⁴⁰ According to the CA, fair criticism therefore will be evaluated within the ambit of **liability** for scandalising contempt, through an analysis of a number of factors articulated by Prakash J in *Tan* (which were also cited by Loh J in *Shadrake I*).⁴¹ These factors include (i) the extent to which the allegedly fair criticism is rationally supported by argument and evidence; (ii) the manner in which the alleged criticism is made; (iii) the party’s attitude in Court; and (iv) the number of instances of contemning conduct. The practical result of this is “the **evidential** burden would be on the party relying on it [and the] *legal* burden, on the other hand, would be on the [Attorney-General] to prove beyond a reasonable doubt that the impugned statement does not constitute fair criticism, and that it presents a real risk of undermining public confidence in the administration of justice.”⁴²

According to the CA, in applying the “real risk” test, the Court “must avoid either extreme on the legal spectrum, *viz*, of *either* finding that contempt has been established where there is only a remote or fanciful possibility that public confidence in the administration of justice is (or might be) undermined *or* finding that contempt has been established *only* in the *most* serious situations”.⁴³ It is also clear that an objective analysis should be undertaken of “the precise facts and context in which the impugned statement is made” and “the court must not substitute its own subjective view for the view of the average reasonable person”.⁴⁴ Furthermore, it must be beyond a reasonable doubt that there is a real risk that the impugned statement would undermine public confidence in the administration of justice in Singapore.⁴⁵

In *Attorney-General v Au Wai Pang*, handed down by the High Court in 2015, Belinda Ang J agreed with the present author that the decision in *Shadrake III* “strikes an appropriate balance between safeguarding, on the one hand, freedom of speech and, on the other hand, the public interest in protecting public confidence in the administration of justice in Singapore.”⁴⁶ In *Au Wai Pang*, the Attorney-General brought committal proceedings against the respondent Au in connection with two articles published by Alex Au on the internet at the his blog – the Yawning Bread – which the AG said amounted to contempt of Court in the form of scandalising the Supreme Court of Singapore. Although Ang J did not explicitly refer to how the respondent as a Singapore citizen was specifically entitled to the freedom of speech under Art 14, a point that was crucial in *Review Publishing v Lee Hsien Loong*⁴⁷, her Honour was concerned that “the law relating to contempt

of court ought not to unduly infringe the right to freedom of speech.⁴⁸ Ang J concluded that the “combination of the ‘real risk’ test and the placing of the legal burden on the Prosecution ‘calibrates’ appropriately the tension between freedom of speech and the public interest in protecting public confidence in the administration of justice”.⁴⁹ On appeal, the CA in 2015 unanimously affirmed the “real risk” test, upheld the conviction and the fine of \$8,000.⁵⁰

Belinda Ang J sought to reason that the real risk test “is also in line with the test applied in other common law jurisdictions such as Australia, New Zealand and Hong Kong.”⁵¹ However, this does not mean that Singapore should be open to an alacrity to align itself with every aspect of doctrinal developments in this area. It would appear that an autochthonous approach does not entail an erection of four walls that is impervious to all foreign influences, but the walls act as a filter for Courts to evaluate which developments are instructive in the context of Singapore’s history, constitutionalism and form of representative democracy. For example, in *Au*, Ang J considered the recent Privy Council’s decision on scandalising contempt in *Dhoocharika v Director of Public Prosecutions*,⁵² and held, *inter alia*, that “*Dhoocharika* is distinguishable from our Court of Appeal’s decision in *Shadrake* ... given the respective local circumstances and constitutional contexts in which these two cases were decided.”⁵³

Fair Criticism ... But Who Will Take the Risk?

The decisions in *Au* and *Shadrake III* resonate with the recent extra-judicial comments of former Chief Justice Chan Sek Keong, who pointed out that:

... mechanisms such as the doctrine of contempt should not be used to stifle fair and reasonable criticism of the work of the Judiciary and also judicial decisions. The right to criticise is only part of the freedom of speech and expression the citizen enjoys in a democracy and its exercise will encourage or ensure that judges are independent in their decision-making ... Fair and objective criticism of judicial decisions will instil accountability and greater discipline in decision-making. If no one is allowed to judge judges, there could be lawless courts and irresponsible judging. But criticism of judgments should not lead to the denigration of judges.⁵⁴

One does not disagree with the Law Minister Mr K Shanmugam, who in his Second Reading Speech on the Administration of Justice (Protection) Bill, said: “If you allow constant attacks; attacks, say of bias or corruption, over time, the public perception of the Judiciary will be affected.” Minister Shanmugam acknowledges that there is “the one

change to the current law in the clauses, on the substantive elements of contempt” which adopts the standard of “risk” rather than “real risk”, on the basis that “[t]his will give us strong anchoring in the Rule of Law, which in itself is of basic, fundamental importance to our people”⁵⁵ and that “it allows Singapore to be the pre-eminent vibrant legal centre in the region.”⁵⁶ In addition, Minister Shanmugam was of the view that the Judges “developed the common law based on a strict legal precedent perspective, but we in the Ministry have a larger policy perspective in terms of the other bits and pieces and aspects of the whole legal spectrum.”⁵⁷ With respect, the Judges on the Singapore High Court and Court of Appeal in arriving at the real risk test, did not adopt this standard based purely on a desire to achieve comity with the Commonwealth common law jurisdictions, but it was substantially influenced by the result of a constitutional balancing exercise between the guarantee of freedom of speech to Singapore citizens under Article 14 of the Singapore Constitution and the national interest in preserving public confidence in the administration of justice. Ultimately, the Singapore Constitution empowers the Parliament to pass laws to restrict the freedom of speech as it deems necessary or expedient. It is perhaps ironic that the judiciary permits a wider latitude of criticism of itself than Parliament would otherwise tolerate.

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Notes

- Attorney-General v Wong Hong Toy* [1982-1983] SLR 398, 403.
- Attorney-General v Pang Cheng Lian and Others* [1972-1974] SLR 658, 662 (following *R v Gray* [1900] 2 QB 36, 40).
- R v Davies* [1906] 1 KB 32, 40.
- Attorney-General v Hertzberg* [2009] 1 SLR(R) 1103, at [21].
- Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, at [36] (*'Sunday Times'*).
- Sunday Times*, *ibid* at [18].
- Contempt of Court Act 1981 (UK) ss 1–4 (Cap 49).
- Crime and Courts Act 2013 (UK) s 33 (Cap 22). See also The Law Commission, Contempt of Court: Scandalising the Court (2012) <http://lawcommission.justice.gov.uk/docs/lc335_scandalising_the_court.pdf>.
- [1974] 1 AC 273, 307 (*'Times Newspaper'*) (as cited in *Attorney-General v Shadrake Alan* [2010] SGHC 327, at [7]).
- Ibid* at 309 (as cited in *Attorney-General v Shadrake Alan* [2010] SGHC 327 at [7]).
- Eli Fisher, ‘The Courts’ Scandal: Scandalising the courts in Australia’ (2011) 16 Media & Arts Law Review 73, 82.
- Amnon Reichman, ‘The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar’ (2007) 95 California Law Review 1619, 1623.

- 13 Lawrence Baum and Neal Devins, 'Why the Supreme Court Cares About Elites, Not the American People' (2010) 98 *Georgetown Law Journal* 1515, 1520.
- 14 Margaret Tarkington, 'A Free Speech Right to Impugn the Judiciary in Court Proceedings' (2010) 51 *Boston College Law Review* 363, 363–4.
- 15 *Ibid* at 364. See also Margaret Tarkington, 'The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation' (2009) 97 *Georgetown Law Journal* 1567, 1569, 1571–72, 1587–91.
- 16 [2010] SGHC 327; 2 SLR 445 (Quentin Loh J, High Court, 3 November 2010) ('*Shadrake I*'). See also *Attorney-General v Shadrake Alan* [2010] SGHC 339; 2 SLR 506 at [3] (Quentin Loh J, High Court, 16 November 2010) ('*Shadrake II*') (on sentencing).
- 17 *Shadrake I*, *ibid* at [77].
- 18 *Ibid*.
- 19 Eg *Attorney-General v Wain Barry* [1991] 1 SLR(R) 85 ('*Wain*'); *Attorney-General v Lingle* [1995] 1 SLR(R) 199 ('*Lingle*'); *Attorney-General v Chee Soon Juan* [2006] 2 SLR(R) 650 ('*Chee*'); *Attorney-General v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ('*Hertzberg*'); *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132 ('*Tan*').
- 20 Article 14 of the Singapore Constitution states, inter alia, that:
- 14 (1) Subject to clauses (2) and (3) —
- (a) every citizen of Singapore has the right to freedom of speech and expression;
- ...
- (2) Parliament may by law impose —
- (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
- ...
- Constitution of the Republic of Singapore (1999 rev ed) art 14 (emphasis added). But the Singapore Parliament then had not enacted relevant legislation governing the appropriate test to be applied for the determination of contempt of court. There are laws in place for criminal contempt and for both the subordinate courts and the Supreme Court to punish acts of contempt. Eg *Criminal Procedure Code* (Cap 68, 1985 rev ed); *Subordinate Courts Act* (Cap 321, 2007 rev ed); *Supreme Court of Judicature Act* (Cap 322, 2007 rev ed).
- 21 *Shadrake Alan v Attorney-General* [2011] SGCA 26; 3 SLR 778, at [57] ('*Shadrake III*').
- 22 *Ibid* at [149].
- 23 *Ibid* at [153]. The CA also held that '[t]here are also no mitigating factors whatsoever in this case that could possibly be considered in the Appellant's favour' and 'that there has not been an iota of remorse demonstrated by the Appellant who continues to stand by the statements made.' *Ibid* at [151].
- 24 Eg *R v Duffy, ex parte Nash* [1960] 2 QB 188, 200; *Times Newspaper* [1974] 1 AC 273, 298–99, 312.
- 25 Eg *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443 at [55], [226]; *McGuirk v University of NSW* [2009] NSWSC 1058, at [239]–[272].
- 26 Eg *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 234.
- 27 Eg *Wong Yeung Ng v Secretary of Justice* [1999] 3 HKC 143, at [13].
- 28 *Shadrake I* [2010] SGHC 327, at [53].
- 29 The Court of Appeal observed that "'justice is not a cloistered virtue" but a public one' (citing *Ambar v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335 (Lord Atkin)).
- 30 *Shadrake III* [2011] 3 SLR 778, at [17].
- 31 Eg Thio Li-ann, 'Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"' (2003) 1 *International Journal of Constitutional Law* 516, 519.
- 32 Eg *Attorney-General v Chee Soon Juan* [2006] 2 SLR(R) 650, at [45]–[48]; *Attorney-General v Hertzberg* [2009] 1 SLR(R) 1103, at [23].
- 33 *Shadrake I* [2010] SGHC 327, at [67].
- 34 *Ibid* at [68].
- 35 *Ibid* at [70] (referring to *Tan* [2009] 1 SLR(R) 1132, at [15]–[23]). See also *Lingle* [1995] 1 SLR 696, 700. See also *ibid* at [72]–[75] (where Loh J sets out the elements of the defence of fair criticism).
- 36 [2009] 1 SLR(R) 1132, at [19].
- 37 *Shadrake III* [2011] 3 SLR 778, at [60]–[67].
- 38 *Ibid* at [70].
- 39 *Ibid* at [71]–[73].
- 40 *Ibid* at [68].
- 41 *Ibid* at [81]–[85]. See also *ibid* at [86] ('In approaching this concept, the court should bear in mind the various factors set out (albeit non-exhaustively) in *Tan Liang Joo John* ... The court ought always to apply this concept not only in relation to the precise facts and context but also bearing in mind the following key question throughout: does the impugned statement constitute fair criticism, or does it go on to cross the legal line by posing a real risk of undermining public confidence in the administration of justice – in which case it would constitute contempt instead?').
- 42 *Ibid* at [78].
- 43 *Ibid* at [36].
- 44 *Ibid*.
- 45 For instance, one of the statements was found in *Shadrake III* not to pose 'a real risk of undermining public confidence in the administration of justice in so far as the Respondent has failed to prove beyond a reasonable doubt the logically prior step that the second statement refers to the courts.' *Ibid* at [105].
- 46 [2015] SGHC 16; 2 SLR 352, at [10] ('*Au*') (referring to David Tan, 'A "Real Risk" of Undermining Public Confidence in the Administration of Justice' (2011) 16 *Media & Arts Law Review* 191, 202). I had previously suggested that this balance is appropriately achieved by the application of the 'real risk' test for liability, coupled with the placing of the onus on the party bringing the committal proceedings (typically, the prosecuting authorities of the jurisdiction concerned to prove the elements of the offence based on the criminal standard of beyond reasonable doubt.
- 47 [2010] 1 SLR 52; [2009] SGCA 46.
- 48 *Au* [2015] 2 SLR 352, at [9] (citing *Shadrake III* [2011] 3 SLR 778, at [17]).
- 49 *Ibid* at [11].
- 50 *Au Wai Pang v Attorney-General* [2015] SGCA 61; [2016] 1 SLR 992.
- 51 *Au* [2015] 2 SLR 352, at [11].
- 52 [2014] 3 WLR 1081 ('*Dhooraika*').
- 53 *Ibid* at [19].
- 54 The Honourable Chief Justice Chan Sek Keong 'Securing and Maintaining the Independence of the Court in Judicial Proceedings' (2010) 22 *Singapore Academy of Law Journal* 229, 239–240 (internal citations omitted).
- 55 Second Reading Speech by Minister for Law, Mr K Shanmugam, on the Administration of Justice (Protection) Bill (15 August 2016) at [191].
- 56 *Ibid* at [192].
- 57 *Ibid* at [201].