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**MEDIA AND THE JUDICIAL PROCESS: CONTENDING WITH TRIAL  
BY MEDIA**



**By**

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**A PAPER SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL  
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**DECLARATION**

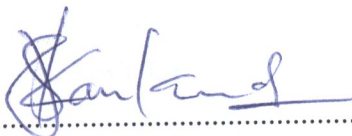
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This directed research paper of **JAMES SHAWA KANKONDO** is approved as fulfilling the requirements or partial fulfilment of the requirements for the award of the (LLB degree) in (Law) by the University of Zambia.

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SIGNATURE.....

THIS .....DAY OF .....2010

## **DEDICATION**

This research paper is dedicated to my mother Miss Grace Choobe and my Brother Mr Milimo Ngululu for their love, devotion, faith, trust and financial support; I am forever grateful. To my wife to be, Womba Silumbu and my son Christian Kankondo for adding new meaning, inspiration and thrust to my life. To Changa Chitabo a friend in need, and a friend indeed. Also to my brothers Maduma Mpofu and Clive Phiri for being true.

## ABSTRACT

“Trial by media” refers to a peculiar kind of reporting adopted by the media in reporting criminal trials which may interfere with the administration of justice. In general terms the evil of “trial by media” consists in dissemination of matters that do not come before the court, or other trafficking with the truth intended to influence proceedings or inevitably calculated to disturb the course of justice. Specific examples include: publishing of inaccurate reports, improper publicity of court proceedings and unjustifiable commentary of criminal action and trials.

Freedom of expression and freedom press is often cited in defence of trial by media. But the freedoms do not extend to uncontrolled expression of either alleged fact or opinion or the right to influence judges or juries. The freedom is limited to fair and accurate comment. No matter how vicious or revolting a crime may be, the person accused is entitled to a fair trial while, courts are entitled to their integrity and freedom from improper influence of any kind in order for them to carry out their functions properly.

In the United Kingdom almost every publication that in any manner, and even any degree, tends to affect the determination of pending causes, is pronounced as contempt. It is not strange for proceedings to be halted or convictions quashed on the basis of judicial acceptance that pre-trial publicity rendered, or would render, a fair trial impossible. This power is drawn from the Contempt of Court Act of 1981. Whereas the law on contempt in Zambia is basically covered by the Penal Code in a single provision and the Contempt of court (Miscellaneous Provisions) Act focuses on contempt of certain proceedings held in private.

There have been many calls from members of the public, lawyers and prosecutors that the press should strictly adhere to proper norms and standards in reporting and commenting on matters before the courts; that with increasing competition the media are mainly concerned with increasing the sales of newspapers or increasing the number of television viewers, thereby attracting more advertising revenue to the publisher or broadcaster at the cost of the due administration of justice.

This is a challenge which the legislature, judiciary and the media need to rise to; that is to say the legislature needs to enact the necessary legislation, the courts to punish the press for prejudicial reports and the media bodies themselves should come up with some kind of controls to ensure that the media operates for the general good.

This paper explores the concept of trial by media in general and then carries out a comparative analysis of the legislation and court decisions in relation to the same in five common law jurisdictions namely the United Kingdom, the United States of America, India, Australia and New Zealand. And finally the findings from the above will serve as a measuring rod for evaluating the effectiveness of Zambia's legal structure in response to the problem of prejudicial publications and reports in general.

## ACKNOWLEDGEMENTS

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## CHAPTER ONE

### INTRODUCTION

1.0

*"The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly that they should be able to rely upon obtaining in the courts arbitrament of a tribunal which is free from bias against any party whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function for that court to decide it according to law."<sup>1</sup>*

It is common practice for the media to report intensely on horrific crimes, crimes involving children or just any case which involves a high profile figure as victim or accused.<sup>2</sup> Reporting of court cases if not done correctly may interfere with a fair trial in the courts and ultimately prejudice the due administration of justice. This is especially true where the report intends to provoke an atmosphere akin to a lynch mob<sup>3</sup> or exposes prospective judges to details of the crime even before a trial has begun.<sup>4</sup> Such reports do not only interfere with the due administration of justice but can specifically injure an accused person by subjecting him to a biased court, and sentencing him to a lifetime of intense public scrutiny, regardless of the result of the trial.<sup>5</sup>

The success of any legal system will depend on the degree to which it is able to achieve a proper balance between social and individual interests.<sup>6</sup> In this case, society's demand for full information on matters of public interest on one hand and an individual's right to a

<sup>1</sup> Lord Diplock in *Attorney-General v Times Newspaper*, (1974) A.C. 273.

<sup>2</sup> [www.en.wikipedia.org](http://www.en.wikipedia.org) "Trial by media" the page as it appeared on 28 Jul 2009

<sup>3</sup> *ibid*

<sup>4</sup> [www.crf-usa.org](http://www.crf-usa.org) "Is a Fair Trial Possible in the Age of Mass Media?" the page as it appeared on 10 Jul 2009

<sup>5</sup> *ibid*

<sup>6</sup> D. Lloyd, *Introduction to Jurisprudence*(3<sup>rd</sup> ed)(London: Stevens & Sons, 1967) p340

fair trial before an impartial court of competent jurisdiction on the other. In the relationship between the judiciary and the media this balance can be achieved by making adequate use of the law of contempt, law of defamation and media ethics and regulations.

Thus, this paper will endeavour to establish whether the Zambian legal system is sufficiently equipped to deal with the problem of adverse media publicity. To begin with chapter two looks at roles of the media and the judiciary and how they should relate to one another in an ideal situation. Secondly, chapter three tables the arguments for press freedom against those for a fair trial. Thirdly, chapter four carries out a comparative analysis of the legislation and courts decisions as regards the problem of trial by media in five common law jurisdictions namely the United Kingdom, the United States of America, India, Australia and New Zealand. Particular emphasis is placed on the sharply divergent judicial decisions and legislation in the United States of American as opposed to the United Kingdom. A slightly detailed study of both case law and legislation in Indian is carried out. Whereas, the analysis of Australia and New Zealand does not look at legislation but concentrates more on the contrast in court decisions. Fourthly, chapter five carries a detailed discussion and evaluation of laws ethics and regulations that can be used to fight trial by media in Zambia. And lastly chapter six makes the necessary conclusion and recommendations.

## **1.1 STATEMENT OF THE PROBLEM**

Since the restoration of multi-party politics and the advent of the Third Republic in 1991 the status of the press in Zambia has greatly changed. The Movement for Multiparty Democracy (MMD) came to power on the platform of market economy and

liberalisation, which effectively was implemented by the privatization programme. From then onwards Zambia has witnessed a number of independent newspapers and magazines.<sup>7</sup> And more recently a number of privately owned television stations have cropped up. This has given rise to fierce competition amongst media houses. From this premise it can be argued that the most sensational reports on criminal cases are not motivated by high ideals, but, money: increasing the sales of newspapers or increasing the number of television viewers, thereby attracting more advertising revenue to the publisher or broadcaster.<sup>8</sup>

This presents a problem which needs both the attention of the judicial system as well as the media fraternity itself. It is common for defence lawyers and litigants to complain of injury by the media's sensational reports yet a search by the writer has revealed that there are no instructive judgments on the subject. In comparison, other jurisdictions have legislation and court decisions that comprehensively deal with adverse media reports.

This deficiency therefore calls for a review of the laws that can be used to regulate the conduct of the media (i.e. contempt law, Defamation Law) and media ethics and regulations.

## 1.2 METHODOLOGY

The subject matter of this paper is relatively unexplored by local authorities as such the initial part of this paper will largely depend on foreign materials on the internet and textbooks in order to get a clear understanding of the foundations of the subject and for

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<sup>7</sup> C.H. Chirwa Press Freedom in Zambia : A brief Review of the Press during The MMD's First Five Years in Office (Lusaka: Zambia Independent Media Association 1996)

<sup>8</sup> [www.orlandosentinel.com](http://www.orlandosentinel.com) "Media Zap Right to a Fair Trial." The page as it appeared on 28<sup>th</sup> July 2009

definitions of the key terms. The middle portion of the of the paper will rely on a combination of the foregoing authorities as well as court cases, journals and newspaper articles and interviews for an in-depth understanding of the practical realities. Whereas, the last part specifically chapters five and four consist of a critical evaluation of legislation and relevant case law.

### 1.3 DEFINITION AND ANALYSIS OF KEY TERMS

#### 1.3.1 **Trial by Media:** This phrase became popular in the late 20th century and early 21<sup>st</sup>

Century to describe the impact of television and newspaper coverage on a person's reputation by creating widespread perception of guilt regardless of the verdict in a court of law.<sup>9</sup> Although a recently coined phrase, the idea that popular media can have a strong influence on the legal process goes back certainly to the advent of the printing press and probably further.<sup>10</sup>

#### 1.3.2 **Fair trial;** it is difficult to give a precise definition of this concept but in a general sense it includes a citizens entitlement to proper legal procedures, the following are examples: first, an accused person should not be deprived of freedom at the hands of the state without first having the opportunity to test the allegations and supporting evidence in a court of law and then only after being found guilty beyond reasonable doubt.<sup>11</sup> Second, provision for ensuring an accused person public trial before a competent tribunal; third, the right to be present at the trial, and the right to be heard in his or her own defense; and

<sup>9</sup> [www.en.wikipedia.org](http://www.en.wikipedia.org) "Trial\_by\_media." the page as it appeared on 28 Jul 2009

<sup>10</sup> *ibid*

<sup>11</sup> [www.austlii.edu.au](http://www.austlii.edu.au) "The right to a fair trial: Prejudicial pre-trial media publicity" the page as it appeared on 4 Jun 2009

Fourth, the doctrine that the provisions of criminal statutes must be drawn so that reasonable persons can be presumed to know when they are breaking the law.<sup>12</sup>

1.3.3 **Presumption of innocence:** In its simplest form a presumption is merely the assumption of the truth of a fact without any premise being established.<sup>13</sup> In other words, a presumption is the initial position the law takes when resolving a dispute brought before it. In this regard, there is a presumption of law that a person accused of a crime is innocent until he is proved guilty.<sup>14</sup> As mentioned above this presumption does not depend upon proof of any preliminary facts, but arises from the circumstances of accusation and another rule which comes into operation is that, he who asserts must prove. Both rules cast the burden of proof upon the accuser.<sup>15</sup> These rules undoubtedly have the advantage of guaranteeing the accused a fair trial by reminding the court that suspicion is not evidence.<sup>16</sup> This concept is important in our discussion because it is a condition to which an accused person is and should be subject to through out the period of investigations, trial and even up to the end of the final appeal in order to ensure a fair trial.

1.3.4 **Judicial Independence:** Independence of the judiciary is commonly understood to refer to independence of the judiciary from the executive for example that a judge must be secure from the risk of dismissal by the government of the day or independence from

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<sup>12</sup> Microsoft ® Encarta ® 2008. © 1993-2007 Microsoft Corporation

<sup>13</sup> G. Nokes, An Introduction to Evidence (4<sup>th</sup> ed) (London Sweet and Maxwell, 1967) p63

<sup>14</sup> Ibid p67

<sup>15</sup> Ibid

<sup>16</sup> Ibid

parliament for example that rules of parliamentary procedure forbid discussion of litigation in progress and further criticism of judges.<sup>17</sup> But here we will refer to it in a more general sense. Thus judicial independence in the context of this paper will include the following:

*“that judges should reach legal decision free from any outside pressure, whether that pressure is political, financial, media related or applied by popular will; that judges do not have to fear punishment or other reprisals for doing their jobs as long as they do so according to the rule of law.”*<sup>18</sup>

Maintaining an independent judiciary in this context enables the judiciary to make impartial decisions.

**1.3.5 Freedom of Expression and Freedom of the Press:** A constituent element of freedom of expression is freedom of the press. Freedom of expression includes the right to hold opinions without interference, the right to receive ideas and information without interference and freedom from interference with one's correspondence.<sup>19</sup> Press freedom on the other hand covers printed matter of all kinds and not only newspapers and periodicals. It has been defined as follows: “The liberty of the press consists of laying no previous restraints upon publications....;”<sup>20</sup> printing without previous license, subject to the consequences of the law;”<sup>21</sup> the right to publish with impunity, truth with good motives, for justifiable ends though reflecting on government, magistracy or individuals.”<sup>22</sup>

<sup>17</sup> G.Kunda, “The Zambian Judiciary in the 21<sup>st</sup> Century,” Zambia Law Journal, Vol 30, 1998 pp27-50

<sup>18</sup> www.indian-laws3.blogspot.com “Media-Role-in-High-Profile-Cases” the page as it appeared on 22 Jul 2009

<sup>19</sup> A.W. Chanda, “Freedom of Expression and the Law in Zambia,” Zambia Law Journal, Vol 30, 1998pp 123-145

<sup>20</sup> P. Jackson and P. Leopold, O. Hood Phillips and Jackson Constitutional and Administrative Law(8<sup>th</sup> ed)(London: Sweet & Maxwell 2001) para 25-018

<sup>21</sup> Per Lord Mansfield in Dean of Asaph's Case, R v Shipley(1783) 21 St. Tr 847

<sup>22</sup> Per Alexander Hamilton in The People v Croswell (1804) 3 Johns (N.Y) 337

1.3.6 **Contempt of Court:** Generally, the offence of contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice.<sup>23</sup> It includes any word spoken or act done and calculated to lower a court's dignity and authority. Further, contempt of court may be shown either by language or manner.<sup>24</sup> Contempt may be civil or criminal. Civil Contempt consists of failure to comply with a judgment or order of the court or the breach of an undertaking to the court in civil proceedings.<sup>25</sup> Criminal contempt; is a wider concept and encompasses activities both inside and outside the court. Such contempt may take the form of interrupting court proceedings, refusing to answer questions before a court without lawful excuse or scandalizing the court.<sup>26</sup> An important form of criminal contempt is unintentional conduct likely to prejudice a fair trial in particular proceedings.<sup>27</sup> This type of contempt is concerned with publications which create a substantial risk of impeding or prejudicing the course of justice.<sup>28</sup> In this study we will concentrate on this kind of contempt.

The law of contempt is designed to strengthen the independence of the judiciary and to ensure that court orders are obeyed and that court proceedings are not disrupted.<sup>29</sup> The law ensures that the course of justice is not impeded by improper comment upon litigation in process or criticism of individual judges.

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<sup>23</sup> Osborn's Concise Law Dictionary (8<sup>th</sup> ed) Eds L. Rutherford & S. Bone (New Delhi Universal Law Publishing Co. Pvt. Ltd, 1993)

<sup>24</sup> Sebastian Saizi Zulu v The People S.C.Z. Judgment no. 7 of 1991

<sup>25</sup> Supra note 20 para 20-045

<sup>26</sup> Supra note 23

<sup>27</sup> ibid

<sup>28</sup> Supra note 20 para 20-052

<sup>29</sup> Kunda, "The Zambian Judiciary in the 21<sup>st</sup> Century," 28

**.3.7 Ethics:** Ethics loosely defined, refers to a professional code that guides dos and don'ts in a manner that stresses the supremacy of the right over wrong.<sup>30</sup> To philosophers, ethics is the study of the distinctions between right and wrong, virtuous or vicious, and beneficial or harmful. Professional ethics is more specific. Most professions place ethical demands on their practitioners. Lawyers for example are required to give their clients the best possible defence even if they doubt their innocence. Physicians swear they will do no harm to their patients. Priests and psychologists are obliged not to repeat what they are told during confession or counseling.<sup>31</sup> In this paper we shall consider the efficacy of ethics in the journalism profession in Zambia.

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<sup>30</sup> [www.misazambia.org.zm](http://www.misazambia.org.zm) "Self regulation, the big ethical question." the page as it appeared on 30 Nov 2009

<sup>31</sup> R.F. Smith, *Groping for Ethics in Journalism* (4<sup>th</sup> ed) Iowa: Iowa State University Press 1999) p13

## CHAPTER TWO

### 2.0 MEDIA AND THE JUDICIARY

This chapter discusses the roles of the media and the judiciary with a view of highlighting the importance of the distinct roles of each institution and demonstrating the need for a relationship of mutual respect between the two institutions.

#### 2.1 Role of the Judiciary

The judiciary's foremost role as the third branch of government is to defend and uphold the Constitution and assure the rule of law prevails.<sup>32</sup> However, a pervasive element in the judiciary's role at every level is the protection of each person's Constitutional, human, civil and legal rights.<sup>33</sup> The judiciary also has an essential role in protecting individuals from the wrong-doing of others, protecting the weak from the strong, and the powerless from the powerful as well as protecting individuals from the unwarranted or unlawful exercise of power by the State. Moreover, the judiciary plays a crucial role in securing domestic tranquility by providing a structured institutionalised forum for the resolution of discord and dispute and the vindication of civil and criminal wrong-doing.<sup>34</sup>

The role of the judiciary can also be looked at from the point of view of the public's expectations.<sup>35</sup> Members of the public expect judges, magistrates, justices and judicial officers to be ladies and gentlemen of integrity. This is achieved by insuring that laws are

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<sup>32</sup> www.smartvoter.org "Role of the Judiciary." Page created on February 29, 2000

<sup>33</sup> ibid

<sup>34</sup> ibid

<sup>35</sup> F. Thayer, *Legal Control of the press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*(4<sup>th</sup> Ed) (Brooklyn: The Foundation Press, Inc 1962) p582

applied to all in a fair, reasoned and understandable manner.<sup>36</sup> And by doing so judges can instill confidence that allegiance to--and reliance on--the law and legal process is the best hope for achieving the fullest measure of human justice, social harmony and progress.<sup>37</sup>

### 1.1 Independence of the judiciary augments the above discussed functions of the judiciary.

The idea underlying independence of the judiciary being that:

*“ judges should be allowed to reach legal decision free from any outside pressure, whether that pressure is political, financial, media related or applied by popular will; that judges do not have to fear punishment or other reprisals for doing their jobs as long as they do so according to the rule of law. ”*<sup>38</sup>

As such to ensure their independence, judges can exercise the power of contempt against any person or body that apparently interferes with their duties.<sup>39</sup>

The media often supports the independence of the judiciary by stimulating public opinion so as to prevent government interference with a free and independent judiciary. Yet on the other hand it may do the exact opposite<sup>40</sup> such as where the media through its reporting creates widespread perception of guilt before a verdict is properly passed in a court of law.<sup>41</sup>

<sup>36</sup> www.smartvoter.org “Role of the Judiciary.” Page created on February 29, 2000

<sup>37</sup> ibid

<sup>38</sup> www.indian-laws3.blogspot.com “Media-Role-in-High-Profile-Cases” the page as it appeared on 22 Jul 2009

<sup>39</sup> G.Kunda, “The Zambian Judiciary in the 21<sup>st</sup> Century,” 27-50

<sup>40</sup> www.thenewlawyer.com.au “Media a threat and 'bulwark' to Independent Judiciary” page as it appeared on 16<sup>th</sup> October 2009

<sup>41</sup> www.en.wikipedia.org “Trial by media.” the page as it appeared on 28 Jul 2009

## **.2 Role of the Media**

The media plays a very significant role in our society today. It is all around us. From the shows we watch on TV, the music we listen to on the radio, to the books, magazines, and newspapers we read each day, the Internet etc. are included. It is a source of information or communication. It is considered to be the 4th pillar of the society. The other three being legislative, executive and judiciary.<sup>42</sup> Its duty is to inform, educate and entertain the people. Without the media, people in societies would be isolated, not only from the rest of the world, but from governments, law-makers, and neighbouring towns and cities;<sup>43</sup> without the wide array of information the media provides, people's opinions and views would be limited and their impressions and conclusions of the world around them would be stunted. The flow of information is important for the development of communities and the media facilitates this.<sup>44</sup>

The media also plays a watchdog-type function which is essential in a democratic society. it enables people to know what their governments are doing, by forcing them to explain their actions and decisions.<sup>45</sup>

### **2.2.1 Media's Power to Shape Opinion**

Media workers are in essence interpreters of information. In an ideal situation the media will weed out the important issues and points, putting them in a context that the average

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<sup>42</sup> [www.indian-laws3.blogspot.com](http://www.indian-laws3.blogspot.com) "Media-Role-in-High-Profile-Cases" the page as it appeared on 22 Jul 2009

<sup>43</sup> S, Kiouis, 'Beyond salience: Exploring the Linkages between the Agenda Setting Role of Mass Media and Mass Persuasion.' Unpublished doctoral dissertation: University of Texas at Austin, 2000.

<sup>44</sup> Ibid

<sup>45</sup> Ibid

reader and listener can make sense of in order to form their own opinions.<sup>46</sup> But it is instead argued that the media may manipulate information in order to impress their opinions on the consumers of their news products. It is widely accepted that what we know about, think about and believe about what happens in the world, outside of personal first-hand experience, is shaped, by how these events are reported in newspapers and communicated through the medium of radio and television.<sup>47</sup>

According to scholars in the field of journalism there are two prominent theories that guide our understanding of the influence of the media namely the ‘Cultivation Theory’ and ‘Agenda-Setting Theory’.<sup>48</sup> The Cultivation Theory holds that the popular media, such as television, has the power to influence our view of the world and it is “primarily responsible for our perceptions of day-to-day norms and reality.”<sup>49</sup> In contrast the ‘Agenda-Setting Theory,’ places somewhat less emphasis on the impact of the media on public opinion and more emphasis on what and how issues are actually covered in the media.<sup>50</sup> This theory holds that, not only do people acquire factual information about public affairs from the news media, but readers and viewers also learn how much importance to attach to a topic on the basis of the emphasis placed on it in the news.<sup>51</sup> For example newspapers will make certain topics lead story on page one, other front page displays, large headlines, etc; while Television will make them opening stories on the

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<sup>6</sup> Supra note 43

<sup>7</sup> www.aare.edu.au “School Discipline Coverage in Australian Newspapers: Impact on Public Perceptions, Educational Decisions and Policy” the page as it appeared on 26 Jul 2009

<sup>8</sup> W. Severin & T. Tankard “*Communication theories.*” (New York: Hastings House, 1997) p23

<sup>9</sup> D. Infante, A. Rancer & D. Womack “*Building Communication Theory*” (3rd ed.) (Prospect Heights, IL: Waveland, 1997) p. 383

<sup>10</sup> J. Dearing & E. Rogers “*Communication Concepts 6: Agenda-setting.*” (Thousand Oaks, CA: Sage, 1996) p75  
www.sticerd.lse.ac.uk “The Agenda-Setting Role of the Mass Media in the Shaping of Public Opinion” the page as it appeared on 26 Jul 2009

newscast or devote lengthy time to the story, etc. when these topics are repeated day after day they effectively communicate the importance of each topic. Another way this is done is through names, word choice and tone adopted.<sup>52</sup> News media often use labels and titles to describe people, places and events. The nature of these labels and titles set the tone of the story and can influence how readers view the news story and the individuals or organizations that are the focus of the news item.<sup>53</sup> With the increasing salience of public figures in the news, for example, more people move away from a neutral position and form an opinion about these persons.<sup>54</sup>

The agenda-setting influence of the news media is not limited to this initial step of focusing public attention on a particular topic. The media also influence the next step in the communication process, our understanding and perspective on the topics in the news.<sup>55</sup> The stories presented in the manner suggested above, in whole or in part, are assimilated and accommodated into the emotional fabric and cognitive structures of individual readers and viewers thereby inevitably influence their thinking.<sup>56</sup> What happens when one of these readers is a judge?

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<sup>2</sup> [www.sticerd.lse.ac.uk](http://www.sticerd.lse.ac.uk) "The Agenda-Setting Role of the Mass Media in the Shaping of Public Opinion" the page as it appeared on 26 Jul 2009

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

<sup>6</sup> [www.aare.edu.au](http://www.aare.edu.au) "School Discipline Coverage in Australian Newspapers: Impact on Public Perceptions, Educational Decisions and Policy" the page as it appeared on 26 Jul 2009

### CONCLUSION

The Media plays a very important role in our lives and in the society particularly in ensuring freedom of speech and expression and by communicating information and ideas to the people. But nowadays it can be argued that the media is not doing its duty honestly because of its tendency to present news in a sensational manner.

Media has a huge responsibility on its shoulders as today's society is very much influenced by it. Its role does not stand for judgment. The tendency to give undue prominence to certain topics or the tendency to capture stories in a manner intended to influence the reader to form an opinion in particular direction if extended to court cases is equivalent to judgment being passed by the media. Judgment should be left to the courts because every accused person has a right to his day in court. In other words, the judiciary should be allowed to operate independently in order for it to perform its role effectively and to preserve confidence and reliance on the law and legal process.

## CHAPTER THREE

### ARGUMENTS

In countries with constitutions which embrace democratic ideals the press is free to cover events and to comment on what takes place even in the halls of justice; when the freedom is used responsibly it admonishes judges from overstepping their constitutional authority, informs citizens of how courts actually work, identifies problems with the criminal justice system and reminds people that criminals do get punished.<sup>57</sup> But when it is not used responsibly it may interfere with the due administration of justice or injure the reputations of parties to litigation. Justice Frankfurter warns that “*to overlook the danger of poisonous journalistic expression during the trial of a criminal case is to entertain the false effect of make believe.*”<sup>58</sup> This chapter weighs the arguments for press freedom against those for the right to a fair trial in order to ascertain whether justifiable grounds exist for restricting the press’s constitutional guarantee in the interests of the latter.

### **Trial by Media**

“Trial by media” is a terminology whose meaning is not easy to determine. However it is normally used to refer to a peculiar kind of reporting adopted by the media in reporting criminal trials which may interfere with the administration of justice. In general terms the evil of “trial by media” consists in dissemination of matters that do not come before the court, or other trafficking with the truth intended to influence proceedings or inevitably

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F. Thayer, *Legal Control of the Press: Concerning Libel, Privacy Contempt, Copyright, Regulation of Advertising and Postal Laws* (Brooklyn: The Foundation Press 1962) p589  
 Pennekamp, 328 U.S. 331

calculated to disturb the course of justice.<sup>59</sup> Specific examples include: publishing of inaccurate reports, improper publicity of court proceedings and unjustifiable commentary of criminal action and trials. Other harmful journalistic practices include publishing of past criminal records of an accused, even though the past crimes may have been long ago atoned.<sup>60</sup> It is a well established rule in common law jurisdictions that the past crimes committed by a person can not be brought before the court on the charge of a new criminal offence.<sup>61</sup>

## 2 Press Freedom v Fair Trial

According to J. Frank<sup>62</sup> “*Judges are human and share the same virtues and weaknesses of mortals generally, they are not demigods or angels or at any rate, do they serve as almost flawless conduits of the divine.*”<sup>63</sup> From this premise it is argued that inaccurate and inflamed newspaper reports as well as editorial comments in heavily publicised cases might have some degree of influence upon the judge,<sup>64</sup> even to the extent that the judge may ignore the basic principle that “a person is presumed innocent until proven guilty.”<sup>65</sup>

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Supra note 57 p590. One case popularized by the media between 1980 and 1982 was the murder trial of Lindy Chamberlain in Australia who was convicted of killing her baby, but later released in 1986 on new evidence showing that a dingo had in fact committed the act as was originally claimed by Chamberlain. The motion picture *A Cry in the Dark* depicted Chamberlain, as played by actress Meryl Streep, caught in a “Trial by Media” which fed the public's, and subsequently the jury's false conviction of her.

Ibid p590

Ibid p598

J. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1950)p146

Supra note 57 p592

[www.indian-laws3.blogspot.com](http://www.indian-laws3.blogspot.com) “Media-Role-in-High-Profile-Cases” the page as it appeared on 22 Jul 2009

But on the contrary, Justice Holmes in **Toledo Newspaper Co. v U.S**<sup>66</sup> states that:

*“Indeed it is true that judges are human and in their process of keeping in touch with the world of affairs they certainly have the right to read books, magazines and current newspapers and in so keeping in touch with categorical phases of life about them they are bound to be impressed, their own knowledge increased or modified and their spiritual understanding deepened. This new depth of understanding may give new operative attitudes and firmer convictions; previous concepts may be discarded. The judge is thus subject to kindred informational and psychological influences. Nonetheless, it is not required that for a judge to be fair in his decisions that he should withdraw from life to become a judicial recluse. The judge should have the same right to grow mentally that is allowed to the average intelligent citizen.”*

Sullivan adds that although the judge as well as other citizens may be influenced, by the many public lectures, searching newspapers, magazines, radio and television broadcasts, such influence does not necessarily mean that in a particular case before the court the judge will sidestep his oath of office and professional obligation to be unfair to the merits of the question before him.<sup>67</sup> One in a judicial position is expected to possess mental balance and emotional control sufficient to withstand undue pressure in extreme cases without placing the tenets of freedom of the press in jeopardy.<sup>68</sup> Further, although comment on pending cases might influence some judges more than others because some are of more sensitive fiber than their colleagues, the law deals in generalities and external standards, and cannot depend on the varying degrees of moral courage or stability which individual judges may possess.<sup>69</sup> Therefore when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.<sup>70</sup> While Lord

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247 U.S. 402 (1918)

H.W. Sullivan, Contempts by Publication, The law of Trial by Newspaper (3<sup>rd</sup> edn) (Fred B. Rothman & Co: Littleton, Colorado, 1980) p602

Ibid p602

Supra note 57 p574

Supra note 57 p576

Russell of Killowen CJ in **R v Gray**<sup>71</sup> maintains that *“personal and outrageous criticism of a judge and publications of matter that is calculated to interfere with the administration of justice is and has always been contempt of court.”*<sup>72</sup>

The constitutional guarantee to freedom of expression and freedom press is often cited in defence of trial by media.<sup>73</sup> But freedom of expression is not an absolute right it is subject to other rights and considerations; in other words *“the Liberty of the press is no greater and no less than the liberty of every subject of the Queen.”*<sup>74</sup> “Freedom of the press does not mean uncontrolled expression of either alleged fact or opinion or the right to influence judges or juries.<sup>75</sup> The freedom is limited to fair and accurate comment. According to Chancellor Kent in **People v Cromwell**,<sup>76</sup> *“the liberty of the press consists in the right to publish, with impunity, truth, with good motives and for justifiable ends, whether it respects government, magistracy, or individuals.”*

The press may also cite public interest in their defence but Mr. Justice Blair rejected the public interest argument in **Attorney General v Tonks**<sup>77</sup> and stated that

*“It is idle for such newspapers to claim that they adopt such practices in the public interest. Their motive is the sordid one of increasing their profits, unmindful of the result to the unfortunate wretch who may ultimately have to stand trial for murder.”*

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[1900–03] All ER Rep at p 62, letters e, f

However, it is important to note that the purpose of contempt of court proceedings is not to protect the feelings or dignity of the judge but rather to see to it that litigants receive a fair and unbiased trial. See *Elias Kundiona v The People* S.C.Z. Judgment No. 14 Of 1993

John Milton cited in S.J. Baran. Introduction to Mass Communication: Media Literacy and Culture (5<sup>th</sup> ed) (Boston: McGraw-Hill Higher Education, 2009) p451

*R v Gray* (1900)2 KB 36, 40

Supra note 67 p590

3 Johns Cases 336,393

1934 NZLR 141

In addition it is important to note that no matter how vicious or revolting a crime may be the person accused is entitled to a fair trial.<sup>78</sup> Firstly, because it is a constitutional right, secondly, a man or woman charged with crime faces possible capital punishment or long punishment. Thirdly, even though a man may have killed another person, there is no absolute certainty that the killer is legally guilty of murder. The killer may have acted in self defence, he may have been provoked, the killing may have been accidental or the killer may be insane as a result of which he is considered unable to form the *mens rea* (guilty mind) necessary to formulate the offence of murder.<sup>79</sup>

## 2.1 Integrity of Courts Apart from endangering the right to a fair trial adverse press

coverage can also undermine integrity and confidence in the judicial system. This was aptly expressed in the following words:

*“when a judge tries and determines a cause in connection with which public charges against his judicial integrity have been published, the public as well as parties interested are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision; and thus confidence is impaired. Is it not only important that the trial of causes be impartial and that the decisions of courts be just, but it is important that causes shall be tried and judgments rendered without bias, prejudice or improper influence of any kind . It is not merely a private wrong against the judges –it is a public wrong—a crime against the state—to undertake by libel or slander to impair confidence in the administration of justice.”<sup>80</sup>*

Therefore, the press when commenting on matters before the courts must do so in a respectful manner.<sup>81</sup>

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Supra note 57 p592

Ibid

People v Stapleton 18 Colo 568

See R v Metropolitan Police Commissioner, ex parte Blackburn (No 2) [1968] 2 All ER 322 at 320

### Drawing the Line

What emerges from the above arguments is the need to identify a clear dividing line in order to reconcile the evident conflict between the judiciary and the media. Below is a summary of the points that can help to identify this line.

According to **The People v David Masupa**<sup>82</sup> comment on pending cases can scandalise the court by seriously lowering the authority of the judge or court or by bringing it into disrepute in the public eye and this would constitute a gross and improper interference with the administration of justice. In such circumstances the acts done or expressions used would amount to a contempt of court. This is so in order to maintain the dignity and authority of the court and to ensure a fair trial. Lord Russell of Killowen CJ in **R v Gray** further notes that criticism should be accurate and fair, bearing in mind that the judiciary cannot enter into public controversy and thus cannot reply to criticism.<sup>83</sup>

Therefore liberty of the press is not license and it guarantees no immunity from damages or punishment when there is such use of this liberty that other rights are violated. Blackstone notes that *“Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press; but if he publishes what is improper mischievous or illegal, he must take the consequences of his own temerity.”*<sup>84</sup> Defamation and contempt law are designed to serve this purpose.

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(1977) Z.R. 226 (H.C.)

(1900–03) All ER Rep 59 at p 62)

Quoted in F. Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*(Brooklyn: The Foundation Press 1962)p86

Press freedom though a constitutionally guaranteed right can be restricted when it is used in a manner that creates a clear and present danger of prejudicing a trial or undermines the administration of justice.<sup>85</sup> However, the condition is that the restriction should not limit the freedom to any greater extent than is necessary.<sup>86</sup>

The press has the right to comment on any matter in the public domain but as a direct consequence of this public function they ought to exercise it with the fullest sense of responsibility. For without such responsibility a free press may readily become a powerful instrument for injustice.

#### CONCLUSION

Freedom of the press and fair trial rights can both be enjoyed if the limits of either are known and in contentious cases the higher interest ought to be allowed to prevail. The fore going statement is more accurately stated in the following words:

*“The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.”<sup>87</sup>*

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S.J. Baran Introduction to Mass Communication: Media Literacy and Culture (5<sup>th</sup> ed) Boston: McGraw-Hill Higher Education 2009 p453

M.P. Mvunga, Contempt of Court and Freedom of Expression, Where to Draw the Line. Law Association of Zambia Journal Vol. 1, 1998. p25

Supra note 84 p45

## CHAPTER FOUR

### REVIEW OF JURISDICTIONS

Each jurisdiction has its own peculiarities in dealing with the complex process of balancing the values underlying free expression and fair trial rights. This chapter carries out a comparative analysis of legislation and courts decisions as regards the problem of trial by media in five common law jurisdictions namely the United Kingdom, the United States of America, India, Australia and New Zealand. Particular emphasis is placed on the sharply divergent judicial decisions and legislation in United States of American as opposed to the United Kingdom. A slightly detailed study of both case law and legislation in India is carried out. While the analysis of Australia and New Zealand does not look at legislation but concentrates more on the contrast in court decisions.

**1 UNITED KINGDOM:** The key approach to the problem of adverse prejudicial publicity in the United Kingdom is contempt law. Almost every publication that in any manner, and even any degree, tends to affect the determination of pending causes, whether before court or jury, whether before civil courts, or military or ecclesiastical tribunals, is pronounced as contempt.<sup>88</sup> It is not strange for proceedings to be halted or convictions quashed<sup>89</sup> on the basis of judicial acceptance that pre-trial publicity rendered, or would render, a fair trial impossible.<sup>90</sup>

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P. Jackson and P. Leopold O. Hood Phillips and Jackson Constitutional and Administrative Law(8<sup>th</sup> ed)(London: Sweet & Maxwell,2001) para 20-043

In *Dyson v R* the Court of Criminal Appeal quashed the larceny conviction of an accused, despite 'overwhelming evidence', because a list of 40 previous convictions had been read out in court and published in a local newspaper  
Corker and Levi, 'Pre-Trial Publicity and its Treatment in the English Courts', (1996) *Crim LR* 622, at 624

The **Contempt of Court Act 1981** is designed to be one of the underpinnings of fair trials in the United Kingdom. Once a prosecution is active –which usually means once a suspect has been arrested or charged – the Act prevents the media publishing anything which might pose a “substantial risk of serious prejudice” to the court or to the administration of justice in proceedings before it or other proceedings, pending or imminent.<sup>91</sup> Under the Act a publication tending to interfere with the course of justice in particular legal proceedings is treated as contempt regardless of intent to do so.<sup>92</sup> The rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.<sup>93</sup> Two distinct types of contempt covered by the Act:

**(a) Publications which create a substantial risk that the course of justice in proceedings that are active will be impeded or prejudiced.** Such prejudice may be by influencing the tribunal, or potential jurors for or against a party, or by putting pressure on parties or witnesses or by other means. Examples are: (i) publication by a newspaper before the trial of the result of its own investigation into a crime;<sup>94</sup> (ii) inciting public opinion against a party so as to affect his conduct of the case or the assertion of his rights<sup>95</sup>; (iii) publishing, during the course of a criminal trial before a jury, information revealing that the accused had committed other offences besides those for which he was being tried.<sup>96</sup>

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Supra note 88 para 20-041

The Contempt of Court Act 1981 s.1. It is important to note that the strict liability rule applies only in relation to publications. See s. 2(1) For this purpose “publication” includes any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.

Ibid s. 2(2)

R. v. Evening Standard (1924) 40 T.L.R. 833

Att.-Gen. v. Times Newspapers Ltd [1974] A.C. 273; [1973] 3 All E.R. 54, H.L.

R. v. Border Television Ltd, ex p. Att.-Gen. (1978) 122 S.J. 162

The Act provides that a person is not guilty of contempt under the strict liability rule in the following instances: where the publisher having taken reasonable care did not know proceedings were active;<sup>97</sup> where the publication represents a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith;<sup>98</sup> where a publication discusses or is part of a discussion, in good faith of public affairs or other matters of general interest or if the risk of prejudice to particular legal proceedings is merely incidental.<sup>99</sup> The consent of the Attorney-General is required for proceedings to punish contempt of this kind.<sup>100</sup>

**(b) Publication of matters which the law or the Court has decided should be kept confidential in the interests of justice.** Even when sitting in open court the Court may direct, in the interests of justice that some matter should not be published; knowingly to frustrate a clear direction, properly given, will be a contempt.<sup>101</sup>

The Contempt of Court Act 1981 has given to courts express power to order the postponement of publication of their proceedings of such publication that might create a substantial risk of prejudice to the administration of justice in those proceedings<sup>102</sup>; a Court may also prohibit publication of any matter (such as a name) which it allowed to be withheld from the public during the proceedings.<sup>103</sup>

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The Contempt of Court Act 1981 s.3

Ibid s.4

Ibid s.5 and Attorney General v English (1983) 1 A.C. 116

Ibid s.7

Att.-Gen. v. Leveller Magazine Ltd [1979] A.C. 440

Ibid s.4(2)

The Contempt of Court Act 1981 s.14). Ex p. Farquharson [1982] Q.B. 762 a disregard of any such order or

Acts calculated to prejudice the due course of justice may constitute contempt, whether committed **before, during or after the proceedings.**<sup>104</sup>

The Act has also, by s.9, made it a contempt of court to bring into Court, or to use in Court, a **tape recorder**, except with the leave of the Court, or to publish to the public any recordings made in Court or to use any recordings in contravention of any conditions imposed by the Court in granting such leave. Taking Photographs and the making of sketches in court is forbidden by the **Criminal Justice Act 1925**, s41 this section also prevents the televising of court proceedings in England and Wales.

Although the law of contempt applies to protect proceedings in all courts, inferior courts have **limited jurisdiction** to enforce the law of contempt.<sup>105</sup> For instance a county court has power under s.118 of the **County Courts Act 1984** to commit for contempt committed in the face of the Court or closely related to events occurring in and about the Court but not contempt committed outside the court.<sup>106</sup>

**2 NEW ZEALAND:** The New Zealand Court of Appeal has on several occasions endorsed the finding that in the event of conflict between the concept of freedom of speech and the requirements of a fair trial, other things being equal the latter should prevail. In **Gisborne Herald Co Ltd v Solicitor-General**<sup>107</sup> it was stated that “*where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is*

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prohibition would be a contempt of court. Where the court is contemplating the making or continuance of an order under s.4(2) the 1981 Act, prohibiting the publication of any matter, it has a discretionary power to hear representations from the press, and should ordinarily do so when the press ask to be heard. R. v. Clerkenwell Magistrates' Court, ex p. The Telegraph Plc [1993] 2 W.L.R. 233 (Mann L.J. and Leonard J.).

<sup>4</sup> Att.-Gen. v. Butterworth [1963] 1 Q.B. 696; [1962] 3 All E.R. 326.

<sup>5</sup> Supra note 88 para 20-053

<sup>6</sup> ibid

<sup>7</sup> Per Richardson J, in Gisborne Herald Co Ltd v Solicitor-General [1995] 3 NZLR 563 at 569

*appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.*” The rationale being that:

*“Contempt is directed to the protection of the public interest in the due administration of justice by an impartial Court. Fair trial values are a protection both to the public in respect to the generality of cases as well as the particular case and to the accused in the particular case. Fair trial is not a purely private benefit for an accused. The public’s confidence in the integrity of the justice system is crucial...”<sup>108</sup>*

Further, the New Zealand Bill of Rights affirms fair trial rights as a ‘guaranteed minimum right’, whereas freedom of expression has to be read subject to other rights.<sup>109</sup>

### 1.3 UNITED STATES OF AMERICA: There are at least two main forces operating in

America to prevent putting down trial by media. First, the reluctance of the judiciary to use the power of contempt, Secondly, judicial interpretation of the constitution’s First Amendment and legislative limitation of power to act by many states.

There is a **disinclination to act** even in genuine cases of contempt by publication. Comparing the American situation with England, we find that in England there are over five hundred adjudicated cases for contempt by publication while in America, there were less than fifteen adjudicated cases of genuine trial by newspaper, including all jurisdictions.<sup>110</sup> It has also been suggested that the elective system is a contributing factor; that judges are forced to rely on newspaper publicity during campaigns for election and so hesitate to take notice of contempts committed by the Press.<sup>111</sup>

<sup>108</sup> [1995] 3 NZLR 563 at 569

<sup>109</sup> Gisborne Herald Co Ltd v Solicitor-General [1995] 3 NZLR 563

<sup>110</sup> H. W. Sullivan, Contempts by Publication, The law of Trial by Newspaper (3<sup>rd</sup> edn)(Fred B. Rothman & Co: Littleton, Colorado, 1980)p138

<sup>111</sup> Ibid p140

The First Amendment to the American constitution expressly states that Congress shall make no law... abridging the freedom of speech, or of the press. The limitation contained in the First Amendment has been interpreted to mean that the freedoms guaranteed therein cannot be limited either by statutes, administrative regulations, executive and court orders and ordinances from government, regardless of locale.<sup>112</sup> The Supreme Court has consistently preferred expanding its definition of protected expression to limiting it.<sup>113</sup> Some judges in the USA have attempted to prevent prejudicial publicity by either (1) holding journalists or publishers in contempt of court or (2) issuing an injunction prohibiting publication of certain information.<sup>114</sup> But the U.S Supreme Court has since **Pennekamp v. State of Florida**,<sup>115</sup> rejected the use of the contempt power to punish publishers for attempting to influence a judge. In **Nebraska Press Association v. Stuart**,<sup>116</sup> the Supreme Court stated that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial" and held that anything occurring in open court is fair game for the press to report.

In many states the power of the courts to cite or attach for contempt articles constituting trial by newspaper, has been abolished.<sup>117</sup> In New York and Pennsylvania, for instance the courts lack this power. The contempts for which they can punish are specifically enumerated, and there is excluded from the list, the common law power of citing for

<sup>2</sup> S.J. Baran Introduction to Mass Communication: Media Literacy and Culture (5<sup>th</sup> ed) Boston: McGraw-Hill Higher Education 2009 p452

<sup>3</sup> Ibid p452

<sup>4</sup> Nye v, U.S., 313 U.S. 33, 51-52( 1941) and Bridges v. State of California, 314 U.S. 252 267 (1941).

<sup>5</sup> 328 U.S. 331(1946)

<sup>6</sup> 427 U.S. 539 (1976)

<sup>7</sup> *US v Edmond* 886 F. 2d 442 (DD Cir 1989) where the trial judge's decision to exclude all non-media spectators from the court was held too drastic. Likewise in *Ip v Henderson* 710 F. Supp. 915 (SDNY 1989), *US v Soussoudis* 807F. 2d 383 (4th Cir. 1986), *Seattle Times Co v US District Court* 845 F. 2d 1513 (9th Cir. 1988), and *In re Petitions of Memphis Pub. Co.* 887 F. 2d 646 (6th Cir. 1989).

publications that tend to affect the determination of pending cases. Indeed, no less than twenty-one states have restricted the common law power by statute.<sup>118</sup>

The American law and tradition does not allow the use of prior restraint on media reports except in cases which border on national security or where public order would be endangered by the incitement to violence and overthrow by force of orderly government, obscenity and pornography.<sup>119</sup>

Print reporters in the United States have long enjoyed access to trials, while broadcast journalists only began having access to the Courts in 1981 following the decision in **Chandler v Florida**; today all 50 states allow cameras in some courts.<sup>120</sup>

The United States instead of using media restrictions focuses on methods that liberate the jury from bias by encouraging its impartiality. Six major remedies are used namely: a change of venue, continuances, delaying trials in order to lessen the heat of publicity on jurors, no-comment rules or gag orders on comment outside court by prosecution, defence attorneys and law enforcement officers, *voir dire*; examination of prospective jurors by the judge and attorneys during jury selection, instructions by the judge cautioning jurors to disregard anything they have heard or seen about the case outside the trial, sequestering or isolation of jurors from any outside contacts.<sup>121</sup>

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<sup>118</sup> Supra note 110 p141

<sup>119</sup> Supra note 112 p456

<sup>120</sup> Ibid p455

<sup>121</sup> www.crf-usa.org "Is a Fair Trial Possible in the Age of Mass Media?" the page as it appeared on 10 Jul 2009

4 **AUSTRALIA:** An accused's right to a fair trial in Australia must compete with the community expectation that an accused charged with a serious criminal offence will be brought to trial.<sup>122</sup> The mere possibility that a jury has been made aware of an accused's prior criminal conviction for similar offences is not enough to conclude that the accused was denied a fair trial, nor does a conviction for contempt mean that the actual trial was unfair.<sup>123</sup>

In **R v Glennon**<sup>124</sup> a reporter who on three separate broadcasts specifically reported the prior conviction of Glennon was convicted for contempt.<sup>125</sup> Despite this Glennon was twice denied a stay of proceedings based on the prejudicial publicity, and was convicted.<sup>126</sup> According to Brennan J "*If a punishable contempt occurs, ex hypothesi there is a real risk of prejudice; a substantial risk of serious interference with a fair trial. But it does not follow that, where a punishable contempt of court has been committed, the trial must be aborted.*"<sup>127</sup>

5 **INDIA:** Indian legal system acknowledges the evil of trial by media and fights it by way of a comprehensive Contempt of court Act and an active judiciary. **The Contempt of Court Act 1971** covers civil and criminal contempt of any matter, which tends to scandalize or lower the authority of any court or causes interference in judicial

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Mason CJ and Toohey J at 598, and Brennan J at 617 *R v Glennon* (1992) 173 CLR 592

ibid at 598 and 605, and Brennan J at 613: 'clearly some risk ... but it does not follow that where a punishable contempt has been committed, the trial must be aborted'

Glennon (1992) 173 CLR 592

Hinch v A-G for Victoria (1987) 164 CLR 15

Mason CJ and Toohey J at 598, and Brennan J at 617

Per Brennan J at 613 in *R v Glennon* (1992) 173 CLR 592, but see also Mason CJ and Toohey at 598-9 and 605-6 where they argue the test for contempt is not as strict as the test for aborting a trial due to prejudice. This approach has been criticised on the ground that fear of public outrage is no excuse for allowing the media to prejudice an accused's trial: it is better to let one guilty person go free than to jail an innocent one.

proceedings or administration of justice. While the courts punish severely in some cases and in others let the newspaper off with a warning, costs and apology<sup>128</sup>

Section 2 of the Act clearly defines 'Criminal contempt' as

*“the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which: Scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.”*

Under section 3 innocent publication and distribution of matter which is likely to prejudice a trial or the administration of justice does not amount to contempt provided it was done in good faith. By section 5 of the contempt of court Act fair criticism or comment on the merits of any case which has been finally decided does not amount to contempt. The law relating to contempt of court is well settled in Articles 129 and 142 of the Indian Constitution which vests the Supreme Court with power to punish anyone for contempt of any law court in India including itself. The court may take action on its own motion or on a petition made by Attorney General, or Solicitor General, or on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.<sup>129</sup>

Indian courts consistently punish newspapers and other media for prejudicial publications. In **MR Prashar v Dr Farooq Abdullah**<sup>130</sup> it was held that the liberty of free expression is not compounded with licence to make unfounded allegations of

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www.indian-laws3.blogspot.com “Media-Role-in-High-Profile-Cases” the page as it appeared on 22 Jul 2009  
 www.supremecourtindia.nic the page as it appeared on 23 Dec 2009  
 (1984) Cr LC 33

corruption against the judiciary. While in **Vamin v O P Bensal**,<sup>131</sup> it was held that truth or justification is no defence to the publisher of a newspaper in proceedings for contempt. ; Judges by reason of their office are precluded from entering into any controversy in columns of the public press.<sup>132</sup> In **The District Magistrate v M A Hamid Ali Gardish**<sup>133</sup> it was held that no editor has a right to assume the role of investigator to try to prejudice the court against any person. Comments on pending proceedings, if emanating from the parties or their lawyers, are generally a more serious contempt than those coming from independent sources.<sup>134</sup>

## CONCLUSION

Indeed the approaches taken by the jurisdictions above vary greatly, for instance Australian law is not prepared to deal with trial by media because of fear of public outrage, whereas the courts in New Zealand prefer to hold that ‘the assurance of a trial by an impartial court is essential for the preservation of an effective system of justice’. India fights trial by media with the aid of a comprehensive Contempt of court Act and an alert judiciary. Similarly, English courts have been on the alert to cite and attach for contempt because of the backing of statute law. In America quite the reverse; tampering by statute and judicial interpretation in favour of the First Amendments guarantee of a free press has produced confusion and a hopeless reluctance to deal with the evil; the U.S. Supreme Court apparently considers freedom of the press to be higher than the rights of other people or institutions.

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(1982) Cr LJ 322 (Raj)

The State v. Vikar Ahmed, AIR 1954 Hyd 175

AIR 1940 Oudh 137

State of Haryana v Ch Bhajanlal, AIR 1993 SC 1348

## CHAPTER FIVE

### LAWS; REGULATIONS AND MEDIA ETHICS IN ZAMBIA

**LAWS:** There are many laws that affect the media in Zambia but here we evaluate only those that can be used to secure a fair trial and generally protect the due administration of justice. This chapter proceeds on the assumption that fighting trial by the media requires a two tier approach as such apart from evaluating the laws that affect the media it shall also evaluate the adequacy of the media's own regulatory mechanisms.

**1.1 The Zambian Constitution** of 1996 guarantees both freedom of expression and freedom of the press in Article 20. The Constitutions recognition of these freedoms as fundamental rights provides the legal basis upon which the press operates.<sup>135</sup>

An important point to note is that the Constitution itself equally sets out the limits under which the aforementioned freedoms can operate. In this regard Article 20(3)(b) provides that the freedoms guaranteed there under can be derogated from under the following circumstances:

*“...for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings..., maintaining the authority and independence of the courts..., or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television...”*

The Constitution also guarantees independence and impartiality of the judiciary in the following provisions: Article 91 provides that the judicature shall be autonomous and specifically that judges, members, magistrates and justices shall be independent impartial

and subject to the Constitution. Article 18(1) entitles any person charged with any criminal offence to a fair hearing by an independent and impartial court. Article 18 is further reinforced by the provision that every person who is charged with a criminal offence is presumed to be innocent until he is proved or has pleaded guilty.<sup>136</sup>

**1.1.2 Defamation:** Defamation law is concerned with the protection of people's reputations.

Thus a reporter who publishes an article which exposes a person to hatred, ridicule or contempt or lowers him in the esteem of right thinking members of society will be liable for defamation. In Zambia the law on defamation is governed by common law and the **Defamation Act**.<sup>137</sup>

The defences or legally acceptable reasons for publishing a news item which is defamatory are traditionally privilege, fair comment and justification or truth.<sup>138</sup> The Act specifically avails newspapers with the defences of absolute and qualified privilege in sections 8 and 9 respectively. In **Lazarus Mumba v Zambia Publishing Company**<sup>139</sup> absolute privilege was held to apply only to a fair and accurate report in any newspaper of a document<sup>140</sup> read out in open court or proceedings<sup>141</sup> on the hearing of a case open to the public and if published contemporaneously<sup>142</sup> with such proceedings.

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Article 18(2)(a) of the Constitution of Zambia

Chapter 68 of the Laws of Zambia

See *ibid* ss.6-9

(1980) Z.R. 144 (H.C.)

Privilege will not, semble, attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court. " R. v Astor (1913) 30 T.L.R. 12.

"Judicial proceedings" have been defined to mean proceedings of any properly constituted court of justice open to the public (para 643, 7th edn. *Gatley on Libel and Slander*)

"Contemporaneously" means "existing" or "occurring at the same time "[with]. In other words the subject of contemporaneous publication must come "as nearly at the same time as the proceedings as is reasonably possible having regard to the opportunities for preparation of the report and the time of going to press or making the broadcast."

**1.3 Contempt:** As observed from the comparative study in the previous chapter contempt is the preferred method of fighting trial by media. The law on contempt of court is recognized in the Constitution of Zambia and scattered in a number of statutes but the main ones being the Penal Code<sup>143</sup> and the Contempt of Court (Miscellaneous Provisions) Act.<sup>144</sup>

**The Penal Code;** The Penal Code restricts the amount of information or comment that the media can publish in respect of judicial proceedings, either during or after the proceedings. The categories of criminal contempt of court in this country are set out under section 116 of the Act. Press reporters and broadcasters can find themselves in contempt of court in either of the following instances: where a judge finds that an article published in the newspaper or broadcast interferes with the administration of justice by **demeaning the court** or impugning the character of the judge<sup>145</sup> where speech or writing, **misrepresents court** proceeding, or if it is capable of **prejudicing** any person in favour of or against any parties to such proceeding. Thus Silungwe, C.J. in **Sebastian Saizi Zulu v The People**<sup>146</sup> held that:

*“Any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority amounts to contempt of court... However, no wrong is committed by any member of the public who exercises his ordinary right of criticising in good faith of any words said or any act done in the seat of justice.”*

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Chapter 87 of the Laws of Zambia  
Chapter 38 of The Laws of Zambia

A.W. Chanda and M. Liswaniso, Handbook of Media Laws in Zambia (Teresianum Press: Lusaka, 1999) p68  
S.C.Z. No. 7 of 1991

Section 117(1) of the **Penal Code** prohibits the **taking and publication of any photographs or the making of any portrait or sketches** of a Judge, witness or a party to any proceedings before the court, whether in civil or criminal proceedings. A violation of this provision amounts to contempt of court.

**The Contempt of Court (Miscellaneous Provisions) Act<sup>147</sup>**; this is an Act which amends the law relating to contempt generally by adding to the already existing law on contempt under the Penal Code, the Juveniles Act and contempt in private proceedings, the specific cases and the extent of amendment are considered below as we consider the provisions of the Act in turn.

Section 2 of the Act provides a defence for innocent publication or distribution of any matter calculated to interfere with the course of justice in connection with proceedings pending or imminent. Therefore, any person who did not know or had no reason to suspect that proceedings were pending or imminent and or in the case of distribution if he did not know that the publication contained such matter will not be guilty of contempt.

Section 3 restricts publication of certain information relating to court proceedings in private for instance (i.e. proceedings involving adoption and maintenance of infants, detention and control of estates of mentally disordered persons, national security, secret process, discovery or invention, appeals under the law with respect to income tax and so on.) Similarly, publishing or transmission of any information in juvenile court

proceedings such as names, photographs in juvenile court proceedings is prohibited and if breached amounts to contempt of court.<sup>148</sup>

Section 4 prohibits publication of any indecent, medical, surgical or physiological details calculated to injure public morals in relation to matrimonial proceedings.<sup>149</sup> Section 5 provides for appeals in both civil and criminal proceedings from an order or decision of a court with jurisdiction to punish for contempt.

**Critique of the Contempt of Court (Miscellaneous Provisions) Act.** The act deals with specifically enumerated cases of contempt but does not directly deal with contempt under the Penal Code except in the provision for appeals which applies to both civil and criminal proceedings.<sup>150</sup> It is not clear whether the defence of innocent publication and distribution<sup>151</sup> also applies to contempt by publication under the Penal Code. The primary concern of the *Zambian Act* is contempt of court in civil proceedings held in private as opposed to proceedings held in open court. The act does not expressly give the court the power to restrain prejudicial publications.

Trial by media is a reality in Zambia and the cases below demonstrate this. The *Post* newspaper of August 27, 2009 edition carried an article entitled '**The Chansa Kabwela case, comedy of errors**' authored by Professor Ndulo. This article prompted the State prosecution team in the *Chansa Kabwela case*<sup>152</sup> to apply for contempt against the

<sup>8</sup> Juveniles Act Chapter 53 of the Laws of Zambia.

<sup>9</sup> (i.e. Dissolution of marriage, nullity, judicial separation or restoration of conjugal rights)

<sup>10</sup> Contempt of Court (Miscellaneous Provisions) Act Chapter 38 of The Laws of Zambia s.5

<sup>11</sup> *Ibid* s.2

<sup>12</sup> [www.times.co.zm](http://www.times.co.zm) the page as it appeared on 21 Dec 2009 This is a case in which the newspaper's news editor, Chansa Kabwela was charged on one count of circulating obscene materials contrary to Section 177 1(b) of the Penal Code Cap 87 of the Laws of Zambia.

newspaper because the comment disregarded the court's earlier directive for media organisations to stop commenting on the case.<sup>153</sup> The state prosecutor argued that the conduct of The Post newspaper was an act that undermined the court's integrity. That in every journalistic field and profession, observance of the law comes within such training.<sup>154</sup> That the court must protect the State and the accused person, contents of the article complained of show assumption of the court's authority by an unauthorised person.<sup>155</sup> He also added that "although there must be freedom of expression, this freedom must strike a balance between what is complained of and what the accused person stands for," and that The Post has already provided judgment and that such article are capable of influencing the outcome of the case."<sup>156</sup> It still remains an open question whether the courts in Zambia can find a publisher or broadcaster guilty of contempt based on the above arguments.

Another example is the case of eight civil servants and business man implicated in a K27 billion **Ministry of Health "scam,"** the Times of Zambia was accused of misleading the public on its coverage of their court proceedings. The defence contended that the article headlined "Stolen health ministry cash was from Global Fund, witness tells court" was sensational reporting intended to mislead, excite and prejudice the accused persons. It was further contended that the article was meant to make the court make a decision over the article.<sup>157</sup>

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<sup>53</sup> Supra note 152

<sup>54</sup> [www.daily-mail.co.zm](http://www.daily-mail.co.zm) the page as it appeared on 27 Dec 2009

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

<sup>57</sup> The Post, Thursday July 30, 2009 The defence specifically stated that court reporters are trained to report what

In **Chiluba v The People**<sup>158</sup> the appellant applied for a change of venue<sup>159</sup> and in support of this application argued that a fair trial could not be had in the subordinate court as guaranteed in Article 18 of the Constitution because of the Republican President's highly prejudicial comments and the Task Force's broadcasts, which were made to convey the message that the appellant was guilty of the charges against him, notwithstanding that the trial had just started. Held, that there was no evidence that the executive branch of government was controlling the Subordinate Court in the discharge of its functions, but, the court disapproved of any comments or broadcasts from any quarter on a matter pending in court and added that the appellant ought to have applied to enforce the provisions of Article 18 of the Constitution instead. With nationwide television channels; radio, newspapers and internet change of venue, such changes of venue are less likely to prevent prejudice in the courtroom.

**Media Regulation and Ethics:** There are no statutory mechanisms to police professional ethics in Zambia except the existing laws (i.e. Defamation and Contempt Laws).<sup>160</sup> However the Media Council of Zambia (herein after referred to as MECOZ) has been established as a non-statutory, voluntary, self regulating council. It has drawn up a code

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is going on in court and not in their heads.

(SCZ judgment No.2 Of 2004)

section 80(1) of the Criminal Procedure Code Cap 88 of the Laws of Zambia gives the High Court Power to change venue to any other court of equal or superior jurisdiction or trial before itself whenever it is made to appear to the Court that a fair and impartial inquiry or trial cannot be had in any court subordinate thereto; or that such an order is expedient for the ends of justice or is required by any provision of this Code. The High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative.

G. Berger, Media Legislation in Africa: A comparative Legal Survey (School of Journalism & Media Studies : Rhodes University, South Africa,2007) p132

of ethics<sup>161</sup> that sets out the journalistic standards that its members are expected to follow.

A summary of the ethical principles relevant to this discussion are set out below:

First, the public has the right to know the truth. Therefore journalists have a duty to report the truth, either as representing what the source says fairly, accurately and objectively.<sup>162</sup> All good journalism is founded on good faith with the public. Truth is the ultimate goal. The public's right to know is only duly served by accurate, truthful information not distorted or coloured by the reporters own opinion, bias, and world view.<sup>163</sup>

Second, newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight an incident out of context.<sup>164</sup>

Third, a reporter must at all times show respect for the rights and well-being of people encountered in the course of gathering and presenting the information.<sup>165</sup>

Fourth, journalists shall rectify promptly any harmful inaccuracies; ensure that correction and apologies receive due prominence and afford the right to reply to persons criticised when the issue is of sufficient importance.<sup>166</sup>

MECOZ is responsible for enforcing compliance with the Code and may impose the following penalties on persons who breach the Code: a reprimand, a demand that the

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ethics helps minimise excesses, instil a sense of responsibility in reporters, and create public respect for individual practitioners and the whole media profession. See L.M. Kantumoya, *Investigative Reporting in Zambia A practitioner's Handbook* (Friedrich Stiftung and Transparency International Zambia, 2004) p79

bid p78

bid p79

bid p78

supra note 160 p79

bid p78

error be corrected within two weeks, a demand that an apology be published within a specified time, or a demand that compensation be paid to the complainant. However MECOZ appears to lack full backing of its membership in terms of enforcing penalties on errant media houses. Mutual mistrust and suspicion continues to characterise the relationship between journalists in the state owned media and the private sector for example private media such as The Post are not members of the organisation.<sup>167</sup> Consequently, it has not been possible to persuade the two groups to subscribe to a common code of ethics.<sup>168</sup>

**3 Interviews;** A lecturer in the School of Mass Communications at the University of Zambia noted that the work of a journalists by its nature may come into conflict with the judicial process therefore the school makes an effort to enlighten student journalists on laws such as contempt of court and defamation. Training in media ethics is another area the school focuses on to encourage responsible journalism, however; she expressed concern over the enforcement of the current Code of Ethics under MECOZ.<sup>169</sup> Another lecturer in the School of Mass Communication observed that the major cause of irresponsible journalism is untrained journalists; he pointed out that there are a number of journalists who are practicing yet have no formal training in journalism.<sup>170</sup>

**Self Regulation Debate;** The last half of 2009 has seen the media take centre stage in public discourse as various stakeholders' debate on how the media should be regulated.

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Supra note 160 p133

www.misazambia.org.zm "So this is Democracy: State of Media Freedom in Southern Africa," the page as it appeared on 30 Nov 2009

Interview: R. Nyondo, 08/01/10

Interview: F. Muzyamba, 07/01/10

For both the media and Government, it is not in contention that there must be regulation of the media but what has been of contention is what form of regulation should be introduced. Should it be statutory regulation or non-statutory self regulation?<sup>171</sup> The government has cited failure by media houses to institute corrective action as reason to introduce statutory regulations.<sup>172</sup> The media on the other hand have argued that self regulation should be preferred to statutory regulation because ethics are moral values that we must not see strictly in the legal sense;<sup>173</sup> there is a clear difference between ethics and law. Ethics are moral rules that govern the conduct of human beings and the relationship among them.<sup>174</sup>

Led by the Media Liaison Committee (hereinafter referred to as MLC) the process towards self regulation was set in motion and culminated in a document dubbed the “Fringilla consensus” proposing the formation of a new regulatory body called the Zambia Media Council (herein after called ZAMEC). This was forwarded to government for study and comment.<sup>175</sup> The government’s position in response to the forgoing submission is that ZAMEC is a reincarnation of the failed MECOZ, in that it is also founded on voluntarism and is unenforceable therefore untenable.<sup>176</sup> In short government has rejected the current model proposed by the MLC and has instead proposed further dialogue.

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w.times.co.zm “2009 REVIEW - Media regulation debate” the page as it appeared on 31 Dec 2009

w.misazambia.org.zm “Self regulation, the big ethical question” the page as it appeared on 30 Nov 2009

Post, Tuesday April 20, 2010

## CONCLUSION

Protection of fair trial rights, the integrity of the courts and the due administration of justice generally, can be greatly enhanced by the effective use of contempt law. The law on contempt in Zambia is spread out in a number of Acts. Contempt by publication in particular is only covered by a single provision in the Penal code. Contempt of court is a great power; it requires to be laid in clear and sufficient detail to encourage its effective use by both litigants and the courts and also to prevent its abuse. The main objection to the law of contempt is its uncertainty. The Supreme Court of Zambia does not seem to have had the opportunity to come up with an exhaustive and instructive judgment on the subject of contempt.<sup>177</sup> It is no wonder the judges prefer making cursory remarks of disapproval as opposed to using the contempt power. A lot can be learnt from other jurisdictions especially the United Kingdom which has an entire statute dedicated to contempts by publication alone.

The courts in Zambia on the other hand are more devoted to punishing contempts committed in the face of the court; we are yet to see the courts act against prejudicial publications by the media. Perhaps it will be the case of the Post Newspaper editor and professor Ndulo.

Media regulations and ethics are also key in the quest to fight trial by the media. The Media Ethics Council of Zambia (MECOZ) is weak; especially that it has no backing of the laws and cannot therefore compel an erring journalist or media institution to take

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<sup>177</sup> Mvunga, Contempt of Court and Freedom of Expression, Where to Draw the Line. Law Association of Zambia Journal Vol 1 1998 p24 The only occasion at which the Supreme court considered the subject is in *astian Saizi Zulu v The People*, (SCZ JUDGMENT NO 7 of 1991 SCZ Appeal No 64 of 1991) Silungwe CJ (who then was ) delivered judgment relying on Halsburys Laws of England 4<sup>th</sup> ed paragraph 5.

corrective action.<sup>178</sup> A Media body that will take punitive action as well as have the power to licence and deregister journalists is what Zambia needs.<sup>179</sup> The media can effectively impact on public life only if the public perceives it as fair, honest, truthful and accurate. Credibility is at the core of the media's value in the eyes of the public.<sup>180</sup>

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[www.times.co.zm](http://www.times.co.zm) "2009 REVIEW – Media regulation debate" the page as it appeared on 31 Dec 2009  
bid  
supra note 160 p82

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### CONCLUSION

It is not easy to give a definitive answer as to whether or to what extent the press influences court decisions. But it is generally agreed that there is a reasonable likelihood that even with the carefully designed rules of procedure and evidence, a trial can be reduced to a farce by prejudicial media coverage: that judges can form opinions of guilt or innocence from reading newspapers or watching television; that judges can base their decision on unreliable, irrelevant, or unfairly prejudicial “facts” presented in newspapers or television, instead of evidence presented in court; that judges can find the criminal defendant guilty, in order to avoid scorn and ridicule from their family, friends, and neighbours whose emotions have been inflamed by sensational news coverage.<sup>181</sup>

The media wields a lot of power which can be used with equal force for good or for evil, for the right or wrong motives, and for constructive or destructive purposes.<sup>182</sup> Reporters, their editors and media owners if left to their own devices may use the power of the instruments in their hands to achieve their own motives.<sup>183</sup> Often the coverage in the press consists of sensational unconfirmed reports and leaks about individuals being tried as opposed to fair and accurate reports. These reports are not motivated by high ideals,

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www.rbs2.com “Pretrial Publicity Prevents a Fair trial in the USA” the page as it appeared on 22 Jul 2009  
 M. Kantumoya, Investigative Reporting in Zambia: A Practitioner’s Handbook (Friedrich Stiftung and  
 Transparency International Zambia, 2004) p78  
 p76

but by money: increasing the sales of newspapers or increasing the number of television viewers, thereby attracting more advertising revenue to the publisher or broadcaster.

Consequently, and rightly so members of the public, lawyers and prosecutors have been calling for higher standards; that the press should strictly adhere to proper norms and standards in reporting and commenting on matters before the courts. This is a challenge to the legislature, media bodies and the courts to come up with some kind of control to ensure that the media operates for the general good.

The court is by tradition a quiet place where search for the truth by earnest, dedicated men goes on in a dignified atmosphere. Spectacles within or outside the court, however do not comport with the quiet dignity and dispassionate search for truth which we associate with judicial proceedings.<sup>184</sup> The sole purpose of court reporting should be to ensure that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself as to the mode in which the public duty is performed.<sup>185</sup>

Freedom of the press is not higher than the rights of other people or institutions. Fair trials affect everyone in society, not just the few criminal defendants. As a result, prejudicial publications should be met with the punishment they deserve (i.e contempt).

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. Thayer, Legal Control of the press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws(4<sup>th</sup> Ed) (Brooklyn: The Foundation Press, Inc 1962) p595  
 Mr Justice Holmes in Cowley v Pulsifer , 137 Mass 392

## 2 RECOMMENDATIONS

Before we can determine what the law ought to be, we must first ascertain what it is. Having done the latter in the previous chapter we now proceed to make the necessary recommendations.

- i. **What Judges can do:** When there is a "reasonable likelihood" that a fair trial will not occur, judges must take legal steps to protect their courts from outside influence.<sup>186</sup> Courts do not act on their own initiative, rather they wait until defence counsel cites an offensive publication; it would seem that there would be more bite in the law, if courts acted on their own initiative.<sup>187</sup> From the point of view of procedure there are two breeds of contempt of court. These are contempt in the face of the court and contempt out of court. Only superior courts of record have power to deal summarily with the two breeds of contempt. Inferior courts do not have power to punish summarily contempt out of court.<sup>188</sup> Yet most contempts by publication are committed against proceeding before Magistrates courts. Giving magistrate courts power to punishment such contempts summarily would be desirable because the sting left by such publications calls for immediate reaction in the judicial breast.<sup>189</sup> However, to avoid abuse it is advised that the power be exercised by a judge only when it is urgent and imperative to act immediately;<sup>190</sup> and only when the case is clear and beyond reasonable doubt.<sup>191</sup>

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Sheppard v. Maxwell, 384 U.S. 333 (1966)

H.W. Sullivan, Contempts by Publication, The law of Trial by Newspaper (3<sup>rd</sup> edn) (Fred B. Rothman & Co: Littleton, Colorado, 1980) p181

M.P. Mvunga, Contempt of Court and Freedom of Expression, Where to Draw the Line. Law Association of Zambia Journal Vol 1 1998 p25

Supra note 184 p184

per Lord Denning, MR, in Balogh v Crown Court (1974) 3 All E.R. 283 at p. 288

see R v Gray (1900) 2 Q.B. 36.

Any further fears of abuse should be put to rest by the right of appeal to a higher court. In all other cases the judge should not take it on himself to move, he should leave it to the party aggrieved to make a motion.<sup>192</sup>

- ii. **Media as part of the solution** The solution to the problem of inaccurate reporting of criminal action and criminal trials lies partly with the press. We recommend self-regulation as opposed to censorship and control by government and other external forces. This can be achieved by a body which ensures strict adherence to a set of moral and professional norms and values to which all media bodies subscribe,<sup>193</sup> and the body should be able to take punitive action as well as have the power to licence and deregister journalists.<sup>194</sup> Without going very far in terms of examples, the Law Association of Zambia (LAZ) stands as one of the success stories of how a professional body can regulate itself within the law.<sup>195</sup> In the United Kingdom the press is supervised through self-regulation by the Press Complaints Commission (PCC) a non statutory body. It publishes monitors and implements a Code of Practice for the guidance of the press and the public.<sup>196</sup>

There should be straight reporting of facts without sensational commentary.<sup>197</sup>

From the time of the arrest of the suspect to the beginning of the trial, there should be restraint by journalists to reporting only information presented in open

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supra note 184 p194

supra note 182 p77

www.times.co.zm "2009 REVIEW - Media regulation debate" the page as it appeared on 31 Dec 2009

the Post, Tuesday April 20, 2010

Jackson and P. Leopold O. Hood Phillips and Jackson Constitutional and Administrative Law(8<sup>th</sup> ed)(London: Sweet & Maxwell, 2001) para 25-023

www.rbs2.com. "Pretrial Publicity Prevents a Fair trial in the USA" the page as it appeared on 22 Jul 2009

court.<sup>198</sup> A definite remedy would be better education of press personnel and more conscientious understanding and direction by the editors of newspapers.<sup>199</sup> If reporters take the time and make the effort they can learn the parameters within which they can operate with relative impunity. Reporters are not expected to be lawyers but they have a duty to themselves and their respective media houses, to know their limits and to operate within the established bounds.<sup>200</sup>

- iii. **Legal reform;** the legislature should enact a Contempt Act similar to the one in the United Kingdom; this Act should specifically address the question of contempt by publication, provide definitions, defences, procedure and expressly provide for the power to restrain publications. It could also prohibit employees of law enforcement agencies, prosecutors, lawyers and court personnel from releasing specific kinds of information to journalists or to the public (i.e. previous convictions).
- iv. **Total freedom for political speech etc** By analogy, perhaps freedom of the press should be absolute for political speech (i.e reporting facts, opinions, or criticism of legislators, executives, candidates for political office, government bureaucrats or reporting facts, opinions, or criticism of government operations).<sup>201</sup> Yet when it comes to publications or broadcasts that create an environment in which a person can not receive a fair trial by an impartial tribunal, or defames an individual the freedoms most certainly need to be limited.<sup>202</sup> This can be achieved via a statute.

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id  
supra note 184 p 594  
supra note 182 p78

www.rbs2.com. "Pretrial Publicity Prevents a Fair trial in the USA" the page as it appeared on 22 Jul 2009

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The Contempt of Court Act 1971 of India

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Attorney-General v Times Newspaper, (1974) A.C. 273.

Dean of Asaph's Case, R v Shipley (1783) 21 St. Tr 847

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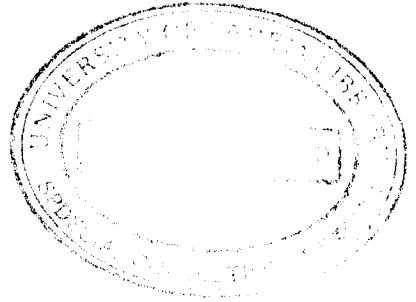
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