

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

**AN ANALYSIS OF THE LAW RELATING TO CONTEMPT OF COURT AND THE
DISCRETIONARY POWERS OF JUDGES: THE ZAMBIAN EXPERIENCE.**

BY

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DECLARATION

I, **Chishimba Yvette Mulenga**, do hereby declare that I am the author of this directed research and that it is a creation of my own ingenuity. I, therefore, remain accountable for the contents, errors and omissions herein. I also absolve my supervisor from being responsible for any errors, omissions and inaccuracies which may remain. Further, to the best of my knowledge, this work has not previously been presented in any University for academic purposes.

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APPROVAL PAGE

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ABSTRACT

It is of great importance to ensure that the courts of law, in their dispensation of justice, are respected and their dignity and integrity maintained. Thus, there is need for the existence of laws put in place for this particular purpose. This law regulates what has come to be known as matters of contempt of court.

This paper is set out to analyse the law relating to contempt of court and the discretionary powers of judges in Zambia. It was largely achieved by desk research even though in certain instances, some field research was conducted. The findings of this research were that it is not debatable that issues of contempt of court form part of the basis of the law in Zambia. However, even though the reason for the existence of this law is to protect the integrity of the courts and their officers, it is sometimes used against the principles of natural justice in that even though it is trite law that a person should only be punished after they have been given a chance to be heard, the law of contempt of court does not really accord with this principle. In fact, in Zambia, the law governing contempt of court has many flaws and this is principally because of its nature which places too much power in the hands of judges, thereby raising the chances of the same power being abused. It is the judges who identify the grounds of complaint, select the witnesses, investigate what the witnesses have to say, decide on the guilt or otherwise of the accused and pronounce the sentence.

As such, the paper recommends that the law on contempt of court be adopted by judges only when there is need. There should also be strict adherence to the procedures set out in the existing laws and defences made available to contemnors.

DEDICATION

To my late mother, Georgina, who taught me that it is only through hard work, prayer and humility that one can truly be successful and to my lovely daughter, Lindiwe Phiri, for understanding when I could not be there for her during the course of this research- I salute both of you.

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The Penal Code, Chapter 87 of the Laws of Zambia.

The Rules of the Supreme Court of England; otherwise called the White Book.

ABBREVIATIONS

CPC	Criminal Procedure Code
ECHR	European Court of Human Rights
HCZ	High Court for Zambia
IPI	International Press Institute
MMD	Movement for Multi-party Development
PC	Penal Code
SCZ	Supreme Court of Zambia
SCZ J	Supreme Court of Zambia Judgment
UTH	University Teaching Hospital

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Chapter One

Contempt of Court in Zambia

Preliminary Introduction

Issues of contempt of court have been recognized in Zambia and form part of the basis of the law. Contempt of court is said to be any willful disobedience to, or disregard of a court order or any misconduct in the presence of a court. This also involves action that interferes with a judge's ability to administer justice and/ or conduct that insults the dignity of the court. Contempt of court is punishable under law. Many have agreed that there are two forms of contempt of court: statutory contempt of court under the Contempt of Court Act¹ which criminalises the publication of material which creates substantial risk that the course of justice in the relevant proceedings would be seriously impeded or prejudiced; and common law contempt which targets any other action which is intended to interfere with the administration of justice, including interfering with pending or imminent court proceedings.

There has been a general and widespread acceptance of the classification of contempt of court as being either civil or criminal. However, referring to *Attorney General v Newspaper Publishing Plc.*², Sir John Donaldson MR stated:

“Despite its protean (which means ‘exhibiting considerable variety or diversity’) nature, contempt has been classified under the heads ‘civil contempt’ and ‘criminal contempt’. Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist because the standard of proof is the same; namely, the criminal standard.”

Nonetheless, in the *Zambian case of Limpile and another v Mpulungu Harbour Management Ltd.*³, it was stated (and the court agreed) that in as much as the punishment for both criminal and civil contempt is the same (payment of a fine or imprisonment or both), the two types of contempt are clearly distinguishable.⁴ Thus, there are two types of contempt. These are categorized as criminal or civil. A judge who feels that someone is improperly challenging or ignoring the court's authority has the power to declare the defiant person (called the contemnor) in contempt of court.

¹ Contempt of Court Act of 1981.

² (1988)Ch 333, CA (Civ. Div.)

³ SCZ/8/270/2005 or SCZ No. 22 of 2008

⁴ Halsbury's Laws of England, 4th Edition, Volume 9, Paragraph 2.

Further, the learned trial Judge in the leading case of *Zulu v The People*⁵ stated that contempt of court includes any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority. As such, yelling at a judge, for example, amounts to contempt of court. All courts in Zambia are protected by the law on contempt. An example of a case of contempt of court in Zambia is an instance where one Victor Chilekwa (Executive Director of Rescue Shoulders Ltd.), a human rights activist and his lawyer Nsuka Sambo faced charges of contempt of court after they insulted the court following their loss of an appeal between Masiye Motels Limited and Rescue Shoulders and Estate Agency Limited. Chilekwa allegedly wrote contemptuous letters addressed to Chief Justice Ernest Sakala. One of the letters dubbed ‘Pay Us Our Money, Maintain Integrity and Root Out Nepotism from the Supreme Court’ signed by Chilekwa and another read in part;

“in fact when handing us the judgment, your own officer of the court, respondent counsel with more than fifteen years of legal practice, who you interviewed for a High Court Judge position said ‘it is a stupid judgment by stupid judges.’”

The Supreme Court of Zambia called upon Chilekwa and Sambo to answer to these charges pursuant to Order 52/1/23 of the Rules of the Supreme Court.⁶

In Zambia, contempt of court is dealt with under section 116 of the Penal Code⁷ and Order 52 of the Rules of the Supreme Court (White Book) which now not only acts as a gap-filler but has a binding effect since the decision of *Ruth Kumbi v Robinson Kaleb Zulu*.⁸ In *Limpile and another v Mpulungu Harbour Management Ltd*⁹, it was agreed that contempt of court proceedings can be combined under section 116 and Order 52 above mentioned. The court’s powers under Order 52 are wider than those provided for under section 116(1) of the Penal Code in the sense that there is no limitation on the court to dispose of contempt of court on the same day it arises.¹⁰

Apart from case law, a number of Zambians and even non Zambians have written on the topic of contempt of court. These include Kuku K.J who wrote a paper called ‘Contempt of Court: A Case Study of its Judicial Use and Abuse in Zambia.’ In this paper, the author basically

⁵ (1990-1992) ZR 62 SC

⁶ Otherwise called the White Book.

⁷ Chapter 87 of the Laws of Zambia.

⁸ SCZ Judgment No. 19 of 2009.

⁹ SCZ/ 8/ 270/ 2005; SCZ Judgment No. 22 of 2008

¹⁰ SCZ/ 8/ 270/ 2005

addressed the possibilities of Judges abusing the law on contempt of court because they have been 'provoked' by, for instance, reacting in a very sensitive manner and passing very harsh judgment or sentences for those they have held to be in contempt. Other works include Brenner S. (Legal Theory) and Burnham W. (Introduction to Law and the Legal System of the United States of America). These writers discuss what the law on contempt of court is and how it has developed since its inception. In a book called 'The Common Law' by Holmes W.O, the author discusses court process as a whole and also tackles issues of interruption of the process of justice in a court of law.

The present study will attempt to analyse the law relating to contempt of court and to what extent it is effectively applied in Zambia.

1.0 Statement of the Problem

Nemo Judex In Causa Sua

It is trite law in Zambia and in many other jurisdictions throughout the world that a person should only be punished for omitting to do something or committing an offence under the stipulated law. However, where contempt of court is concerned, the judges themselves have the discretion to hold someone in contempt either directly (when they are of the view that the person has done something to disrespect the court and its officers in presence of a judge) or indirectly (when the judges are of the view that someone has violated a court order or rule outside the immediate presence of court). The problem that arises from this is that when a judge opts to cite someone for contempt, they will now be adjudicating upon a case in which they have interest. This goes against the principles of natural justice and is capable of rendering the judge, so acting, biased when in fact they are supposed to be impartial. This is best explained by the Latin phrase '*nemo judex in causa sua*'¹¹ which literally means that no one should be a judge in their own cause.¹² This rule should very strictly be applied to any appearance of possible bias, even if there is actually none.

¹¹ <http://en.wikipedia.org/wiki/contemptofcourt>- accessed 22 October, 2010.

¹² <http://en.wikipedia.org/wiki/contemptofcourt> - accessed 22 October, 2010.

Audi Alterum Partem

In addition, issues relating to the notion of '*audi alterum partem*' which, when translated to English, literally means 'hear both sides' must be observed. This is a Latin maxim that is often used to refer to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. It is considered a principle of fundamental or natural justice in many democratic societies. This principle includes the rights of a party and their lawyers to confront the witnesses against them, to have a fair opportunity to challenge the evidence presented by the other party, to summon one's own witnesses, to present evidence and to have counsel, if necessary at public expense, in order to advance one's case properly this principle was referred to in the Nuclear Tests case by the International Court of Justice, referring to France's non-appearance at the judgment. Where contempt of court is concerned, however, this requirement cannot adequately be met because the contemnors are not really given opportunity to exercise these rights. This remains an affront to the principles of natural justice and equity.

Under contempt of court, there is no summons or indictment and it is not mandatory for any written account of the accusation made to be furnished to the contemnor. The judge himself identifies the grounds of complaint, selects the witnesses, investigates what they have to say, decides on their guilt and pronounces the sentence.¹³ This omits all the safeguards to which an accused is entitled and thus is open to abuse and for this reason, many jurists and legal commentators have repeatedly stated that the judges should adopt it (contempt law) only when there is need. The law relating to contempt of court does not really give the contemnors reasonable opportunity to present their side of the case. Justice must not only be done but must be seen to be done. However, this has been quite difficult to achieve in Zambia as a result of the problem aforementioned. This is because even though the legal effect of breach of natural justice, that is, failure to observe the two principles above is normally to stop the proceedings and render the judgment arising thereof invalid, it is practically impossible for this to happen in matters of contempt because it is the same judges who are tasked with ensuring that all the principles of natural justice are adhered to that actually breach these rules in contempt issues. In

¹³ J.K Kuku, *Contempt of Court: A Case Study of its Judicial Use and abuse in Zambia*, UNZA Press, Lusaka, 2006. (Obligatory Essay; 2006).

ordinary parlance, such decisions should be quashed or appealed but may be remitted for a valid re-hearing. However, where contempt of court is concerned, the law is structured in such a way that punishment will be imposed on contemnors even without necessarily hearing them out- especially in summary contempt.

For instance, in a case in which the Post Newspaper's Editor, Fred M'membe was sentenced to four months imprisonment with hard labour in June, 2010,¹⁴ Mr. M'membe had contended in his defence that he was on study leave at the time the Article authored by United States based Zambian law Professor, Muna Ndulo titled "*The Chansa Kabwela Case: A Comedy of Errors*" (from which the contempt case arose) was published. However, in arriving at his decision, Magistrate Simusamba declined to give Mr. M'membe an option of a fine. He used his discretion and this is just an example of how even though the law on contempt is intended to protect the integrity of the court, it is sometimes used to the disadvantage of those that are not officers of the court by those that have the discretion.

1.1 Objectives of the Study

The specific objectives of this study are:

1. To review the law relating to contempt of court in Zambia.
2. To highlight the problems that have arisen as a result of the law on contempt of court.
3. To show whether the discretion of the judges in as far as contempt goes is unfettered and limitless.
4. To provide a critique of the law relating to contempt of court as it stands in Zambia today and show its flaws.
5. To make suggestions on what should be done in order to improve the standard of issues related to contempt of court.

1.2 Research Questions

- 1 What is the purpose of having law that governs matters concerning contempt of court in Zambia?

¹⁴ Unreported.

2. Is there any criteria used in determining what amounts to interruption of the process of justice in a court of law (contempt of court)?
3. Is the discretion or the power given to judges to hold someone in contempt unfettered and/or limitless?
4. Is there a possibility that the law of contempt of court in Zambia has been and continues to be used as an excuse to settle scores (such as political scores) or is it simply being used to discipline those who disrespect the court and its officers?
5. What are the specific sanctions for contempt of court?
6. What needs to be done in order to avert the problems brought about by the interruption of the process of justice in a court of law?

1.3 Significance of the Study

The theoretical and practical importance of this study is that as a result of the large number of cases being brought before the courts and the huge backlog of work that the courts in Zambia continue to handle, it has increasingly become common to see people (parties to trials, their legal counsel, ordinary members of the public in open courts, members of the press and so on and so forth) being cited for contempt of court. As such, it has become a cause of concern for students of law, lawyers throughout the country, the media fraternity, the ordinary *Zambian* citizens who are likely to appear in court at one point or another and even the judges themselves.

In this regard, it is imperative to carry out this research in an attempt to find a lasting solution to the problem already alluded to in order to benefit all people concerned and affected by issues dealing with contempt of court. The results of this research will be useful to students of law as they study, parties to trials will be made aware of what really amounts to contempt of court and this will make the work of their lawyers easier, thereby leading to speedy resolution of trials as proceedings will not unnecessarily be interrupted. Thus, there is need to identify the flaws of the law relating to contempt of court so as to make suggestions that will make it more viable and useful in Zambia.

1.4 Definition of Key Concepts

A court is defined as an institution that the government sets up to settle disputes through a legal process. A court of law, therefore, hears cases and makes decisions based on statutes or the common law.¹⁵

Common law is law that is developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action.¹⁶

According to Brenner, the word 'contempt' refers to a sentiment or manner of seeing someone or something as inferior. From this, one would conclude that contempt of court is willful disobedience to or open disrespect for the rules or orders of a court or similar institutions.¹⁷

1.5 Methodology

This study commenced with desk research. Relevant published and even unpublished work will be consulted. The study will review legislation, various reports on contempt of court and legal commentaries on the subject matter. It will also be aided by case law; especially Zambian cases. In order to obtain maximum benefit, the internet will also be used whenever necessary. Visitation of relevant institutions and direct interviews with people who have had encounters with the law of contempt of court will also be conducted and included in the chapters to follow.

1.6 Limitation of the Study

There is general lack of information in as far as contempt of court goes in Zambia, save the dissertations submitted to The University of Zambia before now and a few newspaper articles. These have not adequately tackled the issue in question because they have neglected to look at the aspect of Order 52 of the Rules of the Supreme Court as having a binding effect in Zambia

¹⁵ S. Brenner, *Legal Theory*. Dayton University Press, Atlanta, 2003. Page 3- also found at brenner@udayton.edu

¹⁶ W. Burnham, *The Common law*, St. Paul Thomson West, Massachusetts, 2006. Page 1

¹⁷ S. Brenner, *Legal Theory*. Page 4

and they have concentrated only on Section 116 of the penal Code, the Contempt of Court Act¹⁸ and the Contempt of Court (Miscellaneous Provisions) Act.¹⁹

Secondly, issues dealing with contempt of court are very sensitive and even in their writings, the legal commentators who have written on the topic are very careful so as to avoid being cited for contempt themselves. Even those who have had encounters with the law on contempt of court do not contribute much to contempt-related issues for fear of being cited all over again. As a result, there is a large dependence on the decisions passed by the courts of law in Zambia. This problem is likely to pose as a clog not only on this study but also other related studies and works. This is worsened by the fact that the Rules of the Supreme Court of England come with their own cases and statutes which are peculiar to the situation in England and might not appropriately be applied in Zambia where parliament is not supreme over the Constitution.

1.7 Conclusion

In conclusion, this chapter began with a preliminary introduction of what contempt of court is and what the position regarding contempt of court in Zambia is. The law of contempt of court is intended to protect the integrity and the authority of the courts (all courts) but since the power rests solely and entirely on the judges to determine what amounts to contempt and at the same time adjudicate in the same matter, there is always a possibility that this power will be abused, suffice to say that some may even use the said law to settle their own scores. As such, there is need to look at the flaws of this law and correct them so as to cure the mischief which it is intended to cure in the first place, that is, to protect the court and its official from being brought into ridicule.

¹⁸ Contempt of Court Act of 1981.

¹⁹ Chapter 38 of the Laws of Zambia.

Chapter 2

The Law of Contempt of Court in Zambia and its Shortcomings.

2.0 Introduction

The main objective of this chapter is to show what the law on contempt of court in Zambia is. It also discusses a brief background and the shortcomings of this law as it stands today. The aim of this chapter is to bring out the flaws of contempt of court law in Zambia.

2.1 Background of Contempt of Court Law in Zambia.

Before the advent of colonialism in Northern Rhodesia (as Zambia was known then), there was still some sort of organization within the territory.²⁰ Customary law was the main practice and those who did wrong were brought before a chief such as the Litunga among the Barotse people. It was the chief who had the responsibility of settling disputes among his subjects. From the foregoing, therefore, there was not much law during this period to regulate matters of contempt of court as many of the indigenous people did not even take matters to court. With the coming of the colonialists in northern Rhodesia, new laws were brought in and incorporated in the already existing system. For most of the colonial period, the territory was governed by an administration comprising no more than about four hundred (400) expatriate Britons and this happened with the approval of the local population. It was after this that courts (as defined in the preceding chapter) were introduced and Northern Rhodesia adopted a dual legal system at independence in 1964.²¹ People now started making use of courts when there was need to resolve disputes between them and as such, there was need to see to it that these courts were respected. It, therefore, became imperative to see to it that laws were put in place to ensure that these courts were protected from ridicule, so that their decisions would be respected and accepted by all.

2.2 What is the Law Today?

Today in Zambia, there are a number of statutes that deal with issues related to contempt of court. These statutes are supplemented by judicial decisions and the common law. It is a well

²⁰ M.P Mvunga, Land Law and Policy in Zambia, Mambo Press, Zimbabwe, 1982. Page 41

²¹ M P Mvunga, Land Law and Policy in Zambia. Page 41

Act states that where any publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, contempt of court will be found. Again, this Act is applicable to Zambia by virtue of the English Law (Extent of Application) Act.²⁵ Where this Act is concerned, there is a problem because the offence of contempt of court is a strict liability offence and one will be found in contempt regardless of whether they intended to interfere with the course of justice or not, provided there is a publication in relation to proceedings which are active in the view of the Judge.²⁶

This, on its own, brings to the fore a number of problems. Take, for instance, a Newspaper Article written by an unknown subscriber and published by that Newspaper. Since the original writer is unknown, it is the Newspaper's Editors that will be tried and found liable and because many of them do not want this for their Newspapers, the voices of many ordinary Zambians are not heard.

Section 116 of the Penal Code²⁷ is another provision that deals with contempt of court in Zambia. Section 116(2)²⁸ provides;

“(2)When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding six hundred penalty units or, in default of payment, to imprisonment without hard labour for one month.”

The above provision deals with acts or omissions that are done in presence of the court. Since there is no jury system in Zambia, the power lies in the presiding judge to determine what (in his view) amounts to contempt of court. For instance, a Lusaka High Court Judge, Philip Musonda, issued a bench warrant against a businessman, Aristogerosimos Vangelatos, for scandalising the court. According to the summary of this case, Vangelatos disrespected the courts by alleging that judge Musonda, Lusaka High Court Judge Nigel Mutuna and Lusaka lawyer, Eric Silwamba conspired to inflict injustice on him. When the matter came up for return of bench warrant,

²⁵ Halsbury's Laws of England, 4th Edition, Volume 9, Paragraph 2

²⁶ J. Young, British Journal of Law and Society. Vol. 8, No. 2, Blackwell Publishing, London, 1981. Page 243

²⁷ Chapter 87 of the Laws of Zambia

²⁸ Chapter 87 of the Laws of Zambia

Vangelatos pleaded guilty. He was ordered to pay three million Kwacha (K3, 000, 000) in fine. Having determined that this was a matter of contempt of court, judge Musonda ordered Vangelatos never to walk into a court premise to insult, disregard court officials, clerks, marshals or any other lawyer or judge. He was also ordered not to use abusive language in court premises for twelve months.

Having taken note of this point, it is important to have regard to the fact that even though it is trite law that judges are supposed to be impartial and are called upon to act in a manner that ensures that justice is not only done but also seen to be done, they still remain human beings and are susceptible to falling prey to bias. Further, what one judge may take to be disrespectful to the court and its officers may be seen as normal and ordinary by another. An example is given where a Mr. Banda (a witness to an ongoing trial) was warned by a magistrate that if he said 'yeah' and not 'yes' one more time in court, he would be cited for contempt- suffice to say that the usage of the word 'yeah' by a witness in response to a question would not exactly be a problem for another magistrate.

In an ideal society, the rule of law is the basic principle of governance of any civilized democratic country. This principle asserts the supremacy of the law, bringing under its purview everyone- individuals and institutions on par without any subjective discretion. The *Zambian Constitution*²⁹ is based upon the concept of rule of law and for achieving this cherished goal, its framers have assigned the special task to the judiciary. In order to facilitate the judiciary to perform its duties and functions effectively, the dignity and authority of the courts have to be respected and protected at all costs. At the same time, the Constitution confers the freedom of expression upon all individuals under the Bill of Rights.³⁰

To add on, the freedom of expression bestowed under the Constitution and the independence of the judiciary are the two essential and most important attributes of democracy in a country. Reconciling these two public interest issues and maintaining a balance presents a challenge to any given democratic set-up. Healthy and constructive criticisms are the necessary feature for the development of democracy. The court as a guardian of the Constitution must vigilantly protect

²⁹ Chapter 1 of the Laws of Zambia

³⁰ Part III of the Constitution, Chapter 1 of the Laws of Zambia

free speech even against judicial resentment³¹. Therefore, it is the duty of every functional government to see to it that this balance between the Constitutional requirement to advance freedom of expression and the desire of the courts to maintain their dignity is struck. In western countries like England and the United States of America, contempt jurisdiction is only sparingly exercised; giving much scope to the fair and constructive criticism which is considered as the core of modern democracy.³² In Zambia on the other hand, it has become increasingly common for people (especially members of the media) to be cited for contempt of court. It was for this reason, for example, that while meeting at their Annual General Assembly on 13th September, 2010 in Vienna, The International Press Institute (IPI) members unanimously adopted a resolution appealing to the Zambian government to relinquish its control of the media in the country. This was in an attempt to ensure that people are free to express their views without the risk of being cited for contempt, even where the allegations put forward are done in public interest. The problem with the current contempt law in Zambia is that it is not applied in a uniform manner to all contemnors- making it appear as if one form of contempt is more harmful than the other;

On the 3rd of February, 2010, one Enoch Kavindele (former vice President of the Republic of Zambia and veteran politician) was ordered to pay five million Kwacha (K5,000, 000) or face six months imprisonment on default.³³ Kavindele had commented on an ongoing trial, saying “I am particularly upset that the President himself could direct the Supreme Court to rule against me over Vodacom.” As a result of this statement, he was held to be in contempt. On the 12th of January, 2010, Kavindele had appeared before the High Court, pleaded guilty and also apologized unreservedly for the contemptuous statement.

On the other hand, one Fred M'membe, the Post Newspaper's Editor (in this capacity) was sentenced to four months imprisonment with hard labour in June, 2010.³⁴ The peculiarity here is that after sentencing Mr. M'membe for his part as Editor-in-chief, Magistrate Simusamba also sentenced him to another four months on behalf of the Newspaper, saying the sentences would run concurrently- meaning, he would only serve a four months jail term. Had the contempt law

³¹ N. Hanson, A Paper on How to Challenge a Contempt of Court Postponement Order (Regional Press News; 26th March, 2008)

³² N Hanson, 2008.

³³ Unreported

³⁴ Unreported

applied uniformly, Mr. Kavindele (above mentioned) would also have served a sentence in his own capacity and another on behalf of Vodacom. Also in a Minister's (Mike Mulongoti) case before a Ndola magistrate, a mere apology was accepted without any ado and no sentence was served. It is for such reasons that some scholars have said that in Zambia, the law on contempt of court is sometimes used to settle political scores. The learned trial judge in the leading case of *Zulu v The people considered* and the Supreme Court agreed that it is only when the contempt is so serious that it cannot adequately be dealt with by the imposition of a fine but if there are mitigating factors, then a suspended sentence can be given. The problem is that there is no criteria in place to determine these mitigating factors. This has a negative impact on the law of contempt of court in Zambia.

From the examples given above, it is very clear that the law on contempt of court (as it stands today in Zambia) still has a long way to go before a balance can be reached between the Constitutional guarantee of freedom of expression and respect for the judiciary. As a way of comparison, the case of *Mahendra Pal Chaudary v Attorney General of Fiji* is an example. The facts of this case were that Mr. Chaudhary was the leader of their Labour Party, he was alleged to have published a pamphlet saying that since the 1987 coups, many judicial officers had become corrupt. Some lawyers had become receiving agents for magistrates and judges and a number of lawyers arranged to appear before a preferred magistrate or judge. The High Court, on the Attorney General's motion, found the pamphlet contemptuous because it scandalized the court. Mr. Chaudhary was found guilty and ordered to pay costs of five hundred dollars (\$500).

This judgment is particularly useful in the way contempt jurisdiction should be balanced with the freedom of expression provisions of the Constitution. In order to strike such a balance, this freedom should be exercised fairly and honestly for a legitimate purpose and not for the purpose of injuring the system of justice. Thus, if the desire to protect the integrity of the courts is to be balanced with that of citizens to enjoy their freedom of expression;

1. The objective of the said contempt of court law must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must be for the sake of concerns that are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to establish this objective must pass the proportionality test; that is to say they must:
 - a) Be rationally connected to the objective of contempt of court and not arbitrary, unfair or based on irrational considerations.
 - b) Impair the right or freedom in question as little as possible; and
 - c) Be such that their effects on the limitation on the rights and/or freedoms are proportionate to the objective.³⁵

If the above requirements are met, then a balance can safely be struck between the need to protect the integrity and dignity of the court and that for citizens to freely express themselves without being cited for contempt of court.

Reform of this law is also necessary to see to it that it is not being used as a tool to settle political and other scores. As the Supreme Court of Zambia said in the case of *Kundiona v The People*³⁶ “an aggrieved judge in summary contempt should try to show restraint and to maintain equanimity.” To achieve this, there is need to depart from the practice where it is an aggrieved magistrate or judge who has the discretion cases in which they have interest as sometimes they cannot help in wanting to get their back at the defendant. It is time for Zambia to do away with the prevalent conservative view of contempt law and bring in the approach pursued by most other commonwealth countries (to be discussed in the concluding chapter of this essay).

As a result of the foregoing problems, there was an attempt to improve the contempt of court law in Zambia and this was done by enacting the Contempt of Court (Miscellaneous Provisions) Act³⁷ which is “an Act to amend the law relating to contempt of court and to restrict publication of the details of certain proceedings and for purposes connected therewith.” Section 2(1) of this Act provides:

“(1) A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time (having taken all reasonable care)

³⁵ Stated in *R v Chaulk* (1991) 2 CR 1-pp27-28

³⁶ (1993-94) ZR 59

³⁷ Chapter 38 of the Laws of Zambia

he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent, as the case may be..."

Even though there has been an improvement in that under this Act where the defendant is not strictly liable provided there has been a publication, a problem still remains in that as far as contempt of court goes. It is still the judge or magistrate who identifies the grounds of complaint, selects the witnesses, investigates what they have to say, decides on their guilt and pronounces the sentence.³⁸ There is still no summons or indictment and it is not mandatory for any written account of the accusation to be furnished to the contemnor.

Another problem with the statutes and cases regulating matters of contempt of court is that they do not offer clarity on what procedures are to be followed when citing one for contempt, during the trial and even when sentencing those found wanting. Again, this leaves vast powers in the hands of judges and/or magistrates which, if not used judiciously, will disadvantage the contemnors. Had there been clear procedure in the institution of contempt cases, this law would flow smoothly and its shortcomings would be limited.

2.3 Conclusion

To infer, before the advent of colonialism in Northern Rhodesia (as Zambia was then known), many of the indigenous did not take matters to court. Instead, wrong doers were brought before the chief who gave rulings on disputes. With the coming of colonialism, new laws were also brought and ultimately adopted within the territory. People now started to go to court and it is from this background that the contempt of court law in Zambia developed. The statutes governing issues of contempt of court are limited in that the 1981 Contempt of Court Act basically makes liability for contempt strict and somewhat conflicts with the constitutional guarantee of freedom of expression. The fact that the White Book also now has a binding effect in Zambia makes the situation worse because the White Book comes with its own cases and statutes which might tend to be in conflict with the Zambian law and not appropriate for the people's experiences in Zambia where contempt of court is concerned.

³⁸ J.K, Kuku, Contempt of Court: A Case Study of its Judicial Use and Abuse in Zambia (obligatory essay; 2006)

Chapter 3

Punishment and Possibility of Appeal

The main aim of this chapter is to determine whether the sanctions for contempt of court in Zambia are adequate; whether there is any recourse for people who are unfairly cited for contempt and to show what the position of the law is in as far as contempt of court is concerned in jurisdictions like Australia, Canada, England and the United States of America is.

3.0 Sanctions for Contempt of Court in Zambia.

As has elaborately been shown in the preceding chapters, it is the Judge's strongest power to impose sanctions for acts which disrupt the court's normal process. It is also trite law that the judge should make use of warnings in any situation that might lead to a person being charged with contempt of court.³⁹ In the words of Lord Denning, MR, in *Balogh v Crown Court*⁴⁰ at page 288,

“this power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity of an authority of the judge and to ensure a fair trial. It is to be exercised by a judge on his own motion only when it is urgent and imperative to do so immediately- so as to maintain the authority of the court, prevent disorder, to enable witnesses to be free from fear... it is, of course, to be exercised with scrupulous care.”

Sanctions are given after contempt of court has been proven.

Where Zambia is concerned, “an aggrieved judge in summary contempt should try to show restraint and to maintain equanimity.”⁴¹ This means that before punishment is actually given, the requirement of the law is that steps should be taken to prevent people from being cited for contempt at every instance. Where the act or omission amounting to contempt is grave, a stiffer sanction of a custodial sentence is required. Where the person cited for contempt is an officer of the court (*amicus curae*), the judgment or proceedings are handed over to the Law Association of Zambia (LAZ) to mete out appropriate sanctions under the Legal Practitioners Act.⁴² This was

³⁹ G. Hill, Contempt of Court, law.dictionary.com.- Retrieved on 12th April, 2010.

⁴⁰ (1974)3 All E.R 283

⁴¹ Supreme Court of Zambia in *Kundiona v The People* (1993-1994) ZR 59

⁴² Chapter 30 of the Laws of Zambia.

shown in an unreported Supreme Court of Zambia case where one Victor Chilekwa and his lawyer, Nsuka Sambo, were found guilty for contempt. After losing an appeal at the Supreme Court level, Chilekwa wrote contemptuous letters to Chief Justice Sakala and in one of the letters dubbed 'Pay Us Our Money, Maintain Integrity and Root out Nepotism in the Supreme Court' he made mention and the court later proved that when judgment was delivered, Mr. Sambo (the lawyer in this case) had said the words "*it was a stupid judgment by stupid judges*". Chilekwa was jailed for three years and suspended for one year on all counts of contempt of court while his lawyer was jailed for one count of contempt of court with a year also suspended. This means that the two will only serve two years in prison, starting April, 2010.

Where contempt of court is proved in Zambia, the contemnor will either be made to pay a fine or face imprisonment or will be slapped with both; payment of a fine and imprisonment. Section 116 (1) of the Penal Code⁴³ gives a list of acts and omissions that amount to contempt of court and further provides that any person who so acts or omits;

"is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units."

Despite the foregoing, the main focus of this chapter is to ascertain whether these punishments are adequate and actually help the courts in achieving their goal of preserving the integrity of the courts and deterring would-be contemnors. To answer this, one has to look at the procedure in arriving at these sanctions and also the conduct of those who have been punished to ascertain whether they did learn their lessons or whether these punishments only serve an academic purpose. For example, in an interview after judgment, the said Victor Chilekwa (earlier mentioned) said he expected the judgment because he was fighting abuse of office. From this mere statement, one would come to the conclusion that Chilekwa was not remorseful for what he had done and the fact that he knew that being found guilty of contempt of court would render him liable to payment of a fine or imprisonment or both did nothing to stop him from sending insulting letters to the Chief Justice.

⁴³ Chapter 87 of the Laws of Zambia.

In the view of some scholars, the punishment given for criminal contempt is adequate because here, the contempt cannot be ‘purged’.⁴⁴ This means that unlike civil contempt where the contemnor is set free by simply following the court order, this is not possible under criminal contempt of court.⁴⁵ Under criminal contempt of court, the punishment is imposed to vindicate the court’s authority. When a person is committed to jail for contempt, the court or judge who made the order may discharge him from imprisonment when it appears that the public interest will not suffer thereby. Whereas this position might prove to be adequate on the part of the courts, it still remains a problem on the part of the ordinary people cited for contempt because in as far as this principle goes, it is still the judges who determine the sentence and it is difficult to ascertain the criteria of what constitutes a ‘public interest’. The decision remains ultimately in the hands of the judge. This goes against the principle of natural justice and therefore evades any chances of these sanctions being fair on all parties involved.

In addition, jurisdiction for contempt of court exists in a limited form under statute and generally under common law. Inevitably, in cases of criminal contempt, the interference with the proper administration of justice must be balanced with a citizen’s right to freedom of expression guaranteed under Part III of the *Zambian Constitution*. In cases of contempt in civil proceedings, the courts should be more likely to be concerned with the willfulness of the disobedience of a court order.

Another *Zambian* example that can be used in determining whether the punishments for contempt of court are actually serving their purpose is that of the *Post Newspapers Editor-in-Chief*, Fred M’membe, who was sentenced to four months imprisonment with hard labour after being found guilty of contempt of court together with the *Post Newspapers* by a *Lusaka* magistrate. In passing his judgment, magistrate Simusamba said he jailed Mr. M’membe to ‘reform’ him and deter would-be offenders and declined to give him an option of a fine.⁴⁶ Commenting on his sentence and whether he thought it was fair, M’membe stated, “*I just want to say that we understand what is going on. We fully know what is going on and we are ready for it.*”⁴⁷ This statement goes a long way in showing that despite his sentence, Mr. M’membe was

⁴⁴ <http://en.wikipedia.org/wiki/contemptofcourt>

⁴⁵ <http://en.wikipedia.org/wiki/contemptofcourt>

⁴⁶ *The Post Newspapers*, 17th April, 2010. Page 4

⁴⁷ *The Post Newspapers*, 17th April, 2010. Page 4

not sorry for his actions and nothing would stop him from doing the same later simply because he did not think this sentence was just. However, it should be mentioned that the conduct of contemnors after judgment has no effect on the determination of whether the sanctions for contempt of court are adequate or not. This is to say that a person found guilty of an offence will rarely admit that they were wrong and that the courts were right in punishing them. As such, a better way of determining whether these sanctions for contempt of court in Zambia actually serve their purpose is by studying the number of people that repeat the offence over and over again even after a warning from the court or punishment.

Under the Criminal Procedure Code, there is an elaborated procedure to support the offence of contempt of court as it is set out in the Penal Code. Also, according to Order 52 of the Rules of the Supreme Court of England, if the contempt is not urgent, a judge should not act on his own motion or take it upon himself to move. He should leave it to the Attorney General or the party aggrieved to make a motion. This is the general procedure laid out in Order 52 which now has a binding effect in Zambia. The reason for this is so that judges should not appear to be both prosecutor and judge as this goes against the principle of natural justice as already stated. In Zambia, however, this procedure is only rarely followed. It is more common for judges to punish contemnors summarily. In the case of *Kundiona v The People*⁴⁸, it was held that no specific procedure is provided for summary contempt, provided the basic principles of fairness such as the right to be heard are observed. This is detrimental to the accused or the respondent, as the case might be, because the same body that has to hear the matter is also the body prosecuting. Further, because contempt generally is an exceptional step with penal consequences, the law requires that all procedural steps under Order 52 be strictly complied with. Seeing that Order 52 of the Rules of the Supreme Court is now binding in Zambia, all procedural steps under Order 52 should be strictly complied with. As Lord Denning said in *McElraith v Grady*⁴⁹,

“No man’s liberty is to be taken away unless every requirement of the law has been strictly complied with.”

To add on, there is also need for a distinction to be made in the way the two forms of contempt are instituted in courts of law. Even though the standard of proof for both is the same, that is, beyond reasonable doubt, the Fiji Court of appeal stated in the case of *Mahendra Pal Chaudhary*

⁴⁸ (1993-1994)ZR 59

⁴⁹ (1968) 1QB 648 at 477

v Attorney General of Fiji, that only civil cases of contempt are to be brought in the civil jurisdiction of their High Court. If a case is brought in the civil jurisdiction but described as criminal, an application should be made under Order 52. This is the example that should be followed even in Zambia. Where there is a distinction in the way each form is instituted, it will be made clearer as to how to proceed in each matter.

It has also been agreed by a large body of scholars that at common law, all courts are protected by the law on contempt but only courts of record have the power to punish for it. In Zambia, a trial court is not limited in the sentence it can impose. This was shown in the celebrated case of *Zulu v The People*.⁵⁰ The problem with this proposition is that it raises chances of abuse. For instance, a trial judge may pass harsh sentence because they have been 'provoked' by the person they have held to be in contempt. It also becomes a problem where a Supreme Court Judge sits as a judge in the High Court, chances are that on appeal, the other Supreme Court judges might not want to overturn a decision of one of their own.

In answering the question of whether the sanctions for contempt of court are adequate or merely serve an academic purpose, it is important to note that the procedure used in the determination of the guilt (the word 'guilt' is used here because whether the contempt in question be criminal or civil, the standard of proof used is criminal, that is; beyond reasonable doubt) deprives an accused of the safeguards offered by the ordinary criminal law.⁵¹ Further, both the procedure and the punishments are uncertain in their application and therefore run counter to the rule of law.⁵²

As such, it goes without saying, that where the courts are concerned, the sanctions for contempt of court are adequate because they have been given vast powers to punish contemnors and to also decide on their guilt before punishment. However, in Zambia this does not go a very long way in preserving the integrity of the courts because as has been shown, the procedure used by the courts themselves where contempt of court is concerned goes against the principles of natural justice and rule of law and even when contemnors are punished, they do not learn their lessons but take these punishments as a way of judges to settle their scores with the contemnors

⁵⁰ (1990-1992)ZR 62 (SC)

⁵¹ J. Young, *British Journal of Law and Society*, Vol.8, No.2, 1981. Page 243

⁵² J. Young, *British Journal of Law and Society*. Page 243

(examples of Chilekwa and M'membe above). There is need for change in procedure if the courts are to achieve their goal of maintaining their respect and integrity.

3.1 Is There Any Recourse for Contemnors Unfairly Cited?

Even though it is trite law that judges should be impartial in their dispensation of justice, experience has shown that they are sometimes susceptible to falling prey to bias. In Zambia after conviction and sentencing, a party that is not satisfied with a judgment where contempt of court is concerned has the option of appeal. Section 323 of the Criminal procedure Code⁵³ provides:

323. (1) *an appeal shall be entered-*

(a) by filing with the court below a notice of appeal in the form prescribed; or

(b) if the appellant is in prison, by handing such notice to the officer in charge of the prison in which he is lodged

(2) The officer in charge of any prison shall, on receipt of a notice of appeal, endorse upon such notice the date it was handed to him and shall transmit the notice to the court below.

(3) The court below shall transmit to the appellate court a notice of appeal filed with or transmitted to it under this section together with the record of the case and the judgment or order therein.

This is a very positive aspect in as far as contempt of court is concerned because the contemnor then has a chance of being heard by a judge who has no interest in the matter. However, even where a party successfully appeals, they might not adequately put their case across for fear of being cited for contempt of court all over again as they present their defence.

⁵³ Chapter 88 of the Laws of Zambia.

3.2 Other Jurisdictions.

The law on contempt of court varies from jurisdiction to jurisdiction. For purposes of this chapter, it is important to consider what the law on contempt in other jurisdictions is so as to be able to show the differences and similarities (if any) as a way of finding out what ought to be changed in the *Zambian* contempt law. In certain jurisdictions, for one to be convicted for contempt, the prosecutor or complainant must prove four elements:

- (i) The existence of a lawful order
- (ii) The contemnor's knowledge of the order
- (iii) The contemnor's ability to comply
- (iv) The contemnor's failure to comply

This is very good as it provides a background and some sort of criteria against which contempt can be found, leading to the subsequent stability in the law governing issues of contempt of court.

In Australia, a judge may impose a fine, fixed jail term or hold a person at the pleasure of Her Majesty.⁵⁴ The latter is usually until such time as a person has performed a sincere act of contrition- that is; purging the offence or the order is no longer deemed necessary to the carriage of justice.⁵⁵

In Canada, contempt of court is the only remaining common law offence.⁵⁶ Under the Canadian Federal Court Rules, section 472, a person who is accused of contempt needs to be first served with a Contempt Order and then appear in court to answer the charges. Convictions can only be made when proof beyond reasonable doubt is achieved.

In several other jurisdictions, there are eight categories of contempt of court. The first is contempt in the face of the court. This entails that the person should show insulting expressions or conduct in presence of officers of the court. Another category involves scandalizing the court. Under this category, a mere attack on the impartiality of a judge constitutes contempt of court. It should be mentioned, however, that proceedings for scandalizing the court are rare. The third

⁵⁴ <http://en.wikipedia.org/wiki/contemptofcourt>- accessed 19th January, 2011

⁵⁵ <http://en.wikipedia.org/wiki/contemptofcourt> - accessed 19th January, 2011

⁵⁶ <http://en.wikipedia.org/wiki/contemptofcourt> - accessed 19th January, 2011

category regards reprisals against witnesses. In the case of *A-G v Butterworth*⁵⁷, the Court of Appeal held that it was contempt to take reprisals against a person who has given evidence in legal proceedings. In this case, a man who had appeared as witness in proceedings involving his trade union was deprived of offices as treasurer and as a delegate of a branch of the union because his colleagues thought that in giving evidence he had acted against the interest of the union. The fourth category refers to obstructing officers of the court and the fifth is about conduct that is liable to prejudice the fair trial or conduct of pending or imminent proceedings. Another category encompasses publications prejudging issues in pending civil proceedings. A seventh category deals with cases of publications that relate to proceedings in private, that is, proceedings in chambers. Finally, the eighth category is about publishing the identity of an anonymous witness.⁵⁸ This becomes a problem in that having too many categories of the same offence makes the offence too wide and broad and therefore liable to lack of proper procedure for its enforcement and subsequent punishment.

In England- as in Zambia and many other commonwealth countries, contempt may be a criminal or civil offence. The maximum sentence for criminal contempt in England is two years. In England, therefore, where it is not necessary to be urgent or where indirect contempt has taken place, the Attorney General can intervene and the Crown Prosecution Service will institute criminal proceedings on his behalf before the Divisional Court of the Queen's Bench Division of the High Court of Justice of England and Wales. The sanctions under this jurisdiction, as in Zambia, are payment of a fine or imprisonment or both. The procedure under this jurisdiction is applicable to Zambia because the Rules of the Supreme Court of England are binding in Zambia but the problem lies in the structural differences in the court systems between Zambia and England.

Under American jurisprudence, sanctions for contempt may also be criminal or civil. If a person is to be punished criminally, then the contempt must be beyond reasonable doubt but once the charge is proven, then punishment (such as a fine or in more serious cases imprisonment) is imposed unconditionally. The civil sanction for contempt (which is typically incarceration in the custody of a sheriff or similar court officer) is limited in its imposition for so long as the

⁵⁷ (1963) 1QB 696, Same holding in *Chapman v Honig* (1963)2 QB 502

⁵⁸ R. Card, *Introduction to Criminal Law*, Butterworths, London, 1980. Page 276

disobedience to the court's order continues. Once the contemnor complies with the court order, the sanction is lifted. The standard of proof for civil contempt in this jurisdiction is a preponderance of the evidence.

In South Africa, the usual punishment for contempt of court is a fine. Only in serious cases does imprisonment become necessary. In Nigeria, contempt of court is punishable under the Uniform High Court Civil Procedure Rules which was enacted into law⁵⁹ by many states of Nigeria and introduced a unique provision in its Order 42 wherein detailed provisions are made for punishment of contempt of court committed by failure to obey lawful orders made by their High Court. The Nigerian system is very workable in that not too much of the law on contempt of court is left to the discretion of the judges. Even though judges there do have some discretion, there is express law to limit it and this is in line with the principles of rule of law and ultimately, democracy. In order to improve the status of contempt law in Zambia, legislation modeled along the Nigerian system would be in order.

These are just some of the jurisdictions that are similar to Zambia in view of the available sanctions for contempt of court, that is; payment of a fine or imprisonment. What differs is the amount paid when dealing with fines and the maximum sentence for each jurisdiction. There is also a difference in how much power is accorded to the judges to determine issues of contempt of court in that in some jurisdictions like Nigeria, the law is clearer and very specific.

3.3 Conclusion

In conclusion, this chapter has considered a number of issues. It has shown that it is a preference of judges in Zambia to cite contemnors summarily and some decided cases have shown that there is no procedure for summary contempt in Zambia which is detrimental to the accused or the respondents. This also goes against some pieces of legislation that give full provisions of the procedure to be followed. As a result of this, contemnor's do not really learn their lessons because they see the punishments given by the judges as a way of their settling scores with them for having provoked them. Even though there is an option of appeal for the contemnor's, a

⁵⁹ In 1987 and 1988.

problem arises because even on appeal, these contemnor's do not really put their defence across as they have to be extra careful for fear of being cited for contempt all over again. It has also been shown that there is a similarity between Zambia and other jurisdictions in as far as the types of punishments given for contempt of court. However, the difference remains in the structure of the courts and the procedures employed in cases of contempt of court.

Chapter 4

Judges and Their Decisions

The main objective of this chapter is to show the powers of judges in contempt of court cases and how the said powers affect issues related to the same. The chapter also gives an example of some Zambian cases regarding contempt of court that have been dealt. It begins with a discussion on the discretionary powers accorded to judges. The chapter then analyses some Zambian cases and ends with a brief conclusion.

4.0 The Discretionary Powers of Judges

Judges have power to enforce many things in many aspects. All courts have the inherent authority to impose punishment in Zambia. It has been shown in the preceding chapters that the proper punishment for contempt of court is by fine or imprisonment or both; at the discretion of the courts.

Even though the offence of contempt of court in Zambia is, by no means, extensively and clearly defined, it will be generally agreed that it is desirable to prevent and punish insulting expressions and disorderly conduct in the courts of justice. It is also desirable to punish perpetrators responsible for publications that may really tend to prejudice a pending cause. A judge may safely be entrusted with the power of keeping order in his court but in many cases, this power has been rendered susceptible to abuse because it is discretionary.⁶⁰ However, it is of great importance to have cognizance of the fact that even though this power of judges is discretionary, it has certain advantages of its own. For example, in exercising their discretion, judges may choose not to imprison a contemnor and this decongests prisons in the long run.⁶¹

Even though there are some advantages of judges having discretionary power, the main problem remains that this power is often liable to abuse; suffice to say that this power (in relation to contempt of court) is unavoidable because the law cannot anticipate every eventuality in

⁶⁰ <http://www.constitution.org/abus/discretion/judicial/judicialdiscretion.htm> accessed 20th February

⁶¹ A Paper delivered by Madam Justice Shameem for the Attorney General of Fiji- December 2004

contempt of court to be the same.⁶² However, many have argued that despite this discretion being unavoidable, it sometimes has a negative effect in the doctrine of *stare decisis*. This is the doctrine according to which a judge, in a case, treats decisions in past similar cases as authoritative precedents and refuses to make the decision in a way that departs from these precedents. This is so because when judges exercise their discretion, they make decisions in a way that they think best and do not necessarily follow the principle of *stare decisis* in so doing.

Further, whereas giving judges discretion in as far as issues of contempt of court go may have its own advantages, it brings about problems in that it sometimes goes against the very core of the 'rule of law'. In the view of Card⁶³, the essence of the rule of law is limitation of the discretion of officials and providing a process by which errors or abuse of discretion can be corrected. A question that judges are often called upon to answer is that of whether the discretion given to officials is unfettered or not. However, where contempt of court is concerned, it is still the same judges who are responsible for making such a call and this remains a problem because the power to do so is in the same hands in which he said discretion rests. It is in this regard that the courts in *Izuora v The Queen*⁶⁴ stated that the usefulness of this discretionary power depends on the wisdom and restraint with which it is exercised. To use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

Thus, it is submitted that there can be no doubt that the discretionary power of judges to punish summarily, by fine or imprisonment, offences committed against their own dignity is liable to abuse. As careful as the judges may be in enforcing it, a trial in the ordinary manner would probably be more satisfactory. This is because even though this discretion is unfettered, judges may sometimes make decisions based on their whims because there are no specific and clarified criteria and the power to impose punishment remains in their hands.

⁶² J Roland, *The Constitution of Society*, Butterworths, London, 2003. Page 12

⁶³ R Card, *Introduction to Criminal Law*, Butterworths, London, 1980. Page 276

⁶⁴ (1953) AC 329

4.1 Examples of Decided Cases in Zambia

1. Sebastian Zulu v The People⁶⁵

The appellant was in court acting for the defence in a murder case. Before judgment could be delivered, that is, after final submissions for the defence had been made, the appellant handed to the trial judge an affidavit and made an application for the learned trial judge to recuse himself from the case on the ground set out in the affidavit. The deponent of the affidavit alleged that four judges (including the learned trial judge) had written and signed a paragraph each to the then President of the Movement for Multiparty Democracy (MMD) Fredrick Chiluba and his vice, Levy Mwanawasa, promising to sentence Kambarange Kaunda (the son of the former President of Zambia) to death. The learned trial judge found the action of the appellant contemptuous and proceeded to call witnesses over a period of a number of days. After hearing the witnesses, the appellant gave evidence on oath. He was found guilty of contempt of court and sentenced to twelve months' imprisonment.

In this case, the Supreme Court held that it is generally improper for a judge to deal summarily with contempt as it is undesirable for him to appear to be both prosecutor and judge. However, where 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.

2. Elias Kundiona v The People⁶⁶

The appellant was charged and convicted on two counts of contempt of court. He was sentenced to two terms of six months' imprisonment that ran concurrently and four of the months were suspended on usual terms. The charge in the first count came up because of the appellant's failure, without good cause, to appear before the learned trial judge in response to a 'summons to accused' issued against him. The charge in the second count related to a scandalous affidavit attributed to him and initiated in the matter of *The People v Kambarange Kaunda*, the burden of which was to allege that the learned trial judge had entered into a pact to be partial and biased in

⁶⁵ (1990-92) ZR 62

⁶⁶ (1993-94) ZR 59

favour of the Movement for Multiparty Democracy (MMD); that he would convict the said Kambarange Kaunda for murder in order to embarrass former President Kaunda. The appellant proceeded under Order 52⁶⁷ and section 116 of the Penal Code and appealed against both conviction and sentence. He argued that the matter should have been heard by a different court. As a result of the appellant's absence from the country, the case was not heard until a year after the alleged contempt took place. The appellant also alleged bias on the part of the court and raised the defence of compulsion.

The Supreme Court held, *inter alia*, that no specific procedure is provided for summary contempt, provided basic principles of fairness such as the right to be heard are observed. It was also held that it is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent.

3. The People v David Masupa⁶⁸

This case involved the High Court's review of proceedings for contempt of court instituted against David Masupa by a magistrate of the first class in Chingola. The learned magistrate had caused a warrant to be issued for the arrest of David Masupa for contempt of court. The warrant was duly executed on the 11th August, 1977 and the accused was produced before the learned magistrate. Thereupon, the magistrate purported to charge the accused with contempt of court under the provisions of section 116 of the Penal Code⁶⁹ and dealt with the matter summarily. The allegation was that the accused had implied, after the conclusion of the case and not in the presence of the court that he had been unfairly dealt with in a case of overcharging when another man (a Mr. Tembo) charged with a similar offence was not found guilty.

In delivering judgment on behalf of the High Court, Moodley, J held that contempt of court under section 116 (1) of the Penal Code⁷⁰, if not committed in view of the court should not be dealt with summarily. The proper course is for the state or for the aggrieved party to institute criminal proceedings, even where it is separated by distance of time or space from the actual

⁶⁷ Of the Rules of the Supreme Court of England

⁶⁸ (1977)ZR 226 (HC)

⁶⁹ Then Chapter 146 of the Laws of Zambia

⁷⁰ Then Chapter 146 of the Laws of Zambia

judicial happening. It was also held that mere criticism of a judicial decision does not amount to contempt of court unless that criticism becomes an attack or abuse on the partiality of a judge or a magistrate in relation to his conduct in a judicial proceeding or when there is an express or implied allegation of bias on the part of the judicial officer.

4. George Limpile and Zambia Competition Commission v Mpulungu Harbour Management⁷¹

This was an appeal against a ruling of a High Court judge who held that the High Court of Judicature for Zambia enjoys extra-territorial jurisdiction to try a Zambian citizen resident in Zambia for an act of contempt allegedly committed in a foreign jurisdiction. The learned trial judge in this case pointed out that whether contempt proceedings are based on section 116 (1) of the Penal Code or Order 52 of the Rules of the Supreme Court, the end result is the same. According to the learned trial judge, it was immaterial that the contempt proceedings before him were commenced under Order 52 of the Rules of the Supreme Court and not under section 116 (1) of the penal Code. He found his solace in the decision in *Zulu v The People* where it was stated that the power to punish under Order 52 are wider than those under section 116 (1) (a). Dissatisfied with the decision of the trial judge, the appellant appealed to the Supreme Court and advanced their grounds of appeal.

In arriving at their decision, the courts made use of section 6 of the Penal Code which provides:

“6(1) Subject to subsection (3), a citizen of Zambia who does any act outside Zambia which, if wholly done in Zambia, would be an offence against this code, may be tried and punished under this Code in the same manner as if such act had been wholly done within Zambia.”

Further, section 65 of the Criminal Procedure Code provides as follows:

“65. Every court has authority to cause to be brought before it, any person who is within the local limits of its jurisdiction, and is charged with an offence committed within Zambia, or which, according to law, may be dealt with as if it has been committed within Zambia, and to deal with such accused person according to its jurisdiction”

⁷¹ SCZ Judgment No. 22 of 2008

It was thus held that since contempt is a criminal offence under section 116 of the Penal Code and the contemnor in this case was a Zambian citizen, the Courts have jurisdiction to deal with criminal acts committed by Zambians anywhere in the world. As such, the learned trial judge was on firm ground in holding that the High Court of Judicature for Zambia enjoys extra-territorial jurisdiction to try a Zambian citizen resident in Zambia for an act of contempt of court allegedly committed in a foreign jurisdiction.

4.2 Analysis of the Cases

Having discussed the discretionary power of the judges and examples of decided cases in Zambia, the task that now remains is to analyse the *ratio decidendi* in these cases so as to find a way of improving the application of the law on contempt of court in Zambia. In the Kundiona case above, the courts stated that the circumstances of each case will also suggest whether the aggrieved judge properly took cognizance of the offence or if it should have been referred for prosecution before another court; having regard to the need for a balance between the undesirability of a judge possibly testifying and being cross examined as a witness before another court and the desirability of swift action in a proper case.

In addition, the courts, in *The Zulu* case (shown above), stated that the making of an application to a judge to recuse himself on the ground that he is biased is in itself contempt unless the application is substantiated by reliable evidence. In this regard, reliable evidence is said to mean evidence which can be tested in cross examination and found to be cogent.⁷² In as far as these two propositions are sound in the protection of the integrity of the courts on the face of it, they are an affront to the course of justice- the obstruction for which people are cited for contempt. This is because whereas these statements exempt judges from the risk of being cross examined in another court for the contempt they allege, they are willing to make people accused of contempt go through the whole process of cross examination. In any democratic state and in line with the rule of law, no one should be above the law. This means that all laws should apply to all individuals equally. Therefore, by judges' unwillingness to be subjected to cross examination for the contempt they allege while at the same time requiring evidence that is susceptible to cross

⁷² Kundiona v The People (1993-94) ZR 59

examination from contemnors, one could safely say that they breach the principles of rule of law and the rules of natural justice at large because they apply the law differently in as far as judges are concerned.

Further, in both the *Zulu* and *Kundiona* cases, it is stated that there is no specific procedure provided for summary contempt, provided the basic principles of fairness are followed. In as much as it is explicitly stated that the presence of principles of fairness are a condition for the passing of summary judgments, there is still a problem because there is no criteria to determine what amounts to fairness. It is still up to the discretion of the judges and as earlier alluded to, their discretionary powers are sometimes liable to abuse.

By holding that it is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent in the *Kundiona* case, the Supreme Court simply brought out the weakness of summary contempt law in Zambia. This is to say that bias in the passing of summary judgments in contempt of court matters is not uncommon. As a way of comparison, in the Australian cases of *Fraser v R* and *Meredith v R*⁷³, it was held that summary power to punish for contempt is part of the inherent jurisdiction of the court. It is an extraordinary power imposing an unusual concatenation of rules upon the judge, resulting in special responsibilities. Also, according to the learned authors of Halsbury's Laws of England, 4th edition, volume 9, paragraph 27;

“Contempts of this kind are punished not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. It would not be a legitimate object of punishment for an aggrieved judge to seek solely to vindicate his personal honour or sate his wrath. It is the public which must be protected against loss of confidence and respect for the courts engendered by acts calculated to undermine authority or expose the courts to contempt.”

What this simply means is that in order for the law on summary punishments of contempt to adequately apply, there should be the people's confidence in the integrity of the court. As such, the learned authors of the Halsbury's Laws of England⁷⁴ argue that the punishment for contempt of court is not necessarily given so that judges can fulfill their goals of being respected but it is imposed so that the public is protected from loss of respect and confidence in the judiciary. A

⁷³ (1985)L.R.C (crim.) 732

⁷⁴ Halsbury's Laws of England, 4th ed., vol.9, Para 27

judiciary that has no confidence of its people has simply failed. This could be said about the Zambian scenario where the courts themselves admit that in summary contempt, the tribunals are not completely unbiased or impartial or even independent. Again, this goes against the principles of natural justice.

The holding in the case of *The People v David Masupa* could be said to be good law in that it gives the procedure for application in both situations; whether the contempt be summary or not. It also shows that it is not every utterance or conduct criticizing the court and its officials that amounts to contempt. Following from this, people are allowed to express themselves freely and enjoy their other Constitutionally guaranteed rights⁷⁵ without the fear of being cited for contempt. However, because this decision preceded the *Zulu* and *Kundiona* cases and because it is a High Court decision, it is difficult to apply the law in the said *Masupa* decision over the other two cases decided by the Supreme Court. This is in line with the principle of *stare decisis* where it is only the decisions of the superior courts that can bind those of the inferior courts. As such, because the High Court in Zambia is inferior to the Supreme Court, the law in *Zulu v The People* and *Kundiona v The People* will override that espoused by the law in *The People v David Masupa* even though the latter has better principles.

4.3 Conclusion

To include, it has been shown that the discretionary powers given to judges is important in the enforcement of many things such as sanctions for contempt of court. However, because these powers are sometimes too wide and because of their discretionary nature, they are liable to abuse by the judges and magistrates. The main role of the rule of law is to limit the discretion given to officials but where contempt of court is concerned, the judges who are tasked with ensuring that this discretion given to officials is not abused are also holders of such discretion and as such, as careful as they may be in exercising it, the problem of abuse of these powers still remains.

This chapter has also shown some cases decided in Zambia regarding contempt of court. These cases include *Sebastian Zulu v The People* which is the leading case, *Elias Kundiona v The*

⁷⁵ Such as freedom of expression.

People, Limpile and Another v Mpulungu Harbour Management and the High Court decision in the review of The People v David Masupa. Even though the first three cases cited are Supreme Court decisions, the latter could be said to be better law in as far as contempt of court goes because it handles the procedure in contempt of court and also shows that it is not all conduct that is done in the face of the court that amounts to contempt of court. The Supreme Court cases, on the other hand both state that no specific procedure is provided for summary contempt and strictly speaking, this goes against section 116 of the Penal Code and Order 52 of the Rules of the Supreme Court of England.

Chapter 5

5.0 Conclusions and Recommendations

The law on contempt of court is not always clear and much emotion often features in contempt prosecutions. Indeed there is need for reform in the contempt law as it stands in Zambia today. This chapter provides a summary of the conclusions drawn from the study and the recommendations suggested. It begins with the conclusions drawn and ends by giving the recommendations.

5.1 Conclusions

Issues of contempt of court have been introduced in Zambia and form part of the basis of the law. All courts in Zambia are protected by the law on contempt. Issues of contempt of court are dealt with under section 116 of the Penal Code and Order 52 of the Rules of the Supreme Court of England; otherwise called the White Book and now binding in Zambia as per decision of the Supreme Court in *Ruth Kumbi v Robinson Kaleb Zulu*.⁷⁶

It has been accepted throughout the world that a person should only be punished for omitting to do something or committing an offence under the stipulated law. It has also been agreed that in order for this punishment to be arrived at, both parties, that is, the party alleging such offence and that being accused should be heard.

Thus, despite the fact that the aforementioned has to be observed in order for any law to be undisputed, matters of contempt of court are dealt with differently. Here, judges have discretion to hold someone in contempt either directly or indirectly. In this regard, judges in often cases adjudicate upon cases in which they have interest- thereby ignoring the principle of '*nemo iudex in causa sua*' which when translated means; no one should be a judge in their own cause.

In addition, before the advent of colonialism in Northern Rhodesia (as Zambia was then called), many people did not take matters to court as we know it today. When conflicts arose, it was the traditional leaders such as chiefs that dealt with such conflicts. As such, issues of contempt of

⁷⁶ SCZ Judgment No. 19 of 2009

court were not common. However, with the coming of colonialism, the colonial leaders brought, with them, many laws based on the English (colonial masters) system and these have an influence on the law in Zambia even today. It is after the coming of colonialism that the indigenous started taking matters to court. Following from this, there was need to develop some laws to ensure that the courts and its officers are respected and its integrity preserved thereof.

Thus, a number of legislation was put in place. The Contempt of Court Act⁷⁷ was one of the laws that was brought with the intention of promoting freedom of speech after the European community had decided that the notion of contempt of court in fact breached Article 10 of the European Convention on Human Rights. As a result, since Zambia's legislation is largely influenced by that of England, this Act also found its application in the territory. As shown in the preceding chapters of this research, the problem with this Act is that it imposes strict liability. This means that one will be liable or found in contempt regardless of whether they intended to interfere with the cause of justice or not. This is very harsh for those cited for contempt and could tend to be an affront to the same justice that courts in Zambia seek to uphold.

As already alluded to, matters of contempt of court are also covered under the Penal Code⁷⁸ under section 116 and the Rules of the Supreme Court of England under Order 52/1/23. It was said in the case of *Sebastian Zulu v The People*, at page 66, that the court's powers under Order 52 are wider than those provided for under section 116 (1) (a) and 2 of the Penal Code in the sense that there is no limitation on the court to dispose of contempt on the same day it arises. The examples given in this research by those who have had an encounter with the law on contempt of court show that sometimes it is used at the detriment of the Constitutional guarantee of freedom of expression and in certain cases, it has been used to settle scores by those who have discretion.

Further, the White Book contains its own cases and statutes. Since it has a binding effect in Zambia⁷⁹, a problem would arise in the event that a decided case in Zambia goes contrary to that contained in the said Rules.

⁷⁷ Contempt of Court Act of 1981

⁷⁸ Chapter 87 of the Laws of Zambia

⁷⁹ Since the decision in *Ruth Kumbi v Robinson Kaleb Zulu*, SCZ Judgment No. 19 of 2009

It has also been established, in accordance with the words of Lord Denning MR in *Balogh v The Crown*⁸⁰, that it is the judge's strongest power to impose sanctions for acts which disrupt the court's normal process. However, it is trite law that before this punishment is given, steps should be taken to prevent people from being cited for contempt at every given instance. In Zambia, for example, the Supreme Court in *Elias Kundiona v The People*⁸¹ said that an aggrieved judge in summary contempt should try to show restraint and to maintain equanimity. This means that they should make use of warnings in any situation that might lead to a person being cited for contempt.

The punishment where contempt of court is concerned in Zambia is payment of a fine or imprisonment or both. It has been shown that in order for these sanctions to serve their purpose of reforming offenders and deterring would-be offenders, there is need to distinguish between the way the two forms of contempt are instituted and dealt with in courts of law. For instance, despite the procedure being provided for in Order 52, the Penal Code and even the Criminal Procedure Code, sometimes criminal contempt is dealt with in the same way civil contempt is supposed to be dealt with. The judges impose summary judgment and the standard of proof for both is the same, that is, the criminal standard- beyond any reasonable doubt.

Even so, those found guilty of having been in contempt of court have the option to appeal as provided for by section 323 of the Criminal Procedure Code (CPC)⁸². This is a very positive aspect in as far as the law of contempt of court goes in Zambia. However, because the appellants may tend to have fear of being cited for contempt of court all over again, they may not adequately put their defence across.

The discretion given to judges is also sometimes abused; suffice to say that judges are deemed to be impartial and very important in the enforcement of contempt law. The main role of the principle of rule of law is to ensure that the discretionary power given to officers is limited. However, the fact that it is still the same judges who are in possession of this discretion that are given the task of making sure that this discretionary power is not abused still remains a problem in as far as the principle of rule of law goes.

⁸⁰ (1947) 3 All ER 283

⁸¹ (1993-94) ZR 59

⁸² Chapter 88 of the Laws of Zambia.

This research has attempted to answer the questions that were put forth in order to properly analyse the law on contempt of court as it is in Zambia today. It was asked as to what the purpose of having law that governs issues of contempt of court is. It has been shown that the reason for this is so as to maintain the integrity of the courts and as such, despite its flaws, this law is a very important aspect in any given society.

It was also asked whether there are any criteria to determine what amounts to contempt of court. In answering this, it has been established that where the contempt alleged is in the presence of the courts, it is up to the judges to cite the contemnors and punish them summarily. However, if the said contempt is not in the presence of the courts, it is up to the person aggrieved to institute proceedings for which the courts have the power to punish. Thus, the answer to this question lies in the fact that it is up to the judges, themselves, to determine what conduct amounts to contempt of court and what conduct is tolerable before them.

Another part of this research was dedicated to the determination of whether the discretionary power given to judges is unfettered and/or limitless in response to one of the research questions. It has been shown that in every democratic society, the rule of law is a core feature and its main function is to limit the discretion given to officials. As such, it would be improper in a democratic state like Zambia if the discretion given to judges was unfettered or limitless. However, even though there is a limit to this power, it has been shown that because of its discretionary nature, it is very susceptible to abuse by judges- regardless of how careful they may be in exercising it.

5.2 Recommendations

It has been established that despite its importance in maintaining the integrity of the courts of law in Zambia, the law on contempt of court has its own flaws. As such, a number of recommendations are given below in an attempt to improve the law under analysis:

Summary Trial

There is need to move from placing much emphasis on summary trial in contempt of court matters, towards the institution of ordinary proceedings in their resolution. This will allow time for the judge handling such a matter to reflect on the nature of the offence and also avoid the danger of the judge taking on the uncustomary role of being both prosecutor and judge. Summary trial should only be used when there is a dire purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end. In addition, civil contempt of court should attract the standard of proof required in all other civil matters, that is, on a balance or preponderance of evidence.

Compliance with Procedure

It is recommended that all procedural steps under Order 52 of the Rules of the Supreme Court of England and section 116 of the Penal Code should be strictly complied with. As Lord Denning put it in *McElraith v Grady*,

“no man’s liberty is to be taken away unless every requirement of the law has been strictly complied with.”

This is to say that judges should move from punishing summarily even for the type of contempt that requires that proceedings be instituted by those who are aggrieved by certain conduct.

It is further submitted that even though the case of *Sebastian Zulu v The People* recognizes the power of the court to order a combination of Order 52 of the Rules of the Supreme Court and section 116 (1), this should only be done on application by the parties and not by the court at its own motion. This may help to avert the problems that may be brought in the event that a case contained in the Rules of the Supreme Court is in conflict with a decided Zambian case or even section 116, itself.

Defences

There should be retention of the defences of innocent publication and distribution. However, it is important to say that this should be with some necessary amendments- especially if the person cited for contempt can prove that the publication, although it incidentally but unintentionally caused a risk of serious prejudice in particular proceedings, formed part of a legitimate

discussion of matters of general public interest. For example, in a case in which the editor-in-chief of the Post Newspaper was found guilty of contempt and sentenced to four months' imprisonment with hard labour, he should have had the defence of innocent publication and distribution at his disposal. This is because the said contempt arose out of a discussion of matters of general public interest. During an ongoing strike by medical practitioners in about 2009, one Chansa Kabwela, an employee of the Post Newspaper had taken pictures of a woman giving birth outside the University Teaching Hospital (UTH) and sent them to some High Profile Officials in Cabinet, including the Vice President. During a press conference in the same year, the President himself announced his anger with the pictures and directed the immediate arrest of the person who was responsible for such pictures. Upon this direction, Chansa Kabwela was arrested and charged for distributing obscene materials, contrary to the provisions of the Penal Code. It was in response to these events that a United States based Zambian Lawyer wrote an Article dubbed "*The Chansa Kabwela Case- a Comedy of Errors*" in the Post Newspaper. Fred M'membe, as the editor-in-chief of the said Newspaper was then sentenced for contempt of court even though he said that he had been away on 'study leave' at the time the said Article was published. Seeing as the Article from which the said contempt arose was a matter of general public interest, the defence of innocent publication and distribution ought to have been available for the accused.

From the foregoing, there should be defences such as innocent publication and distribution at the disposal of those cited for contempt where it can be shown that the publication for which they have been cited for contempt formed part of a legitimate discussion of matters of general public interest.

The defences of truth and fair comment should also be considered in the quest of improving contempt law in Zambia. In the case of *Solicitor General v Radio Avon Ltd.*⁸³, the Supreme court of New Zealand stated that the alternative to this defence is to say that imputing of improper motives to judges must always be contemptuous, even where such criticism is true. The courts, in this case further stated, inter alia, that:

"if this were the law, then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would

⁸³ (1978)1 NZLR 225

it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt.”

A consideration of these defences will help in the attempt to strike a balance between the desire to protect the image of the court by maintaining its integrity on one side and the freedom of expression as guaranteed by the Constitution on the other. This would be in line with the principles of natural justice and rule of law as required in a democratic society.

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**IMPRISONMENT IN THE 21ST CENTURY AS A MEANS OF CRIME-
CONTROL IN ZAMBIA: IS IT EFFECTIVE?**

By

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