

There are many ways of skinning a cat, my lord: humor in the Malaysian adversarial courtroom

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ABSTRACT

This paper examines verbal humor in courtroom interaction in Malaysia. The adversarial courtroom is normally described as a site of struggle as disputes are presented and argued, while frames of reality are built and challenged. Social actors construct, deconstruct and reconstruct narratives and at the same time, through strategic linguistic devices attempt to maintain their professional identities. Humor in the courtroom thus seems rather incongruous as the adversarial courtroom is usually characterized by multi-party discursive acts with both opposing parties having the aim of winning the case. The atmosphere is typically solemn and tense as lawyers ask and demand answers from witnesses, who are usually baffled by the rigors of the institutional talk. Despite this, laughter and humor are present at certain times and during certain occasions. The question is when is humor appropriate in a context of power asymmetry and contestations? Further, can humor in the Malaysia multi-cultural context reveal other strategies that are culturally oriented?

Keywords: courtroom discourse; humor; judicial opinion; legal ethnography; power

INTRODUCTION

The Malaysia adversarial courtroom has inherited the cultural legacy of British colonization, and as reported in many other courtrooms (Atkinson & Drew 1979; Mead 1985; Gibbons 1994) is usually described as a site of struggle where disputes are presented and argued, while frames of reality are constructed, deconstructed and then reconstructed. As the speaking social actors present and re-present their narratives through strategic linguistic devices, their professional identities are duly maintained (Gibbons 1994). Further, in giving the testimony, the witness will be engaged in verbal interactions with his lawyer, the opposing lawyer, and at times, the judge. This is especially so during cross-examinations as they are of high stake value to the witnesses as their credibility and veracity, and hence the evidence will be put to test.

In an earlier study of a criminal case in a Malaysian courtroom (Noraini Ibrahim 2007), the lead researcher observed that despite the culture of professional seriousness, there were, instances of occasional humor and laughter. It was also noted that the laughter was usually controlled and the humor generated seemingly appreciated usually by a few participants of the court, usually the speaking ones only and sometimes by all present. The presence of humor thus, begs to be investigated especially when humor is considered to be “possibly the most pervasive of all human emotions” (Duncan, Smeltzer & Leap 1990, p. 255).

A review of existing literature on courtroom and legal discourse (Atkinson & Drew 1979; Drew 1990; Gibbons 1994; Metzger & Beach 1996; Philips 1998; Matoesian 1993, 2001; Tiersma 1999; Cotterill 2002, & 2003; Coulthard & Johnson, 2010), however, shows that the presence of humor in the courtroom is still under-researched as compared to, for instance, the creation and maintenance of

institutionalized power and asymmetry. This lack, according to Hobbs (2006), is glaring because despite the approaches employed to study language in interaction (e.g. conversation analysis, ethnography and interactional sociolinguistics) that follow a strong sociological and ethnomethodological orientation (Drew 1990), there is no mention of humor in the interactions. One reason for this is that humor is context-bound (Holmes, 2000) and situation-dependent (Raskin, 1985). Further, in certain jurisdictions and Malaysia is one of them, access into the courtroom is not easy to obtain and data collection through recordings is not allowed (Mead 1985; Noraini Ibrahim 2007).

While humor may be a strategy for persuasive communication or rhetoric by lawyers, Hobbs (2007) however cautions that “... some lawyers may elect not to use humor because they feel that is not incompatible with the type of cases they handle, and the effect that they wish to create” (p.127). Hence, the experienced lawyer will have to psychologically gauge his environment and his intended audience (notably the judge and the opposing lawyers) before deciding on the use of humor (Hobbs 2007, p.129).

On the part of the bench, Tiersma (1999) reveals that judges do vary their tone and form in their interactions and decisions, and these include the use of humor, poetry and metaphor. However, humor is generally unacceptable but poetry and metaphor have their followers (Prosser 1952 in Tiersma 1999).

So, what is the position of the Malaysian court where humor is concerned? As the rather limited literature is from other jurisdictions, this paper has sought to enquire into the local context. However, as Malaysia is multi-racial and multi-religious with Islam as the official religion, the local context comprises both civil and *Syariah* courts. The civil court is applicable to all Malaysians for civil and criminal cases, with the exception of matters relating to Islamic family law, which comes under the purview of the *Syariah* court. The following research questions will inform the study:

1. When is humor appropriate in a context of power asymmetry and contestations?
2. Can humor in the Malaysian multi-cultural context reveal strategies that are culturally oriented?

REVIEW OF RELATED LITERATURE

As mentioned earlier, literature on humor in the courtroom is rather limited. A search on humor in the courtroom reveals two studies by a lawyer-linguist, Hobbs (2006; 2007). The first study enquired into the use of humor judges and the second, the use of humor by lawyers. In the 2006 study on judges’ use of humor in judicial opinions as a social corrective, Hobbs (2006) contended that:

“... some commentators have criticized judicial humor as inappropriate, arguing that a judge’s role is not to entertain, and that an opinion that ridicules a litigant or his case violates standards of judicial decorum and impartiality. This article challenges the view that a judge’s use of humor is necessarily injudicious, and argues that judges use humor as a social corrective to sanction wrongdoers and to deter others from engaging in similar conduct.” (ibid: p. 50)

In examining three judicial opinions, Hobbs (2006, p. 51) was highly critical of earlier findings and in her concluding remarks, she succinctly stated that judicial humor in the form of parody, ridicule and satire “can act to sanction counsel and/or litigants who take flatly supportable positions...” (p. 64) as well as “to provide the most effective means of enforcing legal norms” (p. 65). To sanction counsel and enforce legal norms, the presence of power asymmetry is crucial. Thus while humor may be perceived as light, it is not to be taken lightly and she stressed,

“...those inclined to view judicial humor as ornamental – a display of style, or perhaps, of cleverness - should recall that a judge is not free to make a joke instead of writing an opinion, and should look beyond the surface and consider the relationship of the humor to the substance of the court’s ruling. To label a judge a ‘judicial humorist’ for exposing abuses that might otherwise be ignored is to fail to appreciate humor’s moral force.” (p.67)

In the second study, Hobbs (2007) examined the use of humor in the courtroom by lawyers but not before acknowledging that:

“... there is no comparable body of scholarly examination of lawyers’ use of humor in their role as legal advocate. This omission is significant, because in the American legal system, humor and wordplay serve as highly-valued evidence of forensic skill which is deemed appropriate for display both within and outside of the courtroom...” (ibid: 123)

In the paper that dealt with ‘intentional humor’ and not slips of the tongue, Hobbs (2007:125) provided an explanation of what humor is (as contrasted from wit) from the *Random House Dictionary of the English Language* (1969, p. 692) that states

Humor consists principally in the recognition and expression of incongruities or peculiarities present in a situation or character. It is frequently used to illustrate some fundamental absurdity in human nature or conduct, and is generally thought of as more kindly than wit: a genial and mellow type of humor; his biting wit. Wit is a purely intellectual manifestation of cleverness and quickness of apprehension in discovering analogies between things really unlike, and expressing them in brief, diverting, and often sharp observations or remarks.

In her review of the functions of humor, Hobbs found that humor is useful in the repertoire of strategies of competent lawyers so as to ‘distinguish the truth from what is false, to demonstrate cleverness and wit, as a platform for instruction, as a vehicle for fostering solidarity and advancing group norms, and finally, the most important function in court, as a tool to destroy your enemies. In short, the aggressive function of humor was highlighted.

While Hobbs (2007) documented the use of humor in the courtroom, it is interesting to note that the findings are, to a large extent, similar to that of Holmes (2000), which examined the use of humor in situations of power asymmetry in workplace communication.

As a sociolinguist, Holmes (2000) attempted to examine the phenomenon firstly through Politeness Theory (Brown & Levinson 1987), but this approach was found to be inadequate in situations when humor was used for “barbed, competitive and confrontational humor” (p. 159). Hence, reference was made to enquire into ‘the dark side of politeness’ (Austin 1990 cited in Holmes, 2000), and of its use, she said

An alternative perspective thus examines the extent to which humor functions, especially in unequal encounters, as an acceptable strategy to help superiors maintain a position of power but also as strategy used by subordinates to license challenges to the power structures within which they operate, and as a legitimizing steady in attempts at subverting the repressive or coercive discourse of superiors.” (p.159)

Hence, Holmes’ (2000) inclusion of a more critical approach to the study of humor is relevant to this study as the data to be examined included not only lawyer-lawyer interactions but also those of lawyer and the judge. However, before moving on to the courtroom perhaps a reference to Duncan, Smeltzer and Leap (1990) is appropriate. This insightful study looked into humor and work and of relevance is the function of humor at the workplace, a study similar to Holmes (2000). This difference is, Duncan, Smeltzer and Leap(1990) defined joking and humor interchangeably and investigated the

impact of sexist and ethnic jokes as well a superiority and disparagement jokes, which in later studies were termed as contestive and repressive humor. Yet another contribution from Duncan, Smeltzer and Leap (1990:265, citing Lundberg 1969) is the presentation of four analytical categories of individuals involved in a joking behavior, which is as follows:

1. Initiator. The person who tells a joke or starts the humorous episode.
2. Target. The person to whom the joke is directed. In most cases the target is the person to whom the joke is told.
3. Focus. Commonly called the ‘butt’ of the joke. This is the individual to whom the joke is directed.
4. Public(s). This individual or group beyond the initiator, target and focus who observe or hear the joke.

The above categories are interesting and useful as they may represent the participants’ role in the courtroom. Nevertheless, what is important is to note that despite the rather solemn nature of the courtroom, humor does play a role, even if it is only in certain circumstances.

DEFINITION OF HUMOR

There are several definitions of humor (Attardo, 1994; Holmes, 2000; Norrick, 1993) and there are also manifestations of it. Attardo (1994) and Norrick (1993) are of the view that humor is commonly manifested by laughter but in the courtroom, Hobbs (2006) reported that judges would acknowledge humor by adding to the humorous contributions (Hobbs, 2006).

The present study will however, employ Holmes’ (2009:163) definition where instances of humor are “.... utterances which are identified by the analyst, on the basis of paralinguistic, prosodic and discursal clues, as intended by the speaker(s) to be amusing and perceived to be amusing by at least some participants”. As such, the researcher-analyst, who was present throughout the trial, played a crucial role in identifying what is ‘humorous’ and what is not. The clues mentioned above thus included laughter from the ‘public’ (or non-speaking participants) and target, a wry smile from the initiator as well as quick and amusing retorts from the target and even the judge. The inclusion of the analyst in this definition is rather insightful because besides being present during the trials and data collection procedures, this lead researcher had also transcribed and analyzed the data. Her intimate knowledge of the interactions is crucial in a context that disallowed recordings. The data that also included ethnographic notes were crucial to determine the instances of humor, notably when there was an absence of overt act of appreciation of humor.

BACKGROUND AND SETTING

The data presented here were taken from two jurisdictions - a criminal high court and a *Syariah* high court - a parallel system that makes up a holistic Malaysian legal system.

In the case of the civil (non-*Syariah*) courts, they have, to a large extent, been inspired, influenced and modeled after the British common law adversarial system with two main characteristics that set it apart from its western counterparts: trial by judge not jury and the absence of court recorders or clerks. The sole judge thus bears a heavy burden to hear and pass judgments and inevitably assumes a pivotal role in the court. Despite this heavy judicial responsibility, the absence of recorders makes it necessary for the judge must take his own notes of proceedings by hand. These courts deal with the majority of laws - contract, torts, commercial cases, property, succession of property, crime and constitutional and administrative cases.

The *Syariah* courts, which are applicable to Muslims only, are under the purview of the state enactments and deal mainly with Islamic family law (divorce, marriage and disbursement of property) and some criminal offences relating to the practice of Islam. While this study is focused on humor in Malaysia's multi-cultural context, the choice of the *Syariah* court as another site of enquiry is deliberate as the researcher was also interested to see how humor (if it is present at all) is dealt with there.

RESEARCH DESIGN

A qualitative research paradigm was adopted for the study. In both jurisdictions, in-depth *in-situ* ethnographic observations were carried out. In many jurisdictions outside Malaysia, courtroom observations have been carried out in tandem with recordings, either audio or video. In Malaysia however, the criminal courts do not allow any recordings at all but in certain civil courts this is permitted but only by court personnel for the use of the litigating parties, not researchers.

In the *Syariah* court, audio recordings are permitted after obtaining permission from the presiding judge. The equipment must be however, placed at the front table with the court personnel. This proved to be a challenge to the researchers, who were directed to sit in the female section of the public gallery. As this jurisdiction is for Muslims, the participants observed during these sessions were Malays and converts and the proceedings were conducted in Bahasa Malaysia and Arabic.

In the civil court, the data were collected from a single intrinsic case over a three year period, which was also the unit of analysis. It was a murder trial involving a multi racial mix of participants. The judge was of Indian descent, the accused was a Chinese Muslim, the lead defence counsel was a Malay assisted by a Sikh, an Indian and a Chinese. The prosecution team of four was Malays. The witnesses comprised several Chinese, Malays, Indians and a Sikh while two of the expert defence witnesses were British. As it was a high court, much of the deliberations were conducted in English, with permission from the court.

Legal ethnography was made possible due to the long and extended trial allowed for close observation of the discourse, interactants and setting. Verbatim notes, field and ethnographic notes were taken and documents were collected and perused. In some rare instances several of the parties were also interviewed.

For a period of six months in 2008, the lead researcher sat in the courtroom (initially with a co-researcher) and observed many cases, but due to the frequent postponements and long periods of adjournments, the researcher was not able to follow one complete case. Nevertheless, the cases observed included matrimonial cases of applications for polygamy, distribution of matrimonial assets upon divorce and custody of children.

In the civil court, the researcher took down the interactions verbatim by hand (using Pitman shorthand) and these notes were then duly transcribed and coded. In order to verify the credibility of the notes, court 'transcripts' were procured from the Registrar. However, it must be noted that these transcripts were the judge's notes of proceedings and not transcripts taken down by court clerks verbatim as is the practice in many jurisdictions. The researcher acknowledges this as a limitation to the study, but this scenario has not changed since 1985 when Richard Mead first investigated courtroom discourse as part of the British Council–Universiti Malaya Spoken English Project (UMSEP). Hence, to avoid the critics of anecdotalism, the researcher compared her notes with the judge's notes of proceedings (with permission) as well as those taken by the parties' counsel. As the researcher converted the notes into data, the emergent themes were identified, and triangulated with data from interviews, the perusal

of documents (statutes, notes of proceedings from the prosecution and witnesses, expert medical and forensic reports from the expert witnesses, and the decision of the case).

In the *Syariah* courts however, audio recordings were allowed (with consent from the court), and so transcriptions were carried out and then triangulated with the ethnographic notes taken by the researcher. The realities faced by scholars attempting to document legal discourse are thus very real. However, in the current study, because in all the instances when the data were collected, the researcher/analyst was the one who had collected them, she became very close to the data, a feature deemed important by Holmes (2000:163) in the course of coding, analyzing and interpreting the data.

DATA ANALYSIS

Once the data were transcribed and coded, the interactions were carefully studied. These were then triangulated with the field notes where the lead researcher/analyst had indicated the instances of humor vis-à-vis laughter (Attardo1994), or the judge's responses (Hobbs, 2006). The instances were then organized and the themes identified. They will be discussed in the next section.

FINDINGS

This section will present the findings in relation to the research questions. A keen perusal of the data revealed several emergent themes. However, as the courtroom is rather foreign to many researchers, a short discussion of the context will be provided. This will be followed by the findings on the instances of humor and its role in the courtroom. Interestingly, instances of humor are usually episodic, in that they occur just before and towards the close of the proceedings. However, on certain occasions humor might be injected mid-way through the questioning process. Additionally, in the multi-cultural Malaysian courtroom, culture does play its role in the manifestation of humor.

OPENING AND CLOSING RITUALS AND THE RESULTANT MOOD

It was observed that despite both courts having a solemn and formal atmosphere, in relative terms, the *Syariah* court was the more somber. This is interesting because the case that was heard in the civil court was a murder case, a capital offence while the cases heard in the *Syariah* courts were issues of family law. However, the researcher observed that the opening rituals of the *Syariah* court could be the reason for this. The *Syariah* courts opened with a prayer (*al-Fatihah*) and a *Salam* (greeting in Arabic) that seemed to set the tone of the proceedings. Once both counsels had introduced themselves and the parties they represent, the witness was then called to testify. It is imperative for a witness to articulate the *Syahadah*, to prove that he is a Muslim and is thus subject to *Syariah* law. While this should not be an instance of tension or hostility, in a case observed that dealt with *harta sepencarian* or matrimonial assets involving a Chinese Muslim convert (wife/ defendant) and a Malay Muslim male (husband/plaintiff), the judge had to adjourn the proceedings due to the failure of the plaintiff to recite the *Syahadah*.

In the case of the civil courts, the opening ritual begins with the calling of the case by the court interpreter. There is no formal greeting but once the judge is seated and gives the 'signal' that he is ready (usually with eye contact) the proceedings will begin. This is followed by the introduction of the parties by the Deputy Public Prosecutor, who will introduce himself and then he will proceed to

introduce his adversary. The witness will then be called to the stand and while the entire procedure is not marked, it is very similar to all jurisdictions that have adopted the common law.

In the case of the closing of proceedings, both the civil case and the Syariah will mark it with the release of the witnesses. If a decision or judgment has been delivered, the civil proceedings will end with an unmarked departure of the judge. In the case of the *Syariah* court, the judge will recite *Alhamdulillah* (*Praise to Allah*) followed by a gesture of thanking all parties for agreeing to the decision and ending with a recitation of a prayer for the well-being of all. It could be said that the atmosphere of the *Syariah* courtroom is a ‘product’ of an understanding that there is a divine overarching presence, and that the participants, the judge included are subjects to Him.

HUMOR AT THE BEGINNING OF THE TRIAL

In the civil court, as the proceedings developed and many eye and expert witnesses were called, the researcher/analyst observed that the initial tense atmosphere gradually became more relaxed despite the nature of the offence (murder) and the constructions, deconstructions and reconstructions of evidence. Interestingly however, unlike the case of lawyer Melvin Belli (cited by Walsh 2004, in Hobbs 2007) who opened trials with a joke, the data in Excerpts 1 and 2 reveal that the initiator (Duncan, 1985) was the judge. It was done on a seemingly administrative capacity of getting the setting for the day to day business ready (Holmes 2000) as seen in the excerpts below.

Excerpt 1:

Context: Prior to the direct examination of a key defence expert witness, DW3 both the prosecution and defence counsels concurred and found that they had a long way to go and that they should apply for the court to block out dates.

1		My lord (.) before we start (.)
2	Defence:	I think it will be a good idea if we fix a date (.)
3		the DPP and I have discussed that we =
4	Judge :	= Plead guilty? (laughter)
5	Defence	The DPP and I have discussed and (.)
6		we could start next week if the court can accommodate
7		(Looks into his diary)
8		You have to ask the interpreters whether they have any objections (.) (looking at counsel
9	Judge	and then Interpreters)
10		ask the Punjabi there (refers to junior defence lawyer)
11		How long is this going to go on?
	
12	Defence	I think three days for both parties (.) I think we should close the case (.) critical /part/
13		
14	Judge	/Go/ and ask the lawyers what they say (.)
15		How would you like if your case is postponed?
16	Defence	Sometimes I would be happy sometimes not

In this case, the judge had allocated 14 days for the trial, which, as observed, was the ‘standard’ time frame set for a murder trial. However, as the trial progressed and with the calling of many expert witnesses and longer examinations, it was obvious that the case could not be completed as scheduled. This was because both parties were allowed to call witnesses and produce evidence not already submitted, a phenomenon called ‘trial by ambush’ (Noraini Ibrahim, 2007) which is unlawful in other Commonwealth jurisdictions. Therefore, as both counsels had deliberated, and the defence (line 3) had intended to present a joint proposal which was in line 4 was followed by a contiguous utterance by the judge. Now, the utterance ‘plead guilty’ invoked a script, which is incongruous to the fact that the defence’s plea is ‘not guilty’ and that more witnesses will be called to this end. The laughter in the courtroom that followed indicated that that judicial utterance was understood by all, not as an attempt to make light of the matter (a capital offence) but to show that they understand that a long trial loomed ahead. In this case, there was no metastatement of a joke but the duality of meanings (Levine 1969) was not lost on the audience.

Yet another observation can be seen in line 10. The reference to ‘that Punjabi’ is an ethnic identification, which may not happen in other jurisdictions. Data from the observations throughout this trial revealed a pattern where this judge would banter ‘friendly jokes’ with ‘the Punjabi’ as his focus (Duncan 1985) and the defence team, his target. The Punjabi was the most junior member of the defence team and as such was always at the receiving end of the jokes. In multi-racial Malaysia, the Punjabis are a minority group, and because the forefathers hailed from Punjab, they are classified as Indians. As the males wear the turban, they are distinct from other Indians.

Excerpt 2:

Context: This episode was before the second endocrinologist (DW7), another key defence expert witness was called (the first being DW3 in Excerpt 1). The defence had tendered a book written by DW3, which was read by the judge.

1	Judge	Who is the next witness?
2		I like this book very much.
3		Have you read the book?
4		I strongly recommend that book particularly from page 7 to 100.
5		I strongly recommend.
6		The next endocrinologist who comes and for knowledge on hypoglyc-
7		emia (.) hypoglycemia need not ask (.)
8		I have the found book (.)
9		I’ll put it to them

Excerpt 2 is more direct in meaning and is more repressive (Raskin 1985) but because the producer (Duncan 1985) of humor was the judge, the ‘veiled’ intent is interesting because it displays the power and degree of coercion emanating from the judge. In this excerpt, as the judge took his seat, and raised the query in line 1, it is noted that he did not allow for a pause that ought to signal an allocated turn for the counsel. This showed that he was not interested in a response. What he was seen to be doing was to ‘warn’ both counsel and the next expert witness that his medical knowledge had been enhanced due to his reading and that he could, if he so wished, take over the questioning if the counsel proved incapable.

The underlying proposition that a judge may preclude an expert is based on the role of the expert witness, who is not an eye witness, and so is not directly linked to the trial. An expert is summoned

by the court to render ‘assistance’ through his opinion, on issues related to his expertise. So, where is the humor here when there is an absence of laughter? The lead researcher /analyst believes that in lines 6-7, there is an incongruity for the appearance of the witness, and a proposed unfold-the role–replacement of the counsel by the judge (line 9). These are instances of humor. One also notes the repetition of the utterance in lines 4 and 5, “I strongly recommend”, as well as “I’ll put it to them” (line 9) are constructions of coercive humor (Thomas 1995: 125). Again, they are enacted through the asymmetries of power within an institution.

HUMOR AT THE END OF THE DAY’S HEARING

In Malaysia, a day’s proceedings (of a long trial) in the civil court may end in an unmarked fashion, especially if the judge or counsel, or both are tired. The judge may just close the hearing abruptly by announcing that he is tired, and then the counsel will refer to the court registrar for the date to continue. However, in several documented instances, the closing may be preceded by a ‘final’ word play. Let us look at Excerpt 3.

Excerpt 3

Context: This is from the cross-examination of a defence forensic chemist, DW 8, who was examined on the calculation of the peak point for alcohol absorption. The witness had tendered a report which was being closely perused. At this stage the witness seemed to be evasive on the procedures and the court seemed to be getting impatient.

1	Judge	:	... It’s from the number of ethanol volume right?
2	DW	:	We have the formula my lord
3	Judge	:	Where? What formula?
4	DW	:	My lord the calculations are performed from these two graphs
5	Judge	:	From where? Your pocket?
6	DW	:	From the weight of the body and alcohol in the blood
7	Judge	:	What is the next question? (Judge sees no reason to continue this line of
8	Judge	:	questioning)
9	DPP	:	My lord can we stop here?
10	Judge	:	(to defence) your next witness is?
11	Defence	:	Here my lord
13	DPP	:	My lord I haven’t finished with him
14	Judge	:	Yes, after finishing him (.) tomorrow

It is interesting to note that this cross-examination of the defence witness was taken over by the judge from line 1. The prosecution could only reclaim his turn in line 9. If one refers to literature from other jurisdictions that practise the adversarial system, such taking over of the questioning is usually avoided (Bogoch, 1999). However, in this case, the opposite is true.

The judge was also seen to be dissatisfied with the evidence given by the defence witness. Hence in line 10, when the judge asked for the next witness, the prosecution in line 13, wittingly or unwittingly said, ...*I haven’t finished with him*, thus resulting in a play of words ‘...*yes after finishing him tomorrow*’ (line 14). This humor would be lost if one is unaware of the fact that this witness

is an expert witness, who was summoned to court to assist the defence. As the witness seemed to be unfocused, he was not helping the case or himself. In such case, his credibility as an expert witness may be destroyed. Here is also an example of indirect aggressive humor because the focus of humor is not the addressee (the prosecution).

Aside from the ‘schedule-related’ instances of humor, the overt expressions of judicial power in the civil court, data from the latter court revealed yet another interesting finding.

HUMOR, CONTROL AND THE LEGAL DISCOURSE COMMUNITY

It was observed that in the civil court, the speaking parties, notably the defence team and the judge were competent users of English. Humor was thus employed to achieve their professional goals in a context that Hobbs (2007) described as “fast-paced repartee to denote the ability to ‘think on one’s feet’ that is critical to courtroom success” (p. 126). When one party is able to ‘think on his feet’, he loses control. The following excerpts will demonstrate how this ability to ‘think on one’s feet’ may be due to lack of competence (an understanding of the culture of the discourse community) while another may be due to the lack of competence in English. Let us illustrate this in excerpt four.

Excerpt 4:

Context: This is a continuation of Excerpt 2. The court had to date called 2 defence medical experts earlier. This third defence medical expert, the second endocrinologist, DW7 approached the witness box with a lot of books and the judge was observed to be keenly looking as she struggled with them. Once she was seated, the interactions began.

1	Judge :	Your witnesses are all coming with a lot of books
2	Defence:	Yang Arif has frightened them with all your searching questions
3	Judge	... One thing Dr I admit you doctors (.) you never put down another doctor and
4		you would say it beautifully
5	Witness	If I may we classify=
6		=We adjourn for a short while (.) you have the book by Prof.
7	Judge	Marks pages 90 to 91?
9		(Witness nods) have read?
10	Defence	She has read
11	Judge	Not to test you but to educate myself
12	Witness	I think you are very educated
13	Defence	Yang Arif (.) are you trying to get medical advice?
14	Judge	No

In Excerpt 4, Line 1 was addressed to the leading defence counsel and the proposition was, *do experts need books?* The incongruity is thus based on the presence of an expert, who may be ‘frightened’ by the ‘searching questions’ of the judge, a non-expert. But the need for such books is not lost on the judge, who in lines 3-4, took cognizant of the non-contestation stance of medical experts. In line 5, an attempt to explain by DW7 was quickly cut by the judge indicating that he did not need yet another explanation. Instead, the question raised in line 7 and quickly answered by the counsel is interesting. Why was there a need for the counsel to answer on the expert’s behalf? This imposition

by the counsel was not lost on the judge who said, “*Not to test you but to educate myself*” (line 11). At this point, it is pertinent to mention that as the trial unfolded, the defence of hypoglycemia became very interesting because it is also a condition of low blood sugar that is symptomatic to diabetics. Now much of the humor generated which may appear malicious and ill-placed in relation to hypoglycemia must however, be understood within the context, and here it refers to the context of the participants - both the judge and the lead prosecutor are diabetics, as revealed in the discourse produced. Hence, line 13 by the defence counsel was an instance of humor that was more of a tease, not a challenge from a subordinate to a superior, and must be read with an understanding of the context of the discourse.

As both counsel engaged in verbal battles during the constructions of realities in the courtroom, competence in the language used is a factor in the use of humor. This is a feature not observed in the literature reviewed in the earlier section (Hobbs, 2006; 2007; Holmes, 2000 for instance), because they were in jurisdictions where English is the first language. Hence, in the Malaysian civil court, and in the instant court observed here, English was used during examinations with the expert witnesses (see Noraini Ibrahim, 2008 for use of language/s), albeit with the court’s permission. It is noted that due to the confrontational approach to contested claims, the defence counsel would use humor as social control (Norrick and Spitz, 2008) to disparage his enemies. Let us look at the following excerpt.

Excerpt 5 :

Context: This was the direct examination of defence eye witness, DW5. He was one of those who had lunch with the accused. It was a lunch that stretched from 1.30 to 7pm where alcohol was consumed.

1	Defence :	Now I want to ask you a very direct question Mr. Tan (.)
2		Kenny somehow or other got involved in an incident about 8 o’clock (.)
3		When Kenny left at 7 pm was there anything in his behavior that now make some
4		sense to you?
5		Was that (.) Kenny normal? (.)
6		Kenny going to his car?
7		
8	Witness :	Just normal
9	Defence :	Just normal (.)
10		You know when people drink they sometimes speak more =
11	DPP :	=My lord he is leading
12		the witness.
13	Defence :	I can ask (.)
14		How was Kenny’s speech? There are many ways of skinning the cat!(turns to the
15		gallery and smiles)
16		But I will be very happy (.)
17		How was Kenny’s speech at 7 pm did you talk to him? _____ How was his
		speech?
18	Witness :	As usual.

This excerpt is a very good example of the court control exhibited by the defence counsel throughout this trial. He was observed to be flaunting his linguistic ability – to cajole and persuade his friendly defence witnesses and to coerce his hostile adversarial [prosecution witnesses. The reality constructed through his direct examination of the witness was of the defendant leaving the restaurant unaffected by the drinks (type and volume) consumed. The use of line 1 is interesting. Why did the lawyer mark it with a metastatement? The proposition is that it is a direct question and not an indirect

one. However, the defence counsel did not get the response that he wanted, and so in line 10, despite its declarative form, the prosecution objected to line 10 on the basis that it was a leading question (lines 11-12). A leading question (line 10) is one where the question is embedded with an answer, so it leads the witness to the answer that is ‘wanted’ and is thus not allowed. So, in line 13 the counsel signaled that he was capable of rephrasing, and he did so in line 14, but added, “*There are many ways of skinning the cat*”, in a ‘good-humoredly’ fashion but by turning to the gallery and smiling, he had created a triangular relationship between him, his target (prosecutor) and the audience (Duncan 1990; Mulholland, 1994 cited in Hobbs, 2007). At this point the defence could be mocking and ridiculing his opponent and not taking him seriously, and the use of the proverb is his way of putting the showing just how incompetent the adversary is, in terms of advocacy skills and language competence.

The asymmetries in competence and hence power and control mentioned above can be seen in Excerpt 6 that follows.

Excerpt 6:

Context: This is a direct examination of the prosecution rebuttal expert witness.

1		Now (.) we have come to a specific condition (.)
2		And you said that the person does not suffer hypoglycemic condition right after
3		lunch (.)
4		Now (.) the accused person the accused person Dr. N. (.)
5	DPP2	got that condition in the sense that (.)
6		from the notes of evidence in the past(.)
7		he is a person who is healthy (.)
8		what I’m trying to say is that (.)
9		this person who is of that background
10		What background?
11	Judge	It is very vague!(.)
13		You can ask his physical condition (.) medical condition
14	DPP2	Now I would ask him the other way round
15	Judge	<u>You are giving the answer? (laughter from all)</u>

Here the prosecution was attempting to show draw evidence (from the rebuttal witness) that it was impossible for a documented healthy person to suffer post-lunch hypoglycemia, as shown in lines 1-9. This drew a remark from the judge in lines 10-11, followed by a directive in rephrasing of the question in line 13. However, in line 14, instead of just asking the question, the prosecution attempted a metastatement, with, “*Now I would ask him the other way round*’. If this counsel had paid attention, the judge had, in the preceding utterance, said, “*You can ask his physical condition*”, the key words being, *You can ask....* Hence, when the prosecution said that “.... *he would ask the other way...*” the very witty judge rose to the occasion and delivered, “*You are giving the answer?*” in line 15, followed by laughter from all. Yet again, the humor is in the role-reversal of the questioner-questioned. This judicial behavior is similar (albeit in different domains) to that of Pizzini (1991) who found that gynecologists used humor to stop “patients from rambling and to move them along” (p. 477).

From the observations too, the researcher/analyst believes that one of the reasons for laughter from the gallery is also because the target of the judge’s wit was the prosecution, on whose shoulders, the responsibility of proving the crime of the accused was borne. The gallery, as observed by the researcher, comprised mainly, the Other - friends and family members of the accused. Hence, any

faltering or inadequacies by the prosecution would provide ‘relief’ to the family and friends of the accused.

HUMOR IN THE SYARIAH COURT

The description of the setting provided above is a reflection of the solemn atmosphere at the Syariah court, amplified by the contentious family law issues of polygamy, divorce, maintenance and custody of children. The researcher/analyst observed only a few instances of humor or laughter, and such episodes were very brief. Let us turn to Excerpt 7 which is, as Hobbs (2006) described, a judicial corrective.

Excerpt 7

Context: This was taken from a Syariah case, *Baharudding bin Che Man lwn Siti Ramlah bt Suhaidi*, in which an application was made to register a polygamous marriage. The case was heard because the first wife did not give consent, a prerequisite in the Selangor Enactment. The data is the interaction between the applicant and the judge, in Bahasa Malaysia, the national language with translations in italics.

1	Applicant	<i>Ya Yang Arif kami datang nak daftar perkahwinan kami</i> Yes, my lord we are here to register our marriage
2	Judge	<i>Isteri? Ramlah?</i> Wife? Ramlah?
3	Applicant	<i>Ramlah?</i> Ramlah?
4	Hakim Judge	<i>Ya</i> Yes
5	Pemohon Applicant	<i>Dia tak nak ikut tak tak nak</i> She doesn't want to come no no doesn't want to
6	Judge	<i>Kenapa?</i> Why?
7	Applicant	<i>Dia tak nak</i> She doesn't want
8	Judge	<i>Isteri tak datang kan? Masa serahkan surat ini isteri tak datang kan?</i> Wife didn't come right? When you submitted this wife didn't come?
9	Applicant	<i>Tak</i> No
10	Judge	<i>Kenapa?</i> Why
11	Applicant	<i>Tak tau dia</i> Don't know what's with her
12	Judge	<i>Isteri tak setuju?</i> Wife didn't agree?
13	Applicant	<i>ya erm tak tahu:: dia serah</i> <i>ya erm don't know:: she left it...</i>

		<i>Dia kena datang ni sebab dalam proses ni ada kaitan dengan (...)</i>
14		<i>apa apa nafkah dia harta sepencarian jadi kena jawab (.)</i>
15	Judge	<i>kena bawak dia datang</i>
16		She has to come because this concerns her (...) whatever maintenance matrimonial assets (.) so she has to come (.) she has to answer (.) you have to bring her
17	Applicant	<i>Dia tak nak</i> She doesn't want <i>Kena usahakan (.)</i> <i>kalau isteri kedua boleh diusahakan (pemohon ketawa kecil dan hakim dan</i> <i>pegawai tersenyum)</i> <i>satu lagi peluang kepada defenden</i>
18		
19		
20	Judge	You have to make an effort (.)
21		If you can make the effort to get a second wife (applicant giggled at the insinuation while the judge and court officers gave a rather amused look) surely you can give the defendant a second chance.

Polygamy or the taking of more than one wife (to the maximum of four) is sanctioned in Islam. However, the Selangor state deems that in order to marry a second wife, a man must obtain the permission of the first. This involves the appearance of the first wife. While polygamy is allowed, obtaining the permission may not be easy and men have been found to attempt circumventing the procedure.

The proceedings began with the judge ascertaining the identities of parties as the applicant had come with a woman whom the judge initially thought was the first wife. Hence, line 2 ‘*Wife? Ramlah?*’ was repeated by the applicant as she was not present. Since this application made at the Shah Alam *Syariah* High Court, it came under the jurisdiction of the Selangor Enactment, compelling the first wife’s consent. It would appear that the applicant had wanted to circumvent the issue by imputing the blame of absence on the wife and feigning ignorance on his part (lines 11 and 13). However, as polygamy has great repercussions on family life and administration of matrimonial property, for instance, the court did not budge but patiently explained to him the importance of her presence so that her rights would be protected. Therefore, in line 18, the applicant had to admit that the wife was not in favour of this application.

This did not escape the judge’s attention and in line 19, the judge implored him to ‘make an effort’ as he did when he ‘procured’ a second wife. The giggle from the applicant and the resultant smiles from the court officers from the humor generated are interesting. The applicant probably thought that the whole episode was amusing to the court as the judge made a rather humorous response, but that smile could also be culturally construed as a nervous Freudian response as the applicant was aware that it was most probably an admonishment.

The finding of an admonishment could be discerned because firstly, in Islam, one should not shame another publicly. Such a view is also a practice in Malay culture and instead of direct admonishment, the use of indirect, tactful and subtle language is usually used. Hence, in this example, the judge seemed to have used humor to mock and admonish the applicant by alluding to the ‘great’ effort he seemed to have expended in getting a new wife, which he could now also use in bringing his first wife to court. Such insights could only be gleaned if the researcher/analyst shares the same cultural code as the participants. Such insider interpretations of culture-sensitive expressions and behaviors cannot be based on linguistic elements only. Again, the role of the researcher/analyst is crucial.

HUMOR AND COURTROOM CULTURE

At this juncture it is interesting to compare how both courtrooms in Malaysia deal with humor. The findings revealed that both courtrooms are reflections of the cultural norms that are prescribed by the nature of the legal system. The discourse produced in the civil court adheres to the formality of the English courtroom's norms and values that allow for adversarial proceedings between the parties, with the judge as the most powerful participant having the final say. Hence as observed by Tiersma (1999) humor may be pursued, tolerated, quick puns exchanged, and laughter produced.

The *Syariah* courtroom, on the other hand, subscribes strictly to the Islamic code of conduct, and this means the mood is one of seriousness. However, when humor is produced, there is no real reference or acknowledgment of it in terms of marked laughter. The participants, would however, react in measured tones, and the resultant effect is usually a smile or exchange of quick glances by the court staff.

DISCUSSION

So when is humor appropriate as the judge, lawyers and witnesses negotiate meaning during episodes of contestations and power asymmetry? Further, what other functions does humor serve?

The findings from the civil court and to a lesser extent the *Syariah* court, allude to instances of institutional humor being employed by good managers, namely to get the day's business off to a good start (Holmes, 2000 for instance). The judge in many ways is a manager and a disciplinarian with the power to control the participants. This leads to an interesting finding. Unlike in the United States where judges are not allowed to actively participate in the proceedings (Bogoch, 1999), or Prosser, (1952 in Tiersma, 1999), the judge here was not content with merely writing down notes of proceedings but as shown in Excerpt 6, when the end of the day neared, the judge almost took over the questioning, akin to that of the inquisitorial court. This finding, according to Bogoch is similar to that of the Israeli courts.

Secondly, and contrary to the findings from Prosser (1952 in Tiersma 1999), both sites of enquiry reveal an acceptable level of humor and at times, such humor provides a welcome reprieve. However, this could be attributed to the fact that there was no belittling of witnesses or evidence, nor was there any bawdy or jocular humor that was intended to 'injure' anyone. The absence of sexist jokes could also have contributed to that tolerance.

In several of the excerpts above, one also notes that the initiator was the judge and in the multi-racial Malaysian courtroom where the judge is the most powerful participant, who is not subject to any of the turn taking rules, he definitely had the freedom to create humor as he so pleased. Interestingly, while there was an absence of jocular humor, in the civil court, the judge did exercise his liberty by invoking ethnic-based humor on the Punjabi in Excerpt 1. This episode was tolerated by all the participants. Why is this so? One argument could be the powerful-powerless argument (the focus is a junior defence lawyer under a rather strict lead counsel), or perhaps it could also be the case that the defence did not at any time want to earn the ire of the judge. However, what was observed seemed to point to the fact that it was not done 'to injure' the party, but a moment's reprieve and due to the rather light-hearted manner with no excessive deliberation of it, it was allowed to pass.

Interestingly, in relation to function of humor, even if it was subtle, the data revealed that competence in English in the civil court is ideological. The researcher observed that despite Bahasa Malaysia being the official language, English was widely used by the participants. The lead defence counsel, a highly competent user of the language used it quite dramatically. His reference to the

proverbial ‘skinning the cat’ was one such instance. On another instance, he used ‘what is sauce for the goose is sauce for the gander’. It was observed that his competence in English, accompanied by his use of puns and wit, was ably matched by the judge but unfortunately not by the lead prosecution counsel. The lead counsel’s humor can be seen in line 13, Excerpt 4, when he playfully chided the judge for asking questions that border medical advice, as the judge is a known diabetic. But this word play seemed to be beyond the prosecution counsel as seen in lines 13 and 14 of Excerpt 3, with a word play of *finished* and *after finishing* him. There was an absence of retort and acknowledgement of word play from the prosecution.

Interestingly, the occurrences of humor in both courtrooms were not long and labored, which readily proved that such instances were not the ‘meat of the matter’, but a brief interlude. As humor is culture based, it is also important that the researcher/analyst and the parties share the same cultural code. As Holmes (2000) has shown the role of the analyst in determining humor from the data is crucial, we would argue that sharing the same cultural code is also important, especially in multi-cultural contexts where parties adhered to their cultural or religious norms. Hence, what may seem to be humorous could be that and more.

Finally, the researchers believe that where the research design is concerned, inability to record the interactions is a limitation, but with her presence and keen ethnographic observations of the proceedings, and her close proximity with the data, that liability was minimized. It is apparent that there is a need for the researcher to gauge firsthand the responses or feedback, through laughter, smiles or other gestures.

CONCLUSION

This paper argues that humor in the adversarial, multi cultural and multi racial civil courtroom functions in various ways. For the judge, humor allows for the sanctioning of behavior, provides relief during lengthy cases and allows for the human touch in an otherwise tense and hostile courtroom. For the lawyers, contestive and repressive humor allow for an opportunity for bravado and stage-like presence, in scenarios of power asymmetry when possible. For the overhearing audience, humor allows for a reprieve and an opportunity to respond emotively through laughter at an otherwise formal setting. In the *Syariah* courtroom, brief and subtly realized humor the judge to admonish certain behavior, albeit in a gentle way, in adherence to religious norms and principles. This study is a preliminary one, but the researchers believe will open the door to the studies of many other facets of humor in the courtroom that must be investigated.

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Transcription Conventions

Participants: Cases were heard in an open court so parties are named accordingly

(.) pause of less than 3 seconds

(laughter) - ethnographic notes by the researcher who observed laughter

/ / overlap

= contiguous utterance

Italics are for interaction in Bahasa Malaysia

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