

**AN EVALUATION OF THE LAW OF CONTEMPT IN ZAMBIA:
IMPACT ON FREEDOM OF EXPRESSION; PERSPECTIVES AND
PROSPECTS**

BY

**IDAH LOYIWE MANGANI
91205247**

UNZA 2011

DEDICATION

To my precious beloved daughter Nawa for her love and support and for giving me the reason to carry on. May this work inspire her to achieve even greater academic heights.

To my late Parents Mrs. Joyce Mwale Mangani and Mr. Dominic Mangani for their love and for instilling in me the true values of life and all that I am. Your memory lives on.

**AN EVALUATION OF THE LAW OF CONTEMPT IN ZAMBIA:
IMPACT ON FREEDOM OF EXPRESSION; PERSPECTIVES AND
PROSPECTS**

**A DIRECTED RESEARCH SUBMITTED TO THE SCHOOL OF LAW OF THE
UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF THE AWARD OF
THE DEGREE OF BACHELOR OF LAWS (LL.B)**

BY

IDAH MANGANI

91205247

UNIVERSITY OF ZAMBIA

APRIL 2011

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the directed research prepared under my supervision by

Idah Loyiwe Mangani entitled:

AN EVALUATION OF THE LAW OF CONTEMPT IN ZAMBIA: IMPACT ON FREEDOM OF EXPRESSION;PERSPECTIVES AND PROSPECTS

Be accepted for examination in partial fulfilment of the requirements of the award of the Bachelor of Laws Degree of the University of Zambia. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing directed research essays.

C. Chitupila

Ms. C. Chitupila
(SUPERVISOR)

20.04.2011

DATE

20/04/2011

Date

[Signature]
Signature

ACKNOWLEDGEMENTS

I **Idah Mangani (Computer Number 91205247)** do hereby solemnly declare that the contents of this directed research are my own work. To the best of my knowledge, this dissertation has not been previously presented for a degree to any University. Due acknowledgment has been given to the numerous literal works referred to.

I therefore take full responsibility for the contents, errors, defects and omissions herein.

My profound gratitude is extended to Professor Muna O. Njoroge for inspiring and encouraging me to take up the challenge of the study, for his guidance and generosity in assisting me with relevant material resources. I will remain eternally thankful.

Sincere gratitude is extended to Professor Ian Crane, Leeds University, U.K. for having so generously availed me his rich literal works on contract law in the U.K.

I am indebted to the Dean and all the members of staff in the law school for their part in imparting me with the knowledge of the law.

Profound thank you to all the people who accorded me the opportunity to interview them and provided useful information for the study: Mrs. Daisy Ng'ambi, Mr. Stephen Lungu, Mr. Enoch Mulembi, Mr. Goodwill Lungu, Mr. Francis Mwale and Mrs. Jane Chirwa.

To Mrs. Phiri, Senior Clerk of Court, I am immeasurably thankful for so kindly helping me with case records and availing me use of your office at short notice.

To my precious daughter Nawa, who had to endure prolonged periods of my absence and inattention for the past five years, while I pursued my law studies, you gave me the reason to go on, thank you so much for being the light in my life. I love you. My late husband, I thank you for giving me some of the best moments of my life. To all my friends and family, thank you for the support and encouragement throughout this journey.

20/04/2011

Date



Signature

ACKNOWLEDGEMENTS

First and foremost, I thank my Lord God Almighty for having seen me through and brought me thus far. Many were the trials, but He is always faithful. Romans 8: 28.

I am sincerely thankful to my Supervisor Ms. Chitupila for her guidance, qualitative critic, counsel and direction that shaped this paper.

My profound gratitude is extended to Professor Muna B.Ndulo for inspiring and encouraging me to take up the challenge of the study, for his guidance and generosity in assisting me with relevant material resources. I will remain eternally thankful Sir.

Sincere gratitude is extended to Professor Ian Cram, Leeds University U.K for having so generously availed me his rich literal works on contempt law in the U.K.

I am indebted to the Dean and all the members of staff in the law school for their part in imparting me with the knowledge of the law.

Profound thank you to all the people who accorded me the opportunity to interview them and provided useful information for the study; Mrs. Daisy Ng'ambi, Mr. Stephen Lungu, Mr. Enoch Mulembe, Mr. Goodwell Lungu, Mr. Francis Mwale and Ms Jane Chirwa.

To Mrs. Phiri, Senior Clerk of Court, I am immeasurably thankful for so kindly helping me with case records and availing me use of your office at short notice.

To my precious daughter Nawa, who had to endure prolonged periods of my absence and inattention for the past five years, while I pursued my law studies; you gave me the reason to go on, thank you so much for being the light in my life. I love you. My late husband Likando, thank you for giving me some of the best years of my life. To all my siblings, thank you for the support and encouragement through it all. To my dear friend

and mentor Dr. J.C Mwale, you encouraged and inspired me to surmount the odds, thank you for being such a blessing.

Last but not the least; to my late Parents Mrs. Joyce Mwale Mangani and Mr. Dominic Mangani, I could never thank you enough. You gave me life, and instilled in me the true values of life; integrity, honesty, hard work, a passion for knowledge and the fear of God. I thank Almighty God for having given me such loving parents.

TABLE OF STATUTES

South Africa

Constitution of the Republic of South Africa 1995

South African Criminal Law and Procedure 3 Ed (Juta, Cape Town 1996) Vol. II

United Kingdom

Criminal Administration Act of England 1960

Contempt of Court Act of England 1981

The Supreme Court Practice of England (Rules of the Supreme Court) 1999 Volume 1,
Sweet and Maxwell 1998

United States of America

Constitution of the United States of America

First Amendment of the United States Constitution

Zambia

Constitution of Zambia, Chapter 1 of the laws of Zambia

Contempt of Court (Miscellaneous) Provisions Act Chapter 38 of the laws of Zambia

Judicial Service Commission Act, Chapter 259 of the laws of Zambia

Judicial (Code of Conduct) Act No. 13, 2006

Judicial (Code of Conduct Amendment) Act No.17, 2008

Judicature Administration Act, Chapter 24 of the laws of Zambia

Judges (Conditions of Service) Act 1996, Chapter 277 of the laws of Zambia

Judicial Service Commission Act Chapter 259 of the laws of Zambia

Penal Code Chapter 87 of the laws of Zambia

INTERNATIONAL INSTRUMENTS

European Convention on Human Rights

International Convention for Civil and Political Rights (ICCPR)

The United Nations Declaration of Human Rights (UDHR)

TABLE OF CASES

- A.G v Leveller Magazine Ltd (1979) AC 440
- A.G v Times Newspaper Ltd (1991) 2 W.L.R 994
- Ahnee v D.P.P (1999) A.C 294
- Ambard v Attorney General of Trinidad and Tobago (1936) 1 ALL ER 704
- Akinrinsola v A.G Anambra State (1980)2NLR 17
- Attorney -General (New South Wales) v Munday 2 NSWLR 887
- Attorney General v English (1983) 1 A.C 116
- Balogh v St Albans Crown Court (1974) All E.R
- Bridges v Carlifornia (1941) 86 L Ed 192
- California v Orienthal James Simpson, B.A 097211
- Communications Authority v Vodacom Appeal No. 98/08
- Elias Kundiona v The People S.C.Z Judgement No.14, 1993
- Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd (the Bread Manufacturers' 1937) 37 SR (NSW)
- Globe News papers v Superior Court for the County of Norfolk 457 US 596, 606 (1982)
- Jennison v Baker (1972) 2 Q.B
- Mazoka and Others v Levy Patrick Mwanawasa and Others (Exparte Enock Kavindele, SCZ/EP/010203/2002
- Mazoka and others v Levy Patrick Mwanawasa and Others (Exparte Anderson Mazoka) SCZ/08/EP/010203/2002

Masiye Motesl Ltd v Recue Shoulders and Estate Agencies Ltd- Appeal No. 187/2007

Narmada Bachao Andolan v Union of India and Others (1999) 8 SCC 308

R v Kopyto (1987) 62 OR (2d) 449

Schenk v United States (1919) 249 US 47

Sebastian Saizi Zulu v The People S.C.Z No. 7, 1991

State v Russell Mamabolo CCT44/000 2001ZACC 17

Sunday Times v United Kingdom 26 April 1979, Series A No.30, 14 EHRR 229

The People v Chansa Kabwela, Case No. CRMP, 03 of 2009

The People v Fred Mmembe and the Post Newspaper, 2 SP/C/192/2009

Vine Products Ltd v Mackenzie Co Ltd (1969) RPC 1

TABLE OF CONTENTS

Title	Page
Cover Page.....	i
Dedication.....	ii
Recommendation	iv
Declaration.....	v
Acknowledgments	vi
Table of Statutes	viii
International Instruments.....	ix
Table of Cases	x
Table of Contents.	xii
List of Acronyms.....	xv
CHAPTER ONE.....	1
GENERAL INTRODUCTION.....	1
1.0 Introduction.....	1
2.0 Statement of the Problem.....	3
3.0 Purpose of the study.....	5
3.1 Objectives of the study.....	5
3.2 Hypotheses.....	6
4.0 Significance of the study	6
5.0 Methodology.....	6
6.0 Outline of Chapters.....	7
CHAPTER TWO	8
JUDICIAL INDEPENDENCE AND ACCOUNTABILITY	8
2.0 Introduction	8
2.1 Judicial Independence	8
2.2 Judicial Accountability	9
2.3 Legal and Institutional Framework of Zambian Judiciary.....	9
2.3.1 Legal Framework	9

(i)	Judicial Code of Conduct (Amendment) Act 17, 2008.....	10
(ii)	Judicature Administration Act (Chapter) 24.....	10
(iii)	Judges Conditions of Service Act(Chapter)277	11
2.3.2	Institutional Framework.....	11
(i)	Judicial Service Commission.....	11
(ii)	Judicial Complaints Authority	12
(a)	Structure and Composition.....	12
(b)	Functions of the Authority	13
2.3.3	Observed Challenges.....	13
(i)	limitations of Scope of Powers	13
(ii)	Administrative Constraints	14
2.3.4	Extent of Judicial Independence.....	16
(i)	Appointment of Judicial Officers.....	16
(ii)	Tenure of Office.....	16
(iii)	Funding and Conditions of service	16
2.4	Conclusion.....	17
CHAPTER THREE.....		19
NATURE AND PURPOSE FOR CONTEMPT: ZAMBIA, SOUTH AFRICA,		
U.K AND U.S.A APPROACHES.....		19
3.0	Introduction.....	19
3.1	Contempt of Court and what it was Designed to Achieve.....	19
3.2	Law of Contempt in Zambia.....	23
3.2.1	The Courts' interpretation of Contempt Law in Zambia.....	24
3.3	Approaches in South Africa, United Kingdom and United	
	States of America.....	25
3.3.1	Law of contempt in South Africa.....	25
3.3.2	Law of contempt in the United Kingdom.....	27
3.3.3	The United States of Approach to law of Contempt.....	29
3.4	Conclusion.....	29

CHAPTER FOUR.....	31
CONTEMPT OF COURT AND FREEDOM OF EXPRESSION,	
STRIKING A BALANCE.....	31
4.0 Introduction.....	31
4.1 The basis for freedom of expression..	31
4.2 Commenting on Pending Proceedings, role of Media.....	33
4.3 Criticism of judicial officers: imputing impartiality and improper motives, justification and truth.....	37
4.4 Effect on Freedom of Expression and Media.....	41
4.5 Conclusion.....	44
CHAPTER FIVE.....	46
GENERAL CONCLUSIONS AND RECOMMENDATIONS.....	46
5.0 Conclusions.....	46
5.1 Recommendations.....	47
BIBLIOGRAPHY.....	50

LIST OF ACRONYMS

ALRC	Australian Law Reform Commission
CA	Chief Administrator
CHS	Commonwealth Heads of State
CRF	Charter of Rights and freedoms, Canada
ECHR	European Court of Human Rights
HC	High Court for Zambia
HRC	Human Rights Commission
ICCPR	International Convention for Civil and Political Rights
JCA	Judicial Complaints Authority
LGJI	Latimer Guidelines on Judicial Independence
JSC	Judicial Service Commission
LAZ	Law Association of Zambia
LST	Law and Society Trust
MISA	Media Institute for Southern Africa
SCZ	Supreme Court for Zambia
TIZ	Transparency International Zambia
UDHR	Universal Declaration of Human Rights
VTC	Vienna Treaty on Conventions
ZLJ	Zambia Law Journal

CHAPTER ONE

GENERAL INRODUCTION

1.0 Introduction

In any democracy, the rule of law is a fundamental principle by which it is sustained.¹ Indisputably the courts bear a pivotal role in actualising this aspiration through *inter alia* the function of administration of justice.² For there to be any effective discharge of this role, the dignity of the courts must be upheld. However in pursuit of this duty, a necessary balance needs to be sought and applied by the courts. The freedom of speech bestowed under the constitution and the independence of the judiciary are the two essential and most important constituents of democracy in a country.³ The law of contempt attempts to reconcile the two sometimes conflicting sets of interests namely those concerned with the unimpeded functioning of the judicial system on the one hand and those of the general public in learning through the media about court proceedings on the other.⁴ Reconciling these two competing public interest issues and maintaining a balance presents a challenge to any given democratic set up.⁵ This can be said to be the case in the application of contempt powers.

Similarly, Zambia as a democracy guarantees under its constitution the fundamental freedoms including the freedom of speech or expression.⁶ A discussion on freedom of expression will inevitably extend to freedom of the media or press as there seems to be an inevitable nexus to the extent that the media plays a role in conveying the views of the public. Difficulty arises when contempt jurisdiction seemingly clashes with the

¹ K.Balasankaran Nair, *The Law of Contempt of Court in India*, Atlantic Publishers and distributors, 2004.

² Honourable Chief Justice of Kenya then, J.E Gicheru observed in similar terms in his paper "independence of the Judiciary: Accountability and contempt of court," *Kenya Law Review* Vol. 1:1, 2007.

³ G.V Manesh Nath, *Contempt of Court and Free Expression- Need for a delicate balance*, ICFAI Edited Book on Contempt of court (2009) http://works.bepress.com/gv_nath/1. Accessed 9th August, 2010.

⁴ Ian Cram, *Reconciling fair trial interests and the informed scrutiny of public power – An analysis of the United Kingdom's contempt of court laws*. In *Il rapporto tra giustizial e mass medial* (Rome, *Editoriale Scientifica* (2010) 63-90.

⁵ Background paper on the Freedom of expression and contempt of court for the international seminar on promoting freedom of expression with the three specialized international mandates ; Hilton Hotel London, United Kingdom m 229-30 November, 2000.

⁶ Constitution, Chapter 1 of the laws of Zambia, Article 20.

invaluable rights of citizens as well as those of the press. Lord Reid ruled in A.G v Times Newspaper:⁷

The law on contempt is and must be founded entirely on public policy. It is not there to protect private rights of parties to a litigation or prosecution. It is there to prevent interference with administration of justice and it should in my judgement be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary, but it cannot be allowed where there would be real prejudice to the administration of justice.

The law of contempt generally deals with issues related with interference of administration of Justice.⁸ In Zambia, contempt is governed by the Contempt of Court (Miscellaneous) Provisions Act⁹ and the Penal Code,¹⁰ which do not seem to sufficiently define what constitutes contempt. In the recent times, some decisions of the courts in Zambia relating to contempt of court have generated much discourse. These include the contempt case where a lawyer Mr. Nsuka Kalobwe Sambo¹¹ and his client were convicted and jailed for contempt; The Post newspaper editor Fred Mmembe's conviction¹² and the case involving Mr. Enock Kavindele¹³ who was fined for a guilty finding of contempt arising from a public comment against the Supreme Court following his loss of a case. The varying legal and non legal views at different levels have exposed a clear need for further clarity and understanding in the subject law, its application and implications for potential improvement. This development provided motivation for this study in response to the scholarly challenge.

International human rights law has upheld that when balancing rights of free speech with the principle of the authority of the judiciary, the question should be whether the prohibition is strictly necessary in a democratic society.¹⁴ The paper sought to analyse the law on contempt in Zambia, its application in relation to other selected jurisdictions and establish the possible impact on administration of justice and freedom of expression and identify areas for reform. For this purpose the study focused more on criminal contempt.

⁷ A.G v Times Newspapers Ltd (1974) AC 273, 294 H.L.

⁸ Lord Diplock, A.G v Leveller Magazine Ltd. (1979) AC 440, p 449.

⁹ Chapter 38 of the Laws of Zambia.

¹⁰ Chapter 87 of the Laws of Zambia, section 116.

¹¹ Masiye Motel Ltd v Rescue Shoulders and Estate Agency Ltd, Appeal No. 187/2007.

¹² "S.A Editors' Forum condemns Post Editor's imprisonment", The Post newspaper, June 8, 2010.

¹³ Communications Authority v Vodacom Ltd Appeal No 98/08 SCZ.

¹⁴ The Sunday Times v United Kingdom, Judgment of the European Court of Human rights, 26 April 1979, Series A.NO 30, 14 EHRR 229.

The Privy Council in the leading case on contempt Ambard v Attorney General for Trinidad and Tobago¹⁵ aptly summarised;

The path of criticism is a public way; the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny of and the respectful even though outspoken comments of ordinary men.

2.0 Statement of the Problem

It has been stated that criticism of the courts helps to identify weakness in the legal system which can then be improved upon;¹⁶ further that judges must be accountable by being open to scrutiny in the discharge of their functions.¹⁷ South African constitutional court judge Abbie Sachs in State v Russel Mamabolo¹⁸ observed that indeed bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, that the chilling effect of fear of prosecution for criticising the courts might be conducive to its deterioration. Justice Kruger in the same case stated that;

Free and frank debate about judicial proceedings serves more than one vital purpose; self evidently such informed and vocal public scrutiny provides impartiality, accessibility and effectiveness.

Alternatively the Zambian courts have maintained that the dignity of the court must be upheld and comment or public criticism tending in the court's view, to lower such dignity must be harshly dealt with.¹⁹ However, the extent to which the courts must be criticised, the unbridled power left to the judges to determine what constitutes contempt and the harshness of the sentences have been argued to negative the constitutionally guaranteed freedom of expression and flowing from this, freedom of the media. Professor Muna Ndulo asserted that the conviction of Post newspaper editor by a magistrate court on 6th June, 2010 on a charge of contempt was wrong in law.²⁰ Commenting on the four months imprisonment with hard labour arising from an article published in The Post newspaper of August 27, 2009 titled "the Chansa Kabwela case : A comedy of errors", which he authored, he said the conviction was

¹⁵ (1936) AC 322, p35.

¹⁶ Chief Justice Ernest Sakala, addressing the Law Association of Zambia (LAZ) annual general meeting, Pamodzi hotel Lusaka, 5th June, 2010, The Post newspaper, June 10, 2010.

¹⁷ Lord Atkin in Ambard v A.G for Trinidad and Tobago (1936) A.C 332 .

¹⁸ CCT 44/00(2001).

¹⁹ Masiye Motels Ltd v Rescue shoulders and Estate Agency Ltd, Appeal No 187/2007.

²⁰ "Professor Muna Ndulo analyses Simusamba's judgment" The Post newspaper, June 8, 2010.

not supported by judicial precedent from other common law jurisdictions.

He further asserted that there were several commonwealth decisions that say that you cannot have contempt of those kinds of facts in a situation where the trial is by a professional judge alone and there is no jury system. In relation to freedom of expression and commenting on trial proceedings in Zambia, it does not seem clear whether once a matter is in court; it precludes totally any further comment on the matter. In the leading Nigerian case of Akinrinsola v A.G Anambra State,²¹ the court held that a publication of a general comment on a matter, which is related to court proceedings, presided over by a judge and without specific reference to the court trial cannot be held to be contemptuous of the court.

It has been argued in criticism of contempt powers that by being judges in their own cause is itself a pervasion of justice.²² Earl C. Dudley, University of Virginia law Professor, wrote that in contempt power, the roles of victims, prosecutor and judge are dangerously intermingled.²³ Whether particular words, act or behaviour amount to contempt is a question of fact.²⁴ This impliedly means therefore that determining contempt is at the discretionary interpretation of the aggrieved judge against whom it is cited.²⁵ It is therefore patently clear from the various local decisions cited that the law of contempt is rather vague in Zambia. The Contempt of Court (Miscellaneous provisions) Act which is supposed to be the main legislation providing for contempt, does not expressly define what should amount to contempt nor set out clearly the punishment applicable.

The Penal Code Chapter 87, much as it provides for criminal contempt in section 116, is similarly fraught with vagueness. It also does not seem clear what specific complaint mechanisms (other than the lengthy court appeal process) not amounting to contempt are available to an aggrieved party as demonstrated in Sebastian Zulu v people.²⁶

²¹ (1980) 2NLR 17.

²² Contempt – Criticisms of the contempt - of - court power, <http://law.jrank.org/pages/5669/Contempt-criticisms-contempt-court-power.html>. Accessed 8th August, 2010.

²³ Contempt - Criticism of the Contempt of court power.

²⁴ Sebastian Zulu v The people (1991) S.J (S.C) per Silungwe C.J.

²⁵ Sebastian Zulu v The People (1991).

²⁶ Sebastian Zulu v The People, (1991) S.C.Z No. 7.

This study sought to evaluate the law of contempt in Zambia, its application and effect on freedom of expression and as a corollary flowing from this, freedom of the media or press. This was done in relation to case law and legislation of selected jurisdiction namely the United Kingdom, South Africa and United States of America. Relevant cases outside the named jurisdiction have been considered where necessity so dictated.

In considering the issues surrounding the application of contempt powers, the study also sought to establish a clearer understanding and knowledge of the subject and recommend possible areas for improvement of the law.

Arising from this were many questions which the study sought to answer such as; to what degree should the law permit commenting on pending cases without the risk of being cited for contempt and how does this affect the constitutionally guaranteed freedom of expression? Flowing from this, how does the law as it is currently applied affect the role of the media in facilitating the right to information of the citizenry? Are the judicial attitudes unduly restrictive in relation to criticism on the administration of justice or the courts? What kind of a balance should be attained?

3.0 Purpose of The Study

This study sought to identify and generate an understanding and knowledge of issues surrounding the law of contempt, its application and implications on the administration of justice and freedom of speech with a view to point out areas of improvement in the law. The study focused more on criminal contempt for the purpose of the study.

3.1 Objectives of The Study

- 3.1.1 To identify the legal issues surrounding the law of contempt and its application and establish the adequacy of the law governing contempt of court in Zambia
- 3.1.2 Taking into account the application of the law of contempt powers, to assess whether judges have too much power in the exercise of contempt powers and accountability of the courts in relation to other selected jurisdictions.
- 3.1.3 In view of the exercise of unbridled contempt powers, to assess the effect on administration of justice and the implications on the fundamental freedom of speech and consequently of the press.
- 3.1.4 Establish what systems and institutional safeguards are in place to regulate the

exercise of contempt of court powers and the effectiveness of these systems.

- 3.1.5 To consider to what extent does criticism of the court help improve the judicial system.
- 3.1.6 To relate to other selected jurisdictions and based on the findings, recommend areas of reform of the law if any.

3.2 Hypotheses

- 3.2.1 Legitimate and reasoned criticism of the courts helps to improve the judicial system by identifying gaps and errors and thereby leads to improvement in the administration of justice.
- 3.2.2 The harsh punishment and unbridled discretion by the courts on what amounts to contempt of court has a chilling effect on freedom of speech and administration of justice.
- 3.2.3 The current legislation on contempt of court is inadequate and not specific enough in its provision of what should amount to contempt and how it should be applied.
- 3.2.4 There is an imbalance between application of law of contempt and the constitutionally guaranteed freedom of expression.

4.0 Significance of The Study

The need for understanding and clarity of the law cannot be over emphasised.²⁷ It is not farfetched to claim that the law on contempt in relation to its application and implications have posed a legal challenge. Vagueness and controversy have surrounded its application both in terms of punishment and classification of what should amount to contempt with regard to criticising the courts subsequent to decisions or on impending cases. It is hoped that the knowledge generated from this study helped to add clarity and understanding and possibly help to improve the law and subsequently the administration of justice.

5.0 Methodology

The study was primarily qualitative therefore data was collected through principally secondary sources and primary sources. Secondary sources included court judgements, legislation, literal works, journals, internet and relevant documentation on subject matter using a desk study approach and related to other named selected jurisdictions.

²⁷ J.E Gicheru, Hon Chief Justice of Kenya, Independence of the judiciary: Accountability and contempt of court, Kenya law Review Vol. 1:1 2007.

Data was also collected through personal visits to appropriate institutions such as the Judicial Complaints Authority, Human Rights Commission and Law Association of Zambia, Transparency international, Medial Institute of Southern Africa and some personal interviews conducted with heads or representatives of the institutions.

6.0 Outline of Chapters

The chapters are outlined as set out here below;

- 6.1 Chapter one sets out an outline of the organisation of the study. It establishes a brief background, sets out the statement of the problem and the main objectives. It includes the purpose of the study, significance of the study and the research methodology.
- 6.2 Chapter two deals with the independence of the judiciary; what needs to be in place, selection criteria, tenure of office and related issues. It further addresses accountability, how accountability can be insured; It looks at the systems for accountability such as the code of conduct, citizen's complaints commission among others.
- 6.3 Chapter three analyses contempt of court, why we have contempt of court and what it is designed to achieve. What does the current law provide, how has it been interpreted by the courts. In doing so, illustrations and comparatives were made with other selected jurisdictions namely the United Kingdom (U.K), South Africa and the United States of America (USA).
- 6.4 Chapter four analyses contempt of court with respect to freedom of speech and the need to strike a balance between the needs to uphold the dignity of the court and freedom of speech.
- 6.5 Chapter five gives a conclusion and provides recommendations for reformation with a view to improvement of the law.

CHAPTER TWO

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

2.0 Introduction

The notion of judicial independence and judicial accountability can be said to be fundamental to the fulfilment of the mandate of any judicial system as arbiter of the last resort, protector of the rights of citizens and custodian of the rule of law. The two principles are fundamental to good governance in democratic societies.²⁸ Notably, the importance of the two principles was underscored by the Commonwealth Heads of State (CHS) in 2003, by adopting the Latimer Guidelines on Judicial Independence (LGJI).²⁹ In emphasising the separation of powers, it is stated in the guidelines;

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitution functions by the other institutions.

This chapter considers these and related issues including the legal and institutional framework in relation to judicial independence currently in place, their effectiveness on judicial independence and accountability of the judicial system in Zambia.

2.1 Judicial Independence

The definition of judicial independence is by no means a precise one. In Burbank's view, judicial independence exists primarily as a rhetoric notion rather than as a subject of sustained, organised study.³⁰ Essentially judicial independence requires that a country's judicial system be insulated from external influence either from government sources such as legislative, executive or administrative authorities or from private interests attempting to exert economic, social, ethnic or religious pressure on judges.³¹

The extent of judicial independence can be determined by a number of features which include *inter alia*; the method of appointment of judges, remuneration and other conditions of service and whether the judiciary has exclusive jurisdiction over judicial matters.³² According to Brazier, judicial independence in general entails that the public must feel confident in the integrity and impartiality of the judiciary. Judges must therefore

²⁸ David Simmons, Aspects of Judicial Independence and Accountability –Lessons for the Commonwealth Caribbean? Commonwealth Law Bulletin – Vol.33, No.4 (2007) .

²⁹ The Latimer House Guidelines for the Commonwealth, 19 June, 1998.

³⁰ Stephen B. Burbank, Symposium: Perspectives on Judicial Independence: What do we mean by "Judicial Independence"? Vol.64, Ohio State Law Journal (2003) p323.

³¹ Ettambi E.O Alemika, Judicial Systems in Sierra Leon, Tanzania and Zambia, Institute for Security Studies Policy brief No. 15, Oct 2009- [http:// www.issafrica.org](http://www.issafrica.org). Accessed 8 November, 2010.

³² Lovemore Madhuku , Constitutional protection of the independence of the judiciary: A survey of the position in South Africa, Journal of African Law, Vo'.46, 2002, pp232-245 .

be free from undue influence and be autonomous in their own field.³³ He further states, that possibility implies that neither government nor parliament should have any role in the removal or appointment of judges.

2.2 Judicial Accountability

Article 91(2) of the Constitution,³⁴ provides that Judges, Magistrates and Justices shall be independent, impartial and subject only to the Constitution and the law. Further that they shall conduct themselves in accordance with the code of conduct promulgated by Parliament. Judicial accountability entails that judicial officers are transparent and answerable in the exercise of their judicial functions to the public in general and judicial supervising bodies, as a measure to check abuse of judicial powers legally bestowed on them.³⁵ Judicial Officer as defined under the Judicial (Code of Conduct) Act (1999), means the Chief Justice, the Deputy Chief Justice, a Judge, Magistrate, Registrar, Local Court Justice and Justice of a Court or other person having power to hold or exercise the judicial powers of a Court.

It may be said that judicial independence and accountability cannot co-exist as they are in direct opposition, to the contrary the two principles must work in complement and a necessary balance needs to be struck for the ends of justice to be achieved. Judicial accountability is vital in order that confidence by the public in the administration of justice is maintained and enhanced. This can best be achieved where rules are in place to uphold judicial ethics and those rules are visible to the public.³⁶

The Judicial Complaints Authority (JCA) is the primary body legally mandated to oversee and ensure accountability of judicial officers in Zambia by enforcement of the Judicial Code of Conduct. The extent to which this mandate has been effective is subject for discussion and is considered in the subsequent section.

2.3 Legal and Institutional Framework of the Zambian Judiciary

2.3.1 Legal Framework

The judicature is established under part VI, article 91 of the Constitution³⁷ and comprises the Supreme Court, High Court, Industrial Relations Court, Subordinate

³³ Rodney Brazier, *Constitutional Reform: Reshaping the British political System*, 2nd edtn., Oxford (1998) pp 172

³⁴ Constitution of Zambia Chapter 1 of the Laws of Zambia

³⁵ *Judicial Accountability Mechanisms: A resource document* – Produced by The Political Information and Monitoring Service (PIMS) at the Institute for Democracy in South Africa IDASA, 2007

³⁶ *Judicial Accountability Mechanisms: A resource Document* .

³⁷ Constitution of Zambia, Chapter 1 of the Laws of Zambia .

Courts and Local Courts in descending hierarchical order respectively. Operations and functions of the Judicature are governed by various statutes.

i. The Judicial (Code of Conduct Amendment) Act No.17 of 2008

The Judicial (Code of Conduct Amendment) Act No.17 of 2008 stems from amendments to the Judicial (Code of Conduct) Act No.13 of 2006 and Judicial (Code of Conduct) Act No. 13 of 1999. The principle purpose of the Act is to provide for the regulation of Conduct of judicial officers in the exercise of their judicial functions. The Act is promulgated by Parliament pursuant to Article 91 clause 2 of the Constitution of Zambia. It provides for the code of conduct for officers of the judiciary and establishes the Judicial Complaints Authority, which is mandated to investigate allegations of misconduct against judicial officers.³⁸ The Act further provides for four aspects of judicial officers' conduct namely, adjudicative responsibility, extrajudicial matters, political and employment opportunities.

Of particular interest under adjudicative responsibility is stated that it covers professional conduct expected in the dispensation of adjudicative duties by a judicial officer. To this extent, section 5(2) provides that "A judicial officer shall not, in the performance of adjudicative duties, be influenced by *inter alia* partisan interests, public clamour or fear of criticism." It can reasonably be argued that on the strength of this provision, criticism or public comment adverse or otherwise on an impending matter should be of no effect to the judicial officer and therefore not necessarily be deemed indiscriminately as contemptuous.

ii. Judicature Administration Act (CAP) 24

The Act provides for the administration of the courts; to confer on the Judicial Service Commission (JSC) power to appoint staff of the Judicature; and to provide for matters connected with or incidental to the foregoing.

The Act defines "Judicature" to mean the Supreme Court, the High Court, the Industrial Relations Court, the subordinate courts, local courts and any other courts established by an Act of parliament. It is noted that while the subject Act does confer to an extent some level of independence to the judiciary, there are

³⁸ Zambia National Anti- corruption Policy 2009, p 5.

however still some justifiable observable concerns or threats to independence. Section 3(1) provides for the appointment of the Chief Administrator (CA) by the President for the day-to-day administration of the Judicature and for the implementation of resolutions of the Judicial Service Commission in respect of that administration. Section 3 further states that he shall hold office on such terms and conditions as the Commission may determine, with the approval of the President. In effect the President has the final say.

iii. Judges Conditions of Service Act 1996 (CAP) 277

This is an Act to provide for the emoluments, pensions and other conditions of service for Judges and to provide for matters connected with or incidental to the foregoing. For purposes of this Act, "Judge" means a Judge of the Supreme Court, a *puisne* Judge, and the Chairman and Deputy Chairman of the Industrial Relations Court. Section 3 provides that; "there shall be paid to a Judge such emoluments as the President may, by statutory instrument, prescribe" while under section 12 (1), "the President may, by statutory instrument, make Regulations for the better carrying out of the provisions of this Act." By necessary implication, these exceeding presidential powers work against the principle of separation of powers between the executive and judicature and negatively impacts on the very independence constitutionally guaranteed.

2.3.2 Institutional Framework

i. Judicial Service Commission (JSC)

The Judicial Service Commission is the constituent of the Judiciary through which the Judiciary operates as an autonomous institution.³⁹ It is established by reference in the Constitution under part IV and the Judicial Service Commission Act.⁴⁰ The Judicature Administration Act Chapter 24 of the Laws of Zambia provides for its composition. It is chaired by the Chief Justice and comprises members including; the Chairman of the Public Service Commission, the Secretary to the Cabinet, a Supreme Court Judge nominated by the Chief Justice, the Solicitor General, the Attorney General, a

³⁹ Constitution of Zambia CAP 1 of the Laws of Zambia, Article 91(3).

⁴⁰ Chapter 259 of the Laws of Zambia.

member of Parliament appointed by the Speaker of the National Assembly, President of the Law Association of Zambia and Dean of the Law School.

The Judicial Service Commission is responsible for appointing of judicial officers of lower courts and recommend for appointment to the President of High Court and Supreme Court judges. However, much room for argument is presented on the exercise of disciplinary powers. Section 5(1) of the Judicature Administration Act provides; “In connection with the dismissal, disciplinary action or termination of appointment of any officer holding an office to which the Commission appointed him, the Commission shall exercise its powers in that behalf in accordance with regulations made by the Commission with the approval of the President.” This in effect presents a potential fetter on the autonomy of the judiciary as regulations seen as considerably disfavouring the executive can simply be disapproved.

ii. Judicial Complaints Authority (JCA)

The Judicial Complaints Authority is a government institution established in 2002 by the Judicial (Code of Conduct) Act No.13 of 1999 as amended by the Judicial (Code of Conduct) Act No. 13 of 2006 and the Judicial (Code of Conduct) Act No.17 of 2008. The Code of Conduct is promulgated by Parliament pursuant to Article 91 clause 2 of the Constitution of Zambia. The Authority is mandated to investigate allegations of misconduct against judicial officers.⁴¹ The objective of the Code of Conduct is to promote professional conduct integrity and competence among judicial officers in the performance of their adjudicative duties and enhance public confidence in the judiciary.

a. Structure and Composition

The Judicial Complaints Authority (here after referred to as the Authority) comprises 5 non full time members appointed by the President who sit as a panel to preside over complaints submitted to the Authority.⁴² Their appointment is subject to ratification by the National Assembly. For the day to day operations and administration, the Authority is managed by the Secretary appointed by the President for a period of five

⁴¹ Zambia National Anti Corruption Policy 2009.

⁴² Judicial (Code of Conduct) (Amendment) Act 2006, section 20.

years. The enabling Act provides that the Secretary shall serve on such terms as the Authority shall with approval of the Minister determine.

b. Functions of the Authority

The functions of the Authority as provided under the Judicial (Code of Conduct) Act are; (a) to receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer. (b) Submit its findings and recommendations to either the appropriate Authority for disciplinary action or other administrative action or to the Director of Public Prosecutions for consideration of possible criminal prosecution.

2.3.3 Observed Challenges

i. Limitations of Statute and Scope of Powers

The enabling Judicial (Code of Conduct) Act does not provide for punitive powers to the Complaints Authority. It can only recommend to the relevant authority the Judicial Service Commission or the Director of Public Prosecutions for “possible” criminal proceedings. This renders enforcement powers limited to the effect that the Authority is excluded from applying punitive measures to the offending judicial officer. In this event, the redress sought by a complainant cannot be guaranteed as the Complaints Authority has no control on the decision of the Judicial Service Commission or other relevant body to whom appropriate action has been recommended. Thus a judicial officer found wanting may very well continue unabated thereby denying the successful complainant justice.

As regards proceedings, the enabling Act provides for confidentiality of the proceedings to the extent that the members and Authority are proscribed from disclosing details of both the proceedings and the judicial officer against whom a complaint has been laid. This operates to inhibit the deterrent effect that would otherwise be enhanced by publicly disclosing erring officers. It would equally help to enhance public awareness on the availability of recourse as against alleged infringement on their rights in court proceedings. Conversely, details of the complainant are disclosed to the judicial officer against whom they have made a

complaint, notwithstanding that the complainant may still be appearing before the same judicial officer. Predictably, this will likely result in the complainant not receiving a fair trial or justice. It is submitted that the alleged offending officer should be excluded from proceeding with the case pending investigations where appropriate or replaced and details of the complainant should be withheld from the subject officer.

The Judicial Code of Conduct Act confers unilateral powers to appoint the Secretary who is the chief executive officer of the Complaints Authority to the President who heads the executive arm of government. In essence this may tend to limit the independence of the Secretary and amounts to encroachment of executive powers in the Judiciary. A desirable situation would be for a collective judicial body to appoint the Secretary. This would enhance both independence and objectivity of the office holder unhindered by considerations other than judicial in carrying out their functions. Similarly the appointment of the members is conferred on the president with similar effects. Notwithstanding the ratification requirement by the National Assembly, it is trite that the executive usually enjoys majority in the house and given the trend of voting on party lines rather than objectivity, ratification offers little if any check. This presents the possible risk of members to be more sympathetic to the executive in rendering their decisions where a complaint may hinge on the executive's interest.

The issue of remuneration offers further challenge to the extent that remuneration of the Secretary and Authority staff according to the enabling Act are subject to approval of the minister rather than an independent body. Worthy of note is the amendment of section 35 of the Judicial Code of conduct Act by which the powers to make regulations for the better carrying out of the Act were transferred from the Chief Justice to the Minister. It may be justified to suggest that this inevitably infracts on the autonomy of the Judicial Complaints Authority.

ii. Administrative Constraints

A visit was undertaken to the Judicial Complaints Authority on 11th November, 2010 and an interview conducted with the Secretary on the operations of the Authority. It was established that the Authority is under funded with a paltry

K1.5Billion annually to cover both remuneration for the permanent staff, members' allowances and activities of the Authority.⁴³ Evidently, this is inadequate to cover the expected operations country wide and renders it impracticable for the Authority to undertake tours and such activities as are necessary to sensitise the public on the existence and operations of the Authority as a body to offer redress to aggrieved litigants and defendants alike. It was further observed that there is lack of sensitisation activities by the Authority resulting in absence of awareness on the Authority. By way of illustration, this was evidenced by the challenge faced in locating the premises by the author who was only aided by an officer of the Law Association of Zambia.

Material resources such as computers and a library are lacking to the effect that the authority maintains its records manually by way of a register.⁴⁴ This makes it extremely difficult to access information or data. The authority is understaffed with only four operatives to attend to all the national demands while six are support staff. Staff appear de-motivated due to low remuneration and absence of other incentives such as loans and appropriate allowances. The Authority is unable to attract additional qualified professional staff due to the uncompetitive conditions of service currently applicable.⁴⁵

It was established that most of the complaints submitted affected lower level judicial officers namely magistrates and local court justices.⁴⁶ This seemed to suggest a need for reorientation in the training of this category. Complaints included those occasioned by the unbridled application of law of contempt of court. The author was informed of a sitting of the members on such a complaint the day preceding the visit. It involved a complainant who had been unjustifiably made to serve six months custodial sentence for an alleged contemptuous act which was found by the panel to be improper application of the law. While the panel found in favour of the complainant there was little more the Authority could do to atone the complainant for the unjustified sentence served. He was advised to

⁴³ Interview with Mrs. Daisy N'gambi, Secretary Judicial Complaints Authority, 11th November, 2010 Lusaka.

⁴⁴ Physical assessment from visit undertaken to Complaints Authority by author on 11th November, 2010.

⁴⁵ Chief Justice Ernest Sakala, addressing the Law Association of Zambia (LAZ) annual general meeting, Pamodzi Hotel Lusaka, 5th June, 2010, The Post newspaper, June 10, 2010.

⁴⁶ Interview with Mrs. Daisy Ngambi, Secretary Judicial Complaints Authority.

take personal civil action against the judicial officer and the judicial officer in question was recommended for removal to the Judicial Service Commission.⁴⁷ As to whether this was effected remains to be established.

2.3.4 Extent of Judicial Independence (Other Challenges)

i. Appointment of Judicial Officers

The Chief Justice and Deputy Chief Justice are appointed by the President subject to ratification by the National Assembly according to Article 93(1) of the Constitution. Article 95(1) provides for appointment of *Puisne* Judges or High Court Judges are appointed by the President, on the advice and recommendation of the Judicial Service Commission, subject to ratification by the National Assembly. Ratification is rendered “superfluous” due to the executive majority and partisan voting trends in the National Assembly. As stated previously, this presents an encroachment of powers of the executive over the judiciary which are incompatible with judicial independence. Magistrates and local court justices are appointed by the Judicial Service Commission acting in the name of the President under section 4 of the Judicature Administration Act.⁴⁸

ii. Tenure of Office

Article 98 makes provision for the removal of judges and provides security of tenure to the extent that judges can only be removed by the President for infirmity of mind or body or incompetence on recommendation of a special tribunal appointed to investigate the same. Under section 5 (1) of the Judicature Administration Act, it states in connection with the dismissal, disciplinary action or termination of appointment of any officer holding an office to which the Commission appointed him, that the Commission shall exercise its powers in that behalf in accordance with regulations made by the Commission with the approval of the President. By necessary implication, the disciplinary jurisdiction of the Commission is limited and power to discipline such erring judicial officers ultimately lies with the President and subsequently executive. This is incompatible with the principle of separation of

⁴⁷ Interview with Mrs. Daisy Ngambi, Judicial Complaints Authority.

⁴⁸ Chapter 24 of the Laws of Zambia.

powers and judicial independence to the extent that disciplinary recommendations made by the Judicial Complaints Authority against such an erring judicial officer are still subject to Presidential approval. This renders the accountability process subject to executive control.

iii. Funding and Conditions of Service

In addition to being independent from influence from other arms of government, it is equally of vital importance that the judiciary is adequately funded and properly equipped with both human and material resources to be able to effectively, efficiently and justly interpret the law.

Under section 6 (1) of the Judicature Administration Act, the funds of the Judicature shall consist of such moneys as may be appropriated by Parliament for the purposes of the Judicature. It is trite that the judiciary is poorly funded as illustrated in the case of the Judicial Complaints Authority.

Conditions of services of judges including remuneration are governed by the Judges (Conditions of Service) Act, 1996⁴⁹, section 1(1) of which states that the Act may come into force as the President may, by statutory instrument, appoint. Further, section 12 (1) states that the President may, by statutory instrument, make regulations for the better carrying out of the provisions of this Act. This implies that conditions of service are determined or controlled unilaterally by the President as opposed to an independent body. This does not augur well with independence of the judiciary.

2.4 Conclusion

The principal goal of judicial independence is to maintain the courts' integrity and credibility within a political system.⁵⁰ There is a continuous tension between judicial independence and public accountability of judges in a democracy. The tension should be resolved by careful exercise of judgement in order that the proper balance between the two important values is maintained.⁵¹ The chapter considered the extent of judicial

⁴⁹ Chapter 277 of the laws of Zambia.

⁵⁰ Susan Sullivan Lagon, The Role of the independent judiciary, Freedom Paper 4, 1, <http://usa.usembassy.de/etexts/gove/free-pap4.htm>, Accessed 10th September, 2010.

⁵¹ Shimon Shestret, Jules Descitieres, Judicial independence: the Contemporary Debate, Martinus Nijhoff Publishers, Netherlands, 1985 p 656.

independence and accountability in terms of the legal and institutional framework in Zambia. It further assessed some of the determinants namely the system for appointment of judges, funding, conditions of services and tenure. While cognisance is made of constitutional guarantees of judicial independence, the enabling Acts are fraught with “claw back clauses” suggestive of a more than desirable level of powers still vested in the executive over the judiciary.

This is because enormous powers are reserved to the President for appointment, funding and limiting of the exercise of disciplinary powers of the Judicial Service Commission and the Judicial Complaint Authority. In terms of accountability, the Judicial Complaints Authority which is the primary institution charged with regulating conduct of judicial officers is understaffed, ill equipped with material resources and underfunded to effectively carry out its mandate. It is vested with no powers to enforce disciplinary action against judicial officers found wanting. While rules are in place to uphold judicial ethics through the (Judicial Code of Conduct) Act, these rules are largely not visible to the public in that the enforcement process by the Authority is as a legal requirement to be confidential and without publicity.

CHAPTER THREE

NATURE AND PURPOSE FOR CONTEMPT: ZAMBIA, SOUTH AFRICA AND UNITED STATES APPROACHES

3.0 Introduction

The subject of contempt of court has continued to be at the centre of both controversy and emotive discourse alike in the legal world and society at large. This may perhaps be attributed to the blurred delineates and boundaries surrounding the law in respect of contempt of court. This chapter analyses contempt of court and considers the questions; why we have contempt of court as an offence and what it was designed to achieve. Further, it looks at what the current law in Zambia provides generally and how it has been interpreted and applied by the courts from selected sample cases. In so doing, illustrations and comparatives are made with approaches in the selected jurisdictions of South Africa, United Kingdom and the United States of America. In most common law jurisdictions, a significant role of contempt law is the application of the *subjudice* rule to the effect that pending legal proceedings should not be interfered with.

3.1 Contempt and What it is Designed to Achieve

Contempt of court has been said to include any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority.⁵² It has also been described as the wilful defiance, disregard or disrespect of judicial or legislative authority or dignity, especially any disobedience of an order or any conduct that disrupts, obstructs or interferes with the administration or procedures of a court.⁵³ Contempt is distinguished in four classes namely; civil, criminal, direct or indirect contempt. Civil contempt consists of disobedience to the judgements, orders or other process of the court and involves a private injury.⁵⁴ Although it is a wrong done to the person entitled to the benefit of the order or judgement concerned, it also involves an obstruction of the fair administration of justice and may be punished in the same

⁵² Sebastian Zulu v The people (1991) S.J (S.C), per Silungwe C.J.

⁵³ Contempt legal definition; <http://law.yourdictionary.com/contempt>. Accessed 18th December, 2010.

⁵⁴ Halsburys Laws of England, 4th Edt, Butterworths (London) 1974, para 1.

manner as criminal contempt.⁵⁵ Criminal contempt consists of words or acts obstructing or tending to obstruct or interfere with the administration of justice.⁵⁶ Jennison v Baker⁵⁷ described the classification of contempt as unhelpful and almost meaningless due to uniformity of applicable punishment.

Direct contempt is known as contempt in the face of the court. It is broadly described as any word spoken or act done in the face or precincts of the court which obstructs or interferes with the administration of justice or calculated to do so.⁵⁸ According to Balogh v St Albans Crown Court⁵⁹ wherein the accused took steps to introduce laughing gas in a courtroom, the court held that it is unnecessary that the act should take place wholly or partly in a court room to constitute a direct contempt.

Indirect contempt or contempt committed outside the courtroom generally constitutes words spoken, written or otherwise published or acts done outside court which are intended or likely to interfere or obstruct the fair administration of justice.⁶⁰

3.1.1 What it was Intended to Achieve

The term contempt of court is of ancient origin from England used since the 13th century.⁶¹ It was generally designed to protect citizens' rights to a fair trial by protecting the administration of justice. This required the preservation of the dignity and integrity of the court in order that citizens maintained confidence and respect of the courts.

This was necessary for the courts to fulfil its function of arbiter of the last resort. In emphasising the purpose for contempt, the court in A.G v Times Newspaper Ltd⁶² asserted,

...it is based not on any exaggerated notion of the dignity of individuals be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice.

⁵⁵ Halsburys Laws of England, 4th Edt, para 1.

⁵⁶ Halsburys Laws of England, 4th Edt, para, 3 .

⁵⁷ (1972) 2 Q.B 52.

⁵⁸ Halsburys Laws of England, 4th Edt, para 5 .

⁵⁹ (1974) All E.R 283.

⁶⁰ Halsburys Laws of England, 4th Edt, para 7.

⁶¹ Order 52, The Supreme Court Practice of England 1999, volume 1, Sweet and Maxwell 1998.

⁶² (1991) 2 W.L.R 994 .

Lord Diplock in defining the purpose opined;

Although criminal contempt of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.⁶³

3.2 Law of Contempt in Zambia

In terms of statute, there does not seem to be one principle legislation substantively dealing with contempt. It is submitted that the Contempt of Court (Miscellaneous Provisions) Act appears to have been rendered moribund due to limited application if at all.⁶⁴ The Zambian courts have instead applied a multiplicity of laws including common law, section 116 of the penal code⁶⁵ and Order 52 of the Rules of the Supreme Court of England 1999 in determining contempt cases leading to varying interpretations. Unlike the United Kingdom and United States of America for instance, Zambian courts are not obligated to apply any test in determining a contemptuous act as the Zambian law does not expressly provide for such a test. It is left to the sole discretion of the judge against whom the alleged contempt has been committed on the basis of the principle of inherent powers of the court to punish for contempt.⁶⁶

The Contempt of Court (Miscellaneous Provisions) Act⁶⁷ enacted in 1965 is modelled on the old Administration of Justice Act (1960) of England which has long been replaced with the more substantive Contempt of Court Act of 1981. Analysis of the Zambian Act suggests that it is largely archaic, narrow in scope and in many respects inadequate to meet with the current trends of contempt law as compared for instance to the contempt law applied in the United Kingdom, United States of America and South Africa. Some of the observed deficiencies are that it lacks sufficient particularity in delineating what constitutes contempt and is devoid of any necessary criterion for contempt to be found leaving unbridled discretion to the court.

⁶³ A.G v Leveller Magazine Ltd (1979) AC 440, p.449.

⁶⁴ Discernible from the fact that none of the Zambian contempt cases reviewed made any substantive reference to the Contempt of Court (Miscellaneous Provisions) Act Chapter 38.

⁶⁵ Chapter 87 of the Laws of Zambia.

⁶⁶ As inferred in Sebastian Zulu v The People (1991) S.J per Silungwe C.J.

⁶⁷ Chapter 38 of the Laws of Zambia.

The title of the Act states; “An Act to amend the law relating to contempt of court and to restrict the publication of the details of certain proceedings and for purposes connected therewith.” It can plausibly be argued from this statement that in respect of publications or comments on imminent proceedings, the terms “certain proceedings” leaves one with the impression that any proceedings other than what is enumerated in the Act are not subject to restrictions. Yet in effect this has not been the case. Section 116 (1) (d) of the penal code imputes the offence of contempt on a person who;

... while a judicial proceeding is pending, makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken

Section 116(1) of the Penal Code affords less than little assistance for an objective test of determining what may be “capable of prejudicing” which by necessary implication is again resigned to the “inherent” powers of the court as demonstrated from the cases cited. Furthermore, it is not suggestive of any defence of truth or accurate representation although providing for “innocent” publication or distribution unlike the Contempt Act of England (1981).⁶⁸

In criticising the principle of inherent powers to punish for contempt, Sundaram expressed the view that the theory of inherent powers cannot defeat the peoples’ interest in the administration of justice and that the opportunity given to the contemnor is to apologise and not vindicate.⁶⁹ Another observed limitation with the Zambian Contempt Act is that it does not set out an exhaustive procedure for contempt hearings.⁷⁰ In this connection the Zambian Supreme Court attested thus;

Neither the statutes nor the Rules have provided how the summary trial for contempt should proceed and it will therefore depend on what actually did take place in each case whether there was a fair hearing or not. The circumstances of each case will also suggest whether the aggrieved judge properly took cognizance of the offence or it should have been referred for prosecution before another court having regard to the need to balance between the undesirability of a judge possibly testifying and being cross examined as a witness before another court and the undesirability of swift action in a proper case.⁷¹

⁶⁸ Section 4(1).

⁶⁹ K.G Kannabiran, Contempt Law and Human Rights, PUCL Bulletin, April 2001.

⁷⁰ Kishali Pinto Jayawardena, Contempt of Court – The Need for Definition and Codification of The Law in Sri Lanka, Deputy Director Law and Society Trust Editor, LST Review, editorial (Legal) Consultant and Columnist, the Sunday Times Colombo.

⁷¹ Elias Kundiona v The People S.C.Z Judgement No.14 of 1993.

In further demonstration of the inadequacies of the Zambian Contempt law, the challenge of application of multiplicity of laws of contempt was illuminated in Sebastian Zulu v People.⁷² The question arose as to whether the court was limited in terms of punishment powers to the provisions of the penal code. The Supreme Court held that Order 52 would apply to the extent that it provided no particular punishments for contempt and thereby did not limit the court. This was upon reliance of section 116 (3) of the penal code stating that the provisions of the section shall be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court. Seemingly conversely, the provision in the penal code tending to limit the court's punishment powers was in effect rendered subordinate to Order 52 and therefore not binding.⁷³

3.2.1 The Courts' Interpretation of Contempt Law in Zambia

Courts in Zambia have generally applied a more conservative approach and apparently dealt "sternly" with contempt. In Sebastian Zulu v The People,⁷⁴ the Supreme Court affirmed the lower court's guilty finding of contempt arising from the appellant's application and handing an affidavit thereof to the trial judge to recuse himself in a murder trial in which he was defence counsel, on the basis of alleged "biasness" against the accused. The Supreme Court asserted *inter alia* that the appellants conduct was "reckless and in the extreme and constituted contempt of court" but did not clearly pronounce on the appropriate procedure to be followed for such a complaint.

The Supreme Court however set aside the lower courts sentence of twelve months imprisonment with hard labour for three months simple imprisonment suspended for one year, considering as mitigating factors the tendered apology and non publication of contents of the affidavit. While acknowledging it as generally improper for a judge to deal summarily with contempt, as it is undesirable for him to appear to be both prosecutor and judge, the Supreme Court upheld that where a contempt is committed in the face of the court, there is nothing illegal or even unfair in the holding of an enquiry by a judge before whom the contempt is committed.

⁷² S.C.Z Judgement no 7 of (1991).

⁷³ Elias Kundiona v The People S.CZ Judgment No.14 of 1993.

⁷⁴ S.C.Z Judgement No.7 of 1991.

In a subsequent related case Elias Kundiona v The People⁷⁵ where the appellant was convicted for failing to appear before court and on the same facts for contempt, having been the second accused in Zulu v People previously cited, the Supreme Court in upholding the conviction on contempt dismissed *inter alia* the argument by the appellant that he was the victim of an unfair trial because the learned trial judge was not impartial and independent as per article 18 of the Constitution.

Admittedly a judge reacting to an attack upon himself necessarily assumes many roles in the proceeding against the contemnor. This is what makes summary contempt extra ordinary and it is an unavoidable collorary that the tribunal is not completely impartial or independent...

Similarly a more conservative approach has been taken by the Zambian courts with respect to comments on pending cases and criticism of the courts at large outside of the courts. Illustrous of this are the decisions in Mazoka and Others v Levy Patrick Mwanawasa and Others (Ex parte Enock Kavindele)⁷⁶ and Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others (Exparte Anderson Mazoka)⁷⁷. Both cases arose from an impending Presidential petition following the 2001 general elections by three opposition party leaders namely Anderson Mazoka, Godfrey Miyanda and Christon Tembo.

In the first instance Mazoka the first petitioner was found guilty of contempt for having been reported in a local newspaper to have made political remarks at a campaign rally, impeaching the moral character of the first respondent and others alleging they used stolen resources to get elected.⁷⁸ The Supreme Court dismissed the defence's argument that a citation for contempt not in the face of the courts is premised on a fundamental understanding that the court's authority could be undermined on a matter pending before the court, arguing that the alleged statements were made at a campaign rally far from the court without evidence of the accused having commented on the pending trial and the preferred conclusion.

In the second instance, then vice president Enock Kavindele in rebutting Mazoka's statement which became the subject of a contempt hearing, was reported in another

⁷⁵ S.C.Z. Judgement No.14 of 1993.

⁷⁶ SCZ/EP/010203/2002.

⁷⁷ SCZ/08/EP/010203/2002.

⁷⁸ Derived from an extensive analysis of the two cases by Mumba Malila, Contempt of Court and the Limitation of Freedom of Expression in the course of Judicial Proceedings: The Zambian experience, Zambia Law Journal, Vol.38, 2006, pp 112-127.

local newspaper to have said that he had written to the Chief Justice to allow him clarify matters raised in testimony by some witnesses in the petition case some of whom he stated to be liars.⁷⁹ In disagreeing with the decision of the Supreme Court on the two cited cases, Malila averred that the argument that the function of the court would be usurped by the press or other commentators if allowed to comment on pending proceedings was hard to sustain.⁸⁰

In Communications Authority v Vodacom Ltd,⁸¹ the appellant was found contemptuous by the Supreme Court on the basis of a statement attributed to him suggesting political influence as the reason for his loss of the appeal in the Supreme Court. Notably, no custodial sentence was applied. A detailed discussion on contempt and freedom of speech follows in the next chapter.

3.3 Approaches to Law of Contempt in South Africa, United Kingdom and United States of America.

3.3.1 Law of Contempt in South Africa

The approach by South African courts on the law of contempt was extensively dealt with by the Constitutional Court in the landmark case of The State v Russell Mamabolo.⁸² Fundamentally of interest is that the case involved an appeal on the constitutional validity to the limits on criticism of judicial officers and the administration of justice for which they are responsible for. It related to a conviction of contempt of court resulting from the publication of criticism of a judicial order. The appellant was an official in the Department of Correctional Services who was summarily tried, convicted and sentenced. Kriegler J in setting aside the conviction expounded salient principles of contempt. He set out the basis and importance of enhancing and protecting the moral authority of the courts as drawn from the Constitution.⁸³ Kriegler explained the common law crime of scandalising the court as

⁷⁹ Derived from an extensive analysis of the two cases by Mumba Malila, Contempt of Court and the Limitation of Freedom of Expression in the course of Judicial Proceedings: The Zambian experience, *Zambia Law Journal*, Vol.38, 2006, pp 112-127, p116.

⁸⁰ Mumba Malila, Contempt of Court and the Limitation of Freedom of Expression, p 119.

⁸¹ Appeal No 98/08.

⁸² (CCT 44/00) [2001] ZACC 17.

⁸³ Constitution of the Republic of South Africa 1995, ss1-5,165.

one of the devices used to protect the authority of the court. In delineating its scope he asserted;

The interest that is served by punishing scandalising is not the private interest of the member or members of the courts concerned. The offence was created and has been extant in the interest of the public at large...it is not the self esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected but the moral authority of the judicial process.⁸⁴

Sachs J in concurring with the setting aside of the conviction in the same case pointed out that the heart of the offence lies not in the outrage to the sensibilities of the judicial officers concerned, but in the impact the utterances is likely to have on the administration of justice. He added that the purpose of provoking the criminal law is not essentially to provide a prophylaxis for the good name of the judiciary...it is to ensure that the rule of law in an open and democratic society envisaged by the constitution is not imperilled.

Sachs suggested the test for contempt to be that prosecutions should be based not simply on the expression of words likely to bring the administration of justice into disrepute, but on the additional ingredient of provoking real prejudice. In its context such expression must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to administration of justice.⁸⁵ Something more than damage to the reputation of the courts is required before they can give rise to sanctions under criminal law. With respect to the summary procedure used to convict, the court held that it was constitutionally impermissible in such terms;

The law cannot be above the law; if impartial adjudication is to be at the heart of administration of justice, a judge should not ordinarily be a judge in his or her own cause.⁸⁶

This is in sharp contrast to the Zambian Supreme Court's position in the *Kundiona* and *Sambo* contempt cases cited prior.

On the merits of the conviction, the Constitutional Court held that what was published did not in any way impair the dignity, integrity or standing of the judiciary or of the particular judge and that the statements he made did not bear a meaning such

⁸⁴ (CCT 44/00) 2001, ZACC 17.

⁸⁵ South African Criminal Law and Procedure 3ed (Juta, Cape Town 1996) Vol.II at 164.

⁸⁶ (CCT 44/00) 2001, ZACC 17.

as could possibly found a charge of scandalising the court.⁸⁷ The conviction could therefore not be supported on the substantive merits either. In sum as per Kriegler J, the threshold for a conviction on a charge of scandalising the court is higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury not a private delict.⁸⁸

3.3.2 Law of Contempt in the United Kingdom

Prior to the enactment of the Contempt of Court Act 1981, contempt was predominantly governed by common law and there was no statute substantively dealing with contempt. The Administrative of Justice Act 1960 only partially dealt with the subject.⁸⁹ Dissatisfaction with the law then led to the formation of the Philimore Committee to review the law relating to contempt so as to bring it in line with the requirements of the European Convention on Human Rights to promote freedom of speech.⁹⁰ This arose from the case of The Sunday Times v United Kingdom⁹¹ where the European Court of Human Rights found that the previous common law notion of contempt of court in fact breached Article 10 of the European Convention on Human Rights.⁹²

A United Kingdom court had granted an injunction preventing a news paper from commenting on the responsibility of a company for a chemical thalidomide related birth deformities during the subsistence of settlement negotiations. The court rejected the government's argument of balancing public interest in freedom of expression and the public interest in the fair administration of justice.

Prior to the revision, the common law rules applied. These were however increasingly criticized for their vagueness which produced excessive restriction on freedom of expression and the summary procedures by which alleged contemnors were brought

⁸⁷ State v Russell Mamabolo (CCT 44/00) 2001 ZACC 17.

⁸⁸ State v Russell Mamabolo, (CCT 44/00) 2001.

⁸⁹ Halsburys Statutes of England and Wales, 4th Ed Vol. II, 1991 Re issue, London Butterworth p177.

⁹⁰ Halsburys Statutes of England and Wales, 4th Ed Vol. II, 1991 Re issue, London Butterworth p177.

⁹¹ 26 April, 1979, Series A No. 30, 14 EHRR 229.

⁹² Contempt of Court and The Contempt of Court Act 1981, <http://www.inbrief.co.uk/media-law/contempt-of-court/>. Accessed 18th December, 2010.

before courts.⁹³ This problem was illustrated in A.G v Times Newspapers⁹⁴ where the House of Lords ruled *inter alia* that any risk of prejudice was capable of constituting a contempt at common law. This case with facts as hitherto cited in Sunday Times v United Kingdom⁹⁵ gave rise to the decision in the European Court of Human Rights leading to the enactment of the Contempt of Court Act 1981.

While the leading Privy Council case of Ambard v Attorney General of Trinidad and Tobago⁹⁶ is popularly credited for its proposition in support of criticism of courts; "...justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men", a more recent post 1981 Act Privy Council decision in Ah-ee v DPP⁹⁷ dismissed the proviso to that proposition; "...provided that members of the public abstain from imputing improper motives to those taking part in the decision the administration of justice..." often resorted to by *Zambian* courts. The Privy Council dismissed the proviso as an absolute statement not acceptable as the offence of contempt or scandalising the court is narrowed by the need in a democratic society for public scrutiny of the conduct of judges.⁹⁸

The Contempt of Court Act 1981 brought more amenable changes to the law in the United Kingdom. Thus for there to be a finding of criminal contempt or scandalising of the courts, section 2(2) provides that a publication must create a *substantial risk* that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Under section 2(1), a publication is defined to include any speech, writing, broadcast or other communication in whatever form which is addressed to the public at large or a section of the public. A further test to determine substantial risk is provided as; whether the publication is likely to come to the attention of a potential jury member, what the impact on an ordinary reader at the time of publication is likely to be and the timing of the trial and the publication. It is submitted that the explicit tests limit potential for varying interpretations of what constitutes contempt.

⁹³ Ian Cram, Reconciling Fair Trial interests and the informed scrutiny of public power?-an analysis of the United Kingdom's contempt of court law, in *II Rapporto Tra Giustizia e mass media* (2010, Rome editorial Scientifica).

⁹⁴ (1974) AC 273.

⁹⁵ 26 April, 1979. Series A No.30. 14 EHRR 229.

⁹⁶ (1936) 1 All ER 704.

⁹⁷ (1999) A.C 294.

⁹⁸ (1999) A.C 294 .

A noted improvement to the law are the defences to contempt created under section 4 namely; innocent publication, fair and accurate contemporaneous reports of proceedings and discussion of public affairs. These allow wider latitude to the public to exercise the right to comment on both pending and past cases alike without fear of being cited for contempt. This means that media organisations' contemporaneous reports of court proceedings held in public are protected from the application of contempt laws provided the report is fair and accurate and is in furtherance of the principle of open justice.⁹⁹

3.3.3 The United States Approach to Law of Contempt

It is indisputable that the United States of America (USA) stands out distinctly in upholding the freedom of speech as a sacrosanct individual right. It is considered a pre- eminent freedom ranking above all others. This is reinforced in the First Amendment of the United States Constitution.¹⁰⁰ It is on this premise that the United States allows exceedingly wide latitude for criticism of the courts and contempt in general. The American Supreme Court has long since discarded the obsolete offence of “scandalising the court” and has preferred since Schenk v United States¹⁰¹ case to apply the test of “clear and present danger” to all abridgements of free speech,¹⁰² including contempt charges. The rationale for this test is that the first Amendment ranks freedom of expression as a pre eminent freedom ranking above all others and therefore the evil must be substantial to warrant any abridgement.¹⁰³ The US court epitomised their cautious attitude towards contempt proceedings in Bridges v California¹⁰⁴ which concerned comments related to ongoing proceedings. Justice Hugo L. Black stated in delivering judgement,

...And an enforced silence, however limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt, much more than it would enhance respect.

⁹⁹ Ian Cram, Reconciling Fair Trial interests and the informed scrutiny of public power? - p 4.

¹⁰⁰ The United States of America Constitution, 1st Amendment.

¹⁰¹ (1919) 249 US 47.

¹⁰² Vinod A.Bode, Scandalising the Court, (2003) 8 SCC (Jour) 32.

¹⁰³ First Amendment provides; Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievance.

¹⁰⁴ (1941) 86 L Ed 192 at 204.

In the same case, Justice Felix Frankfurter in support of public scrutiny of judges asserted;

There have sometimes been martinets upon the Bench as there have been pompous wielders of authority who have used the paraphernalia of power in support of what they call dignity. Therefore the judges must be kept mindful of their ultimate public responsibility by a vigorous stream of criticism expressed with candour, however blunt.¹⁰⁵

A noteworthy demonstration of the US judicial system's considerable disfavour to a threat of abridgement of freedom of expression by the courts was amplified in the impeachment proceedings against Federal Judge James H. Peck. Circumstances occasioning impeachment proceedings were that Judge Peck instituted contempt proceedings against a lawyer Luke Lawless for writing a critical article on his judgement.¹⁰⁶

The alleged contemnor instead moved the House of Representatives for impeachment of Judge Peck which was referred to the Judiciary Committee. The matter went to Senate for trial of the Judge who was charged by the article of impeachment, with intention wrongfully and unjustly to oppress, imprison and otherwise injure the said Luke Edward Lawless, under colour of law by ordering that he be committed to prison for twenty four hours and that he be suspended from practicing as an attorney at law...to the great disparagement of public justice, the abuse of judicial authority and subversion of the liberties of the people of the United States.¹⁰⁷ Although the impeachment narrowly failed by one vote, it led to the enactment of the Act of 1831 declaring the court had no power to punish constructive contempt, words spoken or written other than those uttered in or very near court and resistance to any lawful writ, process or order of the court.¹⁰⁸

3.4 Conclusion

There can be little doubt that there is a wide divergence in application of the law of contempt in Zambia and the selected jurisdictions of South Africa, United Kingdom and United States of America. It is also apparent that the stringent application of law of contempt has an effect on freedom of speech. There is a need to reformulate the

¹⁰⁵ Bridges v California (1941) 86 L Ed 192.

¹⁰⁶ Vinod A. Bobde, Scandalising the Court, 8 SCC (Jour) 32, 2003.

¹⁰⁷ Senate Impeachment Journal, 2nd session of the 21st Congress debates dated 4/5/1830.

¹⁰⁸ United States of America Constitution, section 401.

law to more tolerable outcomes. The effect of the law of contempt on freedom of speech forms part of the detailed discussion subject of chapter four.

CHAPTER FOUR

CONTEMPT OF COURT AND FREEDOM OF SPEECH, EXPRESSION AND PRESS: STRIKING A BALANCE

4.0 Introduction

Freedom of expression is one of the fundamental rights guaranteed by the constitution.¹⁰⁹ The freedom to speak one's mind is an inherent quality of the type of society contemplated by the constitution. It is the duty of every member of civil society to be interested and concerned in public affairs including courts.¹¹⁰ The media plays a critical role in this process by providing a forum to inform, educate and for exchange of information. This chapter considers contempt of court in relation to freedom of expression and explores some of its implications or effect on freedom of expression and as a corollary freedom of the press. Some of the questions considered include; whether it should be the intention of the law to totally bar any comments on pending cases or what permutations should be allowed in the public interest. Has the unbridled discretion in determining what constitutes contempt and the exercise of contempt powers by courts in Zambia had a chilling effect on freedom of expression and the press or media? To what extent do public comments on pending cases interfere in the administration of justice? Should the voicing out of public criticism against judicial officers be invariably deemed as contemptuous?

4.1 The Basis for Freedom of Expression

International recognition of freedom of expression as one of the fundamental human rights necessary in any modern democratic society has been given full pre-eminence in international human rights instruments. Prominent of these *inter alia* are the International Covenant for Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). Locally, it is guaranteed under Article 29 of the Zambian Constitution.

¹⁰⁹ Constitution Chapter 1 of the Laws of Zambia, Article 20.

¹¹⁰ Per Sachs J, *State v Mamabolo* (CCT 44/00) 2001 ZACC 17.

In defining the parameters of the contempt offence of scandalising, the Privy Council in Ahnee, Sydney Selvon and Le Mauricien v DPP¹¹¹ emphasised *inter alia* that it should be narrowly interpreted on the basis that there is a need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. Further, that there is available to a defendant a defence based on the right of criticising, in good faith, in private or public, the public act done in the seat of justice. The Australian High Court's support for freedom of expression was given effect by Hope JA in AG (NSW) v Munday¹¹² by stating;

The truth is of course that public institutions in a free society must stand upon their own merits; they cannot be propped up if their conduct does not command respect and confidence; if their conduct justifies the respect and confidence of a community, they do not need the protection of special rules to shield them from criticism. Indeed, informed criticism, whether from a legal or social or any other relevant point of view, would be of the greatest assistance to them in the performance of their functions.

Notable from this view is the point that the Courts are public institutions and to this extent ought to be equally subject to open criticism devoid of undue restraint like any other public institution.

Barend van Niekerk set out six premises on which a system of free speech in the legal domain may be predicated. He described them as 'inherently reflective of democratic values and expectations and suggests that they 'constitute tolerably useful yardsticks and intellectual tools with which to assess the use to which legal free speech should be put.'¹¹³ These are that freedom of speech; a) encourages the achievement of individual self fulfilment (in particular self fulfilment of the lawyer and self fulfilment of other groups, particularly journalists), b) is an essential instrument for the advancement of knowledge and truth in the administration of justice, c) is a device of democratic participation in the administration of justice; d) is a means of minimizing conflict and maximizing stability in the administration of justice; e) is a prerequisite for justice to and the liberty of the individual; and f) avoids the inefficacy and frequent counter productivity of free speech restrictions concerning the administration of justice.¹¹⁴

¹¹¹ Ahnee, Sydney Selvon and Le Mauricien v DPP (1999) 2 WLR 1305.

¹¹² Attorney -General (New South Wales) v Munday 2 NSWLR 887.

¹¹³ Barend van Niekerk, The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World, Praeger Publishers New York (1987) Chapter 1,1-45.

¹¹⁴ Barend van Niekerk, The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World, p 1-45.

Further arguments advanced against restraint of judicial comment are that openness and the wider scrutiny of judicial process which it entails ought to make the courts more accountable to the community. On this argument, publicity is one means of ensuring a competent judicial performance.¹¹⁵ The United States Supreme court has demonstrated one of the highest safeguards in advancing the case for freedom of expression in relation to the courts. Justice William Brennan in Globe Newspaper v Superior Court for the County of Norfolk expressed the view that;

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole. More over public access to the criminal trial fosters an apparent fairness, thereby heightening public respect for the judicial system. And in broadest terms, public access to the criminal trial permits the public to participate in and serve as a check upon the judicial process, an essential component of self government.¹¹⁶

It is to be noted that these remarks are predicated in the context of the first amendment of the United States Constitution which represents a presumptive hostility towards contents based government regulation of expression.

4.2 Commenting on Pending Cases and the Role of the Media

The question worthy of consideration is whether it ought to be or is the intention of the law to totally bar any comments on pending cases or what permutations should be allowed in the public interest? A significant principle in respect of contempt law under common law is the application of the *subjudice* rule which essentially proscribes interference with ongoing legal proceedings usually by prohibiting publication of matters deemed likely to prejudice the right of a fair trial.

The basis of concern by the courts on public comment or media reporting on trial related material is that this poses a risk on the fairness of trial proceedings and subsequently the administration of justice.¹¹⁷ This suggests that the judge is susceptible to being influenced by such public comments. However against such assertions, the court held in the Nigerian case of Akinrinsola v A.G Anambra State,¹¹⁸ that publication of a general comment on a matter which is related to a court

¹¹⁵ Ian Cram, Reconciling fair trial interests and the informed scrutiny of public power – p 5.

¹¹⁶ Globe News papers v Superior Court for the County of Norfolk 457 US 596, 606 (1982).

¹¹⁷ Anderson Mazoka and others v Levy Patrick Mwanawasa (Exparte) Enock Kavindele SCZ. /EP/010203/2002.

¹¹⁸ (1980)2NLR 17.

proceeding presided over by a judge and without any specific reference to the court of trial cannot be held to be contemptuous, reasoning that a statement that was regarded as contempt in a jury trial would rarely be contempt in a trial by judge alone. The reasoning in this regard shared in common law jurisdictions is that because of their professional training, a judge is far less susceptible to being influenced by prejudicial publications than a jury which normally comprises lay members.¹¹⁹ In further buttress of this view, Buckley J in the English case of Vine Products Ltd v Mackenzie Co Ltd poised;

It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing a prejudging to influence them in deciding a case.¹²⁰

A learned judge should be able to discount the contents of an objectionable publication concerning a pending matter before court as sensational and would not be swayed by its comments.¹²¹ It is submitted that similarly, the Zambian courts are presided not by lay jury members but by learned judges whose judgement can arguably not be subject to influence from the rightful or misplaced whims of public comment or criticism.

The United States courts apply a much narrower approach to restraint as earlier alluded, to the extent that in order for a publication to be contemptuous it must pose a clear and present danger to the administration of justice.¹²² The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. In consequence, an environment is created such as permits the media to report on pending judicial proceedings without much restraint. The famous 1995 American case California v Oriental James (OJ) Simpson¹²³ case where the defendant was alleged to have murdered his wife and was widely publicised while proceedings were on going highly buttresses this position.

¹¹⁹ Background paper on Freedom of Expression and Contempt of Court for the International Seminar on Promoting Freedom of Expression with the three Specialised International mandates, Hilton London, United Kingdom, 29 -30th November, 2000.

¹²⁰ (1969) RPC 1.

¹²¹ Akinrinsola v A.G of Ambara State (1980) 2 NLR 17.

¹²² Bridges v California (1941) 86 L ED 192.

¹²³ B.A 097211.

In sharp contrast, the Zambian courts have not taken kindly to reporting on pending cases. The People v Chansa Kabwela¹²⁴ case which resulted in the Post Newspaper's managing editor Fred Mmembe¹²⁵ being convicted of criminal contempt by a magistrate court, on account of a published article commenting on the case while it was still proceeding demonstrates this position. It is to be noted however that the decision is the subject of appeal and is yet to provide a binding outcome by the Zambian High Court.

The two cases of Anderson Mazoka and Others v Levy Patrick Mwanawasa and others (Ex-Parte Enock Kavindele)¹²⁶ and Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (Ex Parte Anderson Kambela Mazoka)¹²⁷ which arose from an election petition following the 2001 general elections in Zambia also lend weight to the above proposition. In these cases Anderson Mazoka and then vice President Enock Kavindele were in separate incidences cited for contempt for making political comments in respect of the subject impending election petition case.

To what extent then should permutations of expression be allowed? It has plausibly been argued that openness by way of media reporting of trial and wider scrutiny of judicial process which it entails ought to make the courts more accountable to the community and publicity is one of the means of ensuring a competent judicial performance.¹²⁸ Lord Atkin laid down the proposition which has come to be renowned as one of the most fundamental in the indignant disfavour of the excesses of contempt law and the relevant prescription for the appropriate balance;

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.¹²⁹

Another significant principle advanced in defence of public comment on impending proceedings is that of public interest and whether the risk of prejudice is only

¹²⁴ Case No. S.C, CRMP-03 (2009).

¹²⁵ 2SP/C/192/2009.

¹²⁶ SCZ/EP/010203/2002.

¹²⁷ SCZ/08/EP010203/2002.

¹²⁸ Ian Cram, Reconciling fair trial interests and the informed scrutiny of public power- p 5.

¹²⁹ Paul Terrence Ambard v A.G of Trinidad and Tobago (1936) A.C 322, p 335.

incidental. Section 5 of the English Contempt of Court Act 1981 adequately provides for this defence in these terms:

A publication made as part of a discussion of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice is merely incidental to the discussion.

Illustration is to be found in the European Court of Human Rights decision in Sunday Times v United Kingdom¹³⁰ wherein a United Kingdom court had granted an injunction to prevent a newspaper from commenting on the responsibility of a company for thalidomide related birth deformities while there were ongoing settlement negotiations. The European Court applied a three part test namely that interference of freedom of expression was prescribed by law and had a legitimate aim of maintaining authority of the judiciary but that in the circumstances of the case, it was not necessary in a democratic society. The court held that there was a public interest in knowing about the case which was not outweighed by a social need which was sufficiently pressing. Further that the families of numerous victims of the tragedy who were unaware of the legal difficulties involved had a vital interest in knowing all the underlying facts and the various possible solutions.

This standard is yet to be applied by the Zambian courts and would positively affect the paradigm of contempt cases if so applied.

4.2.1 The Role of the Media

The media has a key role to play in development both as educator and provider of key information for the process of democracy and development. A free media by providing factual information and honest opinions empowers citizens to advance their political rights and contribute to the strengthening of institutions so that they can contribute to good governance.¹³¹ The media provides information that permits accountability to be achieved, laws to be carefully applied, markets to function and people to be creative.¹³² The English position echoes this view to the extent that access to legal proceedings served the legitimate function of ensuring informed public

¹³⁰ 26 April 1979, Series A No. 30, 14 EHRR 229.

¹³¹ Background paper on Freedom of Expression and Contempt of Court for the International Seminar on Promoting Freedom of Expression with the three Specialist International mandates, Hilton Hotel, London United Kingdom. 29th – 30th November, 2000.

¹³² Background paper on Freedom of Expression and Contempt of Court.

debate about the daily work of the courts, given the physical constraint of the court room, the role of the court reporter was vital in relaying details of the proceedings beyond the confines of the court.¹³³

In some jurisdictions, public interest has been held to be established in the balancing exercise if the risk to the administration of justice is an incidental and unintended by product of the discussion of public affairs as in the Australian case of Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd (the Bread Manufacturers' case).¹³⁴

The court held *inter alia* that, it was well settled that a person cannot be prevented from process of contempt, from continuing to discuss publicly a matter which may fairly be regarded as one of public interest by reason merely of the fact that the matter in question has become the subject of litigation.

The above position was concurred by the House of Lords in the English case of Attorney General v English.¹³⁵ under the protection of section 5 of the English Contempt of Court Act 1981 which provides that;

A publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

The argument is to be made that this position is far from what the courts have held in Zambia as demonstrated by the cases cited prior. To the contrary, the Zambian decisions on contempt may lead one to the inference that once a matter is before court, no comments whatsoever may be made, a position which is inimical to the constitutionally guaranteed freedom of expression.

4.3 Criticism of Judicial officers : Imputing Impartiality and Improper Motives – Justification and Truth

The preceding section and chapters substantially enunciated the various legal arguments surrounding the case for criticism of judges. It is necessary at this point to further examine in greater detail some of the specifics in this respect. In aiding the discussion, the question to be considered is; should voicing out of public criticism or

¹³³ Ian Cram, Reconciling fair trial interests and the informed scrutiny of public power – p7.

¹³⁴ (1937) 37 SR (NSW).

¹³⁵ (1983) 1 A.C 116.

allegations of impartiality or any form of impropriety whatsoever against judicial officers in Zambia be deemed as contemptuous?

The Zambian courts in exercising their contempt powers have often resorted to the proviso in Ambard¹³⁶ against criticism of the courts suggesting that criticism was permissible provided that members of the public abstain from “imputing improper motives to those taking part in the administration of justice.” This has been rejected as an absolute statement no longer acceptable in a later Privy Council decision in favour of greater latitude for criticism in Ahnee v D.P.P.¹³⁷ The Privy Council further held that the application of the contemptuous offence of scandalising the court was narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. The exposure and criticism of judicial misconduct was deemed to be in the public interest and therefore ought not to invariably be deemed contemptuous.

The law as it is currently applied in Zambia suggests that people are expected to observe silence and refrain from criticising judges and pointing out any alleged or perceived impropriety or face the real prospect of a jail sentence.¹³⁸ Any imputation of biasness or any improper conduct has been in wholesale manner been the basis of a finding of criminal contempt. In Sebastian Zulu v People,¹³⁹ the Supreme Court of Zambia although suspending the one year sentence affirmed the lower court’s finding of contempt. This was where the appellant acting for the defence in a murder case handed an affidavit to the trial judge supporting an application for the trial judge to recuse himself on account of biasness against his client.

The Supreme Court described the appellants conduct as “reckless in the extreme and constituted contempt of court.” The Supreme Court noted that when the appellant handed the offending affidavit to the learned trial judge, he did not make its contents known in open court so that although they had found that the contempt consisted of an application to the learned trial judge to recuse himself, the injurious remarks about the judge were not made public. This worked to mitigate the sentence.

¹³⁶ Andre Paul Terence Ambard v Attorney General of Trinidad and Tobago (1936) 1 All ER 704.

¹³⁷ (1999) A.C 294 P.C.

¹³⁸ Derived from the various local contempt cases reviewed.

¹³⁹ (1991) S.J S.C).

An argument is to be made that no other guidance was offered as to the availability of other possible recourse for the defendant such as would provide for substantiating the said claims, particularly since this was the final court of appeal.

This approach has been more pronounced in the more recent contempt cases. In Communications Authority v Vodacom Ltd,¹⁴⁰ the appellant Enoch Kavindele was found guilty of contempt of court by the Supreme Court based on a statement in the press attributed to him inferring political interference such as to imply a fetter on judicial independence. This he suggested was the reason for his loss of an appeal against the refusal by the Communication Authority to grant Vodacom a license to operate cellular phone services in Zambia.

Attention is drawn to the recent case of Masiye Motels Ltd and Rescue Shoulders and Estate Agency Ltd¹⁴¹ concerning contempt proceedings. In that case, two alleged contemnors Nsuka Kalobwe Rabbi Sambo a legal practitioner and his client Victor Kaluba Chilekwa were convicted of contempt and sentenced to two years imprisonment by the Supreme Court of Zambia on 30th March 2010. The brief facts are that Chilekwa an Executive Director of a company called Rescue Shoulders and Estate Agency Ltd in a claim for commission under a contract entered into with Masiye Motels Ltd for the sale of Masiye Lodge Motel, was awarded a sum of K100 million by the High Court. Upon appeal by the dissatisfied respondent Masiye Motels Ltd, the Supreme Court rendered a judgement in favour of the Appellant and set aside the award made by the trial judge on 7th January 2010.

Aggrieved by the judgement of the Supreme Court, the losing party Chilekwa went on “rampage” of sending a series of three disparaging letters in strong revolting terms alleging *inter alia* biasness and discounting the Supreme Court judgment. Upon being summoned to appear before the Supreme Court, he maintained his stance and further implicated his lawyer to substantiate his claims.

It is acknowledged that the Supreme Court as the highest seat of justice in order for it to fulfil its function effectively must be held in highest respect and confidence by the public for the effective administration of justice and not be unduly brought into

¹⁴⁰ Appeal No. 98/08.

¹⁴¹ Appeal No. 187/2007.

disrepute. However, this does not detract from the Court the need to be seen to dispense justice in a manner that accords with the fundamental rules of natural justice. Some legal issues arise, it may be plausibly argued that in keeping with the rules of natural justice, ordinarily judicial officers are not expected to be judges in their own cause as this negates from this principle.

Particularly in a finding of criminal liability, the accused regardless of the excessive statements in the absence of any factual basis and gravity of their alleged transgressions are entitled to the benefit of a fair trial. This is constitutionally guaranteed under article 18(1) of the Zambian Constitution. This can not be seen to be so by the public where the judicial officers against whom such contempt was committed preside in their own cause as was so in the case above.

A parallel may be drawn with some considerably liberal judicial attitudes. A leading case in point is the Canadian case of R v Kopyto¹⁴² wherein the court gave full consideration to the Charter of Rights and Freedoms of (1982) which protects freedom of expression in adjudicating the case. In that case, a barrister had been charged with contempt of court following remarks made by him to a newspaper reporter after a court decision against his client in the following terms;¹⁴³

This decision is a mockery of justice. It stinks to high hell. It says that it is okay to break the law and you are immune so long as someone above you said to do it. Mr Dawson and I have lost faith in the judicial system to render justice. We are wondering what is the point of appealing and continuing this charade of the courts in this, which are warped in favour of protecting the police...

In the same case, the Ontario Court of Appeal by majority consensus applied the clear and present danger to the administration of justice test to determine contempt. Cory JA asserted that;¹⁴⁴

As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy...The courts have functioned well and effectively in difficult times. They are well regarded in the community because they merit respect. They need not fear criticism or need to sustain unnecessary barriers to complaints about their operations or decisions.

¹⁴² (1987) 62 OR (2d) 449.

¹⁴³ Background Paper on Freedom of Expression and Contempt of Court , p 16.

¹⁴⁴ (1987) 62 OR (2d) 449.

The Ontario Court of Appeal found that there was no clear and present danger to the *administration of justice presented by the barrister's disparaging remarks* however despicable, so as to warrant a finding of contempt. What is even more astounding is that the objectionable remarks were uttered by a learned barrister and not his client. This position is far from our Zambian courts approach and demonstrates a considerably generous level of latitude for freedom of expression in respect of judicial criticism which is necessary in a democratic society.

4.4 Effect on Freedom of Expression and Freedom of the Media

Having considered the preceding legal issues surrounding contempt and freedom of expression, close attention could usefully be paid to the question; has the perceived unbridled discretion in determining what constitutes contempt and the exercise of contempt powers by courts in Zambia had a chilling effect on freedom of expression and the press?

It has been argued in reference to the contempt offence of scandalising the court that the continued existence of this offence renders individuals vulnerable to prosecution. Further, that indiscriminate application of the offence of contempt has the potential for abuse or may lead to self-censorship or 'chilling' on the media and the general public at large for an offence which, it has been argued 'is arbitrary, irrational, and vague in its nature and constitutes a violation of the principle of legality'.¹⁴⁵

In setting out 'grounds for a defence of justification,' the authors of the Australian Law Review Commission (ALRC) report noted that without such a defence; well founded allegations of judicial misconduct may be punished and more importantly, people in possession of sound evidence establishing judicial misconduct may be restrained from revealing it publicly out of fear of being convicted of contempt...a dangerous tradition of excessive deference to the judiciary may arise within the media and the community at large... Thus, far from vindicating the position of those who

¹⁴⁵ Milton, South African Criminal Law and Procedure (1996) 187-188 as cited by Sachs J in *S v Mamabolo* [2001] ZACC 17; (2001) 3 SA 409 [67]

successfully investigate and bring to light abuses within the judiciary, the law, through not recognising a defence of justification, seems inclined to victimise them.¹⁴⁶

In this regard, the law regarding contempt of court in Zambia particularly criminal contempt is so vague and general that it operates as an oppressive limitation on free speech. The lay agitator, activist, disgruntled litigant or other individual who feels that their story has not been heard deserves better protection from unexpected prosecution and should rightly expect a wide scope to air their complaints.¹⁴⁷ Freedom of speech in the legal domain will avoid the inefficiency and counter-productivity of restrictions. Prosecutions may be counterproductive in a dual sense; publicity may increase the audience for the words complained of and may open the door to the suggestion that the judicial system is oppressive.¹⁴⁸

The United States courts have strongly expressed aversion for taking contempt proceedings against free expression regarding court hearings. Justice Hugo L. Blackburn stated;

... and an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt, much more than it would enhance respect.¹⁴⁹

In the same vein, the then Chief Justice Rajendragadkar of the Indian Supreme Court echoed similar views in Narmada Bachao Andolan v Union of India and Others¹⁵⁰ stating;

We ought never to forget that the power to punish for contempt large as it is must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely...wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect of the public at large by the quality of their judgement, the fearlessness, fairness and objectivity of their approach and by the restraint and dignity and decorum which they observe in their judicial conduct.

¹⁴⁶ In 1987 the Australian Law Reform Commission considered scandalising as part of *Contempt*, Report No 35. The chapter 10 of that report outlines the offence, considers the justifications for and appropriateness of the offence and recommends a limiting of the offence. The recommendations were not implemented.

¹⁴⁷ Litaba, Oyiea --- "Does the 'Offence' of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?" Deakin Law Review 6; (2003) 8(1) Deakin Law Review 113, 2003.

¹⁴⁸ Litaba Oyiea, Does the Offence of Contempt by Scandalising the Court have a valid place, p113.

¹⁴⁹ *Bridges v California* (1941) 86 L Ed 192.

¹⁵⁰ (1999) 8 SCC 308.

In attempting to address the issues surrounding the question at hand, views were solicited from representative civil organisations and bodies. Transparency International expressed the view that contempt powers exercised by the Zambian courts are highly discretionary to the extent of determining what constitutes contempt and therefore susceptible to abuse being shrouded in vagueness.¹⁵¹ Additionally, that adverse public perception of abuse of such powers go to affect the confidence of the public in the courts. Fair comment and public interest ought to be legally provided for as defences. Further that the exercise of contempt powers go against principles of natural justice to the extent that judges against whom contempt is alleged adjudicate in their own cause thereby disentiing the alleged contemnor the right to a fair trial.¹⁵²

Where the alleged contempt affects the highest court the Supreme Court, the accused is left without further recourse since there is no right to appeal.¹⁵³ It was also stated that the application of contempt law in its current form has a chilling effect on freedom of expression and on the media due to lack of clarity of what constitutes contempt and the excessive punishments meted out in some cases.

The Media Institute of Southern Africa (MISA) Zambia had these views to express,¹⁵⁴ Access to information allows citizens to contribute to national discourse necessary in a democracy and that that journalists play a crucial role in facilitating information including reporting on court cases whether impending or decided. It was said that the current law of contempt tends to hinder the journalistic mind from explaining to the public the proceedings of court and this takes away the layman's understanding of the courts functioning giving way to breeding resentment for the judicial system by the public.

The law is too general and applies a blanket restriction against comment or criticism of courts or judicial officers to the extent that it has a chilling effect on both the public and the press. Analysis of cases ought to be allowed as the current restriction limits the function of journalists.¹⁵⁵ The media provides a market place for exchange of ideas and the media is in essence an extension of public expression. It was stated that

¹⁵¹ Interview with Mr. Goddwell Lungu, Transparency Zambia Executive Director 24th February, 2011.

¹⁵² Interview with Mr. Francis Mwale, Legal Officer Transparency Zambia. 20th January, 2011.

¹⁵³ Interview with Mr. Stephen Lungu, LAZ President. 16th February, 2011.

¹⁵⁴ Interview with Ms. Jane Chirwa, MISA Zambia Information Officer. 24th February, 2011.

¹⁵⁵ Interview with Ms. Jane Chirwa, MISA Zambia.

there is need to reform the law and narrow the wide interpretations of contempt to allow rightful exercise of freedom of expression by both the public and the media.

The Law Association of Zambia (LAZ) conceded that the law of contempt is in a state of flux both substantively and procedurally due to want of specificity and clarity as to what constitutes contempt. Further that there was inevitably a need for reformation of the law in that respect.¹⁵⁶ The Human Rights Commission (HRC) maintained;¹⁵⁷ that a reasonable balance needed to be maintained between freedom of expression and the important requirement to protect administration of justice and integrity of the courts from undue media or public comments on pending proceedings. That freedom of expression is not absolute and must be exercised responsibly. Further that excessive media or public comment on pending cases generally presented a risk to interference with the administration of justice by the courts.

4.5 Conclusion

It can be seen that courts in Zambia have applied a firm and conservative approach to contempt in relation to freedom of expression. It is particularly desirable that as the ultimate guardian of free speech, the judiciary show the greatest tolerance to criticism of its own functioning. Its standing in society can only be undermined if the public are led to draw the inference that in pursuance of the principle that an injury to one of them is an injury to all, the judicial establishment is closing ranks.¹⁵⁸

It seems desirable and in the public interest that even if allegations are of corruption against judges or there are imputations of improper motives to them in discharging their functions, they are not contemptuous if they can be proved and it is for the public good that such charges should be made whenever the facts warrant the levelling of such charges, without fear of a real prospect for a jail sentence.¹⁵⁹

¹⁵⁶ Interview with Mr. Stephen Lungu, Law Association of Zambia President. 16th February, 2011.

¹⁵⁷ Interview with Mr. Enoch Mulembe, Executive Director Human Rights Commission. 18th February, 2011.

¹⁵⁸ Per Sachs J in *State v Marnabolo* (CCT 44/00) 2001 ZACC 17.

¹⁵⁹ *Vonod A. Bobde, Scandalizing the court* (2003) 8 SCC (Jour) 32.

CHAPTER FIVE

GENERAL CONCLUSIONS AND RECOMMENDATIONS

5.0 Conclusions

It is recognised that for any judicial system to function effectively and fulfil its mandate as an umpire of justice and upholding the rule of law in a democratic society, it is necessary that the institutions that dispense justice are respected and their dignity upheld. However this respect should not be an end in itself but should be a means to enhance the administration of justice and maintenance of the rule of law.

This study sought to evaluate the law of contempt in Zambia, its adequacy as it is currently applied and its impact on freedom of expression. It further sought to identify areas of concern for possible reformation to improve the law of contempt. To this effect the study established that the law of contempt in Zambia is generally inadequate in certain material respects. There is no single principle legislation which substantively deals with contempt. The statute listed in the Statute books the Contempt of Court (Miscellaneous) Provisions Act Cap 38 is archaic, inadequate and out dated. It appears to have been rendered moribund as there seems to have been no reference to it in many years judging from the cases reviewed.

The courts have applied a multiplicity of laws including Section 116 of the Penal Code, Common law principles and the rules of the Supreme Court of England Order 53. This has led to variations and inconsistencies in applying the law. The study further established that due to the vagueness and lack of clarity in the law as to what constitutes the scope of contempt, wide discretion is left to the courts to determine. Consequently the absence of a substantive codified contempt statute has sanctioned wide interpretation and discretion by the courts in the exercise of contempt powers owing to the lack of clarity and certainty in the current law of contempt. Judges have enormous powers of exercising the law of contempt. This has had an impact on the freedom of expression.

Due to a lack of sufficient specificity and clarity, commenting on impending cases is generally considered averse and an interference in the administration of justice

thereby creating an imbalance between the constitutionally guaranteed freedom of expression and the need to preserve the integrity of the courts. The law is too general and applies a blanket restriction against comment or criticism of courts or judicial officers to the extent that it has a chilling effect on both the public and the press.

It was further established that the courts place heavy reliance on common law principles of contempt which have long been superseded by more accommodating legislation in various jurisdictions including England. Our courts in comparison to the U.K, U.S.A and South Africa treat contempt with a firm and conservative approach which does not exactly accord with modern legal standards. The current law does not provide for defences of justification, truth, public interest issues or accurate reporting. The seeming defence available is to purge the contempt by renouncing it. Other than the appeal process which has the disadvantage of being lengthy, there are no specific mechanisms to regulate the exercise of contempt powers and to provide immediate recourse in the event of alleged abuse. The Judicial Complaints Authority which is mandated to regulate conduct of judicial officers is ill equipped, understaffed, underfunded and is inadequately placed to meet the demands. It is not legally empowered to enforce disciplinary action against erring judicial officers.

5.1 Recommendations

- 5.1.1 It is recommended that the law on contempt in Zambia be reformed to bring it in line with modern international law standards. The current Contempt of Court (Miscellaneous) Provisions Act ought to be repealed and a more substantive statute be enacted to address all the concerns raised. This can best be achieved through a technical committee of legal experts to be constituted who will review and draft the desired enactment drawing lessons from other democratic jurisdictions cited. A more comprehensive Act that will substantively deal with contempt is imperative.
- 5.1.2 The new legislation should be modelled from lessons from other jurisdictions in terms of providing for defences. It should provide for defences to contempt as created under section 4 of the Contempt of Court of England 1981 Act namely; innocent publication, fair and accurate contemporaneous reports of proceedings and discussion of public affairs, truth, fair comment accuracy of reporting, public interest issues and justification.

- 5.1.3 The new enactment must clearly define the scope of what constitutes contempt and provide for an appropriate test in founding criminal contempt to reduce the wide discretion placed on courts. These amendments should take into account the constitutional guarantees and harmonise the law with the same.
- 5.1.4 The threshold for a conviction on a charge of criminal contempt should be aligned with constitutional provisions and made higher than common law principles which are superimposed by constitutional values.
- 5.1.5 The law should provide clear procedure for instituting contempt and must take due regard in criminal contempt of the constitutional guarantee for due process of the law and right to a fair trial by inter alia; providing for independent adjudication from the officer against whom the alleged contempt has been committed.
- 5.1.6 In terms of the regulatory mechanisms, the Judicial Complaints Authority should be strengthened by revising the enabling Act to allow for enforcement powers. Appointment of commissioners and the Secretary should equally be conferred on an independent body and not the executive through the President to enhance independence.
- 5.1.7 Similarly the appointment of judges should be conferred on an independent body and not the executive through the President to enhance separation of powers.
- 5.1.8 The law should provide for a mechanism to seek recourse and determine imputations of improper conduct and biasness in a prompt manner other than the appeal process.
- 5.1.9 With respect to the Judicial Complaints Authority as regards proceedings, the enabling Act provides for confidentiality of the proceedings to the extent that the members and Authority are proscribed from disclosing details of both the proceedings and the judicial officer against whom a complaint was made. This restriction or veil of secrecy ought to be removed to allow free access to the information provided once the case has been concluded, which should operate as a deterrent to abuse of powers.
- 5.1.10 Powers to appoint the Secretary of the Judicial Complaints Authority and the Commissioners thereof be conferred in a collective independent judicial body and not the President of the Republic. This would enhance both independence and objectivity of the office holder.

Law is dynamic and not static and should meet the aspirations of the society at any given point in time in order to be both relevant and effective in its intended purpose of sustaining the rule of law. A necessary balance needs to be had between the need to maintain the integrity of the courts and need for people to rightfully exercise their freedom of expression.

BIBLIOGRAPHY

Books

Brazier R, 'Constitutional Reform: Reshaping the British Political System' 2nd Edt. Oxford Press, 1998

Balasankaran N, 'The Law of Contempt Court in India' Atlantic Publishers and Distributors, 2004

Cram I, 'Reconciling Fair Trial Interests and the Informed Scrutiny of Public Power?- An Analysis of the United Kingdom's Contempt of Court Laws' in II *Rappoportito tra Giustizia e mass media* (2010, Rome Editorial Scientifica)

Earl of Halsbury, Davies.A, Roydhouse E, 'Halsbury's Statutes of England and Wales 1991' Vol. 16, Butterworth's Laws (1991)

Hailsham, Lord High Chancellor of Great Britain Edt., 'Halsbury's Laws of England,' 4th Edition, Butterworth London (1974)

Niekerk van B., 'The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World,' Praeger Publishers, New York, 1987

Russel P.H, Obrien M. D, Editors, 'Judicial Independence in the Age of Democracy- Critical Perspectives from Around the World,' University of Virginia Press, 2001

Shestreet S, Descitieres, 'Judicial Independence: the Contemporary Debates,' Martinus Nijhoff Publishers Netherlands, 1985

Journals

Burbank B: S, 'Symposium: Perspectives on Judicial Independence: What do we mean by Judicial Independence?' Ohio State Law Journal Vol.64 (2003)

Bobde V. A., 'Scandalising the Court' 8 SCC (Jour) 32 (2003)

Gicheru G.E, 'Independence of the Judiciary: Accountability and Contempt of Court,' Kenya Law Review, Vol. 1:1, (2007)

Madhuku L, 'Constitutional Protection of the Independence of the Judiciary: A survey of the position in South Africa,' *Journal of African Law* Vol.46, (2002)

Simmons D, 'Aspects of Judicial Independence and Accountability-Lessons for the Commonwealth Caribbean?' *Commonwealth Law Bulletin*, Vol. 33, No 4 (2007)

Malila M, 'Contempt of Court and the limitation on Freedom of Expression in the course of judicial proceedings: The Zambian Experience,' *Zambia Law Journal* Vol. 8 (2006)

Developments in the Common Law World' 26 *Monash University Law Review* 362, (2000)

Oyiela L, 'Does the 'Offence' of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' *Deakin Law Review* 6; (2003) 8(1)

Documents/Reports

Background paper on Freedom of Expression and Contempt of Court for the International Seminar on Promoting Freedom of Expression with the three Specialised International Mandates, Hilton London, United Kingdom, 29 -30th November, 2000

Judicial Accountability Mechanisms: A Resource Document – Produced by the Political Information and Monitoring Services (PIMS) at the Institute for Democracy in South Africa IDASA 2007

Latimer House Guidelines for the Commonwealth, 19/06 / 1998

Kannabiran K.G, 'Contempt Law and Human Rights,' *PUCL Bulletin*, April 2001

Ndulo B. M. 'Freedom of the Press, Governance and Economic Development,' Paper presented to the International Press Association, International Press Institute, World Press Freedom Review, 2009 Vienna Austria.

Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985)

Zambia National Anti Corruption Policy, 2009

Internet Sources

Contempt of Court legal definition; <http://law.yourdictionary.com/contempt>.

Contempt of Court and the Contempt of Court Act 1981, [http://www.inbrief.co.uk/media-law/contempt of court](http://www.inbrief.co.uk/media-law/contempt-of-court).

Ettambi A. E.O, Judicial Systems in Sierra Leon, Tanzania and Zambia, Institute for Security Studies Policy Brief No.15 October 2009, <http://www.issafrica.org>

Lagon S.S, The Role of the independent Judiciary, Freedom Paper 4, 1, http://usa.usembassy.de/etexts/gov/freed_pap4.htm

Manesh N.G.V, Contempt of Court and Free Expression-Need for a Delicate Balance, ICFAI Edited Book on Contempt of Court, 2009 http://works.bepress.com/gv_nath/1

Miller C.J, Contempt of Court, Oxford University Press <http://fds.oup.com/www.oup.co.uk/pdf>

Sivakumer S, Role of the Media in a Democracy, Halsbury's Law Monthly sponsored by Lexi Nexis, <http://www.halsburys.in/role-of-the-media.html>.

Interviews

Ms Chirwa Jane, Information Officer, MISA Zambia, MISA Zambia offices. Lusaka. 20th January, 2011.

Mr Lungu Goodwell, Executive Director, Transparency Zambia, Transparency Zambia offices Lusaka. 23rd February, 2011.

Mr Lungu Stephen, President, Law Association of Zambia, Shamwana and Company offices, Lusaka. 16th February, 2011.

Mr Mulembe Enock, Executive Director, Human Rights Commission, Human Rights Commission offices Lusaka. 18th February, 2011.

Mr Mwale Francis, Legal Officer, Transparency International Zambia, Transparency International offices Lusaka, 20th January, 2011.

Mrs Ng'ambi Daisy, Secretary, Judicial Complaints Authority, Judicial Complaints
Authority Lusaka, 11th November, 2010.