Freedom of Expression and the Administration of Justice

Part 2 Scandalizing the Court

Nantapol Khaimuk

In the previous discussion, freedom of expression and the administration of justice were defined and examined. Freedom of expression, the freedom to speak freely without censorship, has major international human rights instruments that protect this principle. At the same time, contempt of court occurs when freedom of expression goes beyond the limits and interferes with the administration of justice. The purpose of limiting the rights of the freedom of expression is to protect the rights of litigants and the court (judicial process) from abuse and not the personal dignity of the court. However, when the court or judges are criticized to the extent which may undermine public confidence in the judicial system, scandalizing the court is punishable by law. In this discussion, several international cases of scandalizing the court are observed to illustrate actions that bring up the issue of undermining the authority of the courts and public confidence in the administration of justice.

In English common law, the primary justification for contempt of court laws (scandalizing the court) is the maintenance of public confidence in the administration of justice. These laws are used when there have been defamatory remarks of a judge or court, accusations of bias or partiality made against a judge or court, or allegations that a judge or court has been influenced by outside pressures. Scandalizing the court was described in the case of *Chokolingo v. AF of Trinidad and Tobago* as "… a convenient way of describing a publication which, although it does not relate to any specific judge, is a scurrilous attach on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice."

In *In Re: Patrick Anthony Chinamasa*, a case of the Supreme Court of Zimbabwe held that the offence of scandalizing the court is reasonably justifiable in a democratic society because "Unlike other public figures, judges have no proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardizing their impartiality. This is why protection should b given to judges when it is not given to other important members of society such as politicians, administrators and public servants."

The European Court of Human Rights (ECHR) has also considered cases dealing with scandalizing the court. In *Barford v. Denmark*, the applicant was convicted for defamation of character because of an article alleging that Greenland lay judges were biased in favor of their employer (the local government). The Court saw that the restriction on freedom of expression was necessary in a democratic society as the State has a legitimate interest in protecting the reputation of judges and

that the applicant had attacked the judges personally and had not submitted evidence to support his allegation of bias.

In *Prager and Oberschlick v Austria*, the applicant was also convicted for defamation because of an article he wrote claiming that the Judge was "arrogant" and "bullying" in his performance of duties and treated accused persons as if they had already been convicted. Once more, the Court held that the restriction on freedom of expression was necessary in a democratic society. The judiciary must be protected against unfounded attacks and that the statements were excessive and lacked a factual basis.

In the United States, on the other hand, The Supreme Court has made it clear through a series of cases that a publication contributing to scandalizing the court must create a "clear and present danger" to the administration of justice. Similarly in Canada in the case *R. v. Koptyo*, where a barrister had been charged with contempt of court following the remarks made to a newspaper, the Ontario Court of Appeal were divided on applying the scandalizing the court principle but had a majority consensus that there was a need to prove that there was a "clear and present danger" to the administration of justice.

While common law courts such as the United Kingdom do not require "actual intent to interfere with the administration of justice", the South African case of *State v. Van Niekert* clearly established that intent is required to establish liability. In that case, an academic had accused racial bias to judges in the application of the death penalty but the court held that he had not committed contempt of court because "… before a conviction can result the act complained of must not only be willful and calculated to bring into contempt but must also be made with the intention of brining the Judges in their judicial capacity into contempt or casting suspicion on the administration of justice."

In Thailand, recent political turmoil has launched attacks on the courts which include threats and attempts to discredit the courts. The Supreme Administrative Court has called for new legal mechanisms that provide better protection for Administrative Court judges. While the ongoing political conflicts had nothing to do with the court, they affected the institution greatly, according to a judge. A new system including a law to protect the courts, not just to ensure judges' personal safety but also their independence was needed.

As can be seen in the above examination of scandalizing the court cases in common law and other law systems, there are contrasting principles which exist in different jurisdictions. However, all jurisdictions have a common aspect and whether there is "an intent to interfere with the administration of justice" or a "clear and present danger" to the administration of justice, the

principle of scandalizing the court is addressed by laws. The question seems to be whether there needs to be a need and basis to develop international standards on the topic of contempt of court.

As far as Thailand is concerned, while contempt of court and scandalizing the court cases in the world is held because of verbal and written publications, how should dangerous and threatening cases in Thailand be dealt with? If the courts in Thailand are subject to political pressures against judges and attempts to discredit the judicial system as a whole are directed on purpose, should there be measures to adoption of new laws or establishing a special body to deal with threats to the security and independence of court judges?