
**Independence of the Judiciary: Accountability and Contempt
of Court**

Hon. Mr. Justice J. E. Gicheru, E.G.H.*

INTRODUCTION

Contempt of Court, Independence of the Judiciary and Judicial Accountability are huge themes that should ordinarily be tackled independently. The choice of the topics and the consolidated mode of presentation is, however, dictated by their relevance as current legal problems and by the expediency of dealing with related matters together. These subjects have recently been called into debate following disturbing stances, acts and omissions of the executive and the legislative institutions of the government and their members in relation to the process and decisions of the Court.

The relationship of the members of the executive and legislative institutions of the government with the Judiciary has in the recent past been characterized by three attitudes the first of which is taking the Court as a necessary step before extra-judicial (and illegal) mass action to justify the subversion of rule of law in the pursuit of the litigants' interests. Secondly, the process of the Court and its decisions have been held in outright contempt and have been disobeyed by factions of the executive and the legislature that are adversely affected and thirdly, the legislature has arrogated itself the role of a supervisor of the discharge by the Court of its judicial function. This has taken the form of discussions through question time in Parliament on matters pending before the court and recently the purported investigation in Court by the Parliamentary Committee on Security regarding the whereabouts of the cocaine haul the subject of pending criminal proceedings.

None of these attitudes come near to the desirable mutual respect between the institutions of the government under the constitutional doctrine of Separation of Powers by which the three institutions of government should respectively perform their special functions and thereby uphold the rule of law and good governance.

This presentation is designed to earnestly exhort the judges to take seriously their constitutional duty of judicial adjudication without regard to the misconceived protestations of the members of the executive, legislature

* The Chief Justice of Kenya.

and the general public who second-guess the Judiciary's authority. The institutions of government are urged to work in complementary partnership for the benefit of the inhabitants of Kenya,

Now let me justify that posture with the applicable principles of our law in relation to Independence of the Judiciary, Accountability and Contempt of Court.

INDEPENDENCE OF THE JUDICIARY

The first principles of the Independence of the Judiciary flow directly from the Judiciary's constitutional mandate. Constitutional democracy depends upon the limitation on government imposed by the Constitution through separation of powers between governmental institutions. In his book *The New Commonwealth and its Constitutions* (1964) Professor S.A. de Smith identifies constitutionality as follows:

"A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionality is practised in a county where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judicial; and he may not easily be persuaded to identify constitutionality in a country where any of these conditions is lacking".

The Constitutional doctrine of Separation of Powers calls for a separation of the functions of government under the three institutions of the executive, the legislature, and the judiciary. As Professor B. O. Nwabueze in the book- *Constitutionalism In Emergent States* (1973) – notes:

"Not even the sternest critics of the doctrine of separation of powers deny its necessity as regards the judicial functions. For the Rule of Law as an element of constitutionality depends more upon how and by what procedure it is interpreted and enforced. The limitations which the law imposes upon the executive and legislative action cannot have much meaning or efficacy unless there is a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of them. The necessity for a procedure to interpret the law with finality is underlined by the fact that both the executive and the legislature have also to interpret

the law in the course of carrying out their primary functions.”

The Rule of Law upon which the principle of constitutionality is founded depends on an independent judiciary to authoritatively interpret and enforce the law. As H.W.R Wade in his book - *Administrative Law* (1988) - at p.24 writes, the principle of the Rule of Law means:

“that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive. In Britain as in the principal countries of the commonwealth and in the United States of America, such disputes are adjudicated by the ordinary courts of law. Although many disputes must be taken before official tribunals (‘administrative tribunals’) these tribunals are themselves subject to the control by the ordinary courts and so the rule of law is preserved. In countries such as France, Italy and Germany, on the other hand, there are separate administrative courts organised in a separate hierarchy - though it does not follow that they are less independent of the government. The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the Rule of Law.”

Since the U.S. Supreme Court decision in *Marbury v Madison* (1803) 1 Cranch 137, it has been accepted that the judiciary has the right to interpret the Constitution with finality and determine the constitutionality of executive and legislative acts. Correspondingly, the Court has power under the doctrine of ultra vires to determine the legality of administrative action.

It is also settled that the judicial power of the government lies in the courts notwithstanding lack of express vesting provisions in the Constitution and that the judicial power exists independently and co-ordinately with the sovereignty of Parliament. The Privy Council in *Liyange v. R* (1967) 1 A.C. 259 decided that the arrangement of the Constitution in parts among them one headed “Judicature” demonstrates an intention to separate the judicial power from the legislature and the executive. The Privy Council held that: “These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They could be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution’s silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century,

in the hands of the judicature. It is not consistent with any intention that henceforth it should be passed to, or shared by, the executive or the legislative.”

It would seem therefore that the legislature’s power to make laws and the executive’s power to implement them does not entitle these two institutions of government to usurp judicial power of the judicature. Happily in *ex abundanti cautela* the Judiciary is pursuing the enactment in the new Constitution and the Judicial Service Bill of provisions expressly stipulating the vesting of judicial power in the Judiciary.

Having laid down the jurisprudential basis of the independence of the Judiciary, I now propose to conceptualize the independence within the daily task of administration of justice. Two international instruments or documents are crucial here and these are the Bangalore Principles of Judicial Conduct and the 1985 United Nations Basic Principles of the Independence of the Judiciary. Articles 1-7 of the United Nations Basic Principles set out at the macro-level addressed to States principles for the independence of the judiciary as follows:

1. The independence of the judiciary shall be guaranteed by the states and enshrined in the constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be an inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This privilege is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.”

Our efforts in pursuing the enactment of the Judicial Service Bill and the inclusion in the proposed new Constitution of Kenya of provisions relating to the independence of the Judiciary seek to entrench the foregoing principles. At the micro-level, the individual judges similarly have obligations under the Bangalore Principles of Judicial Conduct to uphold and express judicial independence in both its individual and institutional aspects. The application of the principle of judicial independence in relation to individual judges is as follows:

“1.1 A judge shall exercise the judicial function independently on the basis of the judges’ assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or antecedents, direct or indirect from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A Judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.”

The Bangalore Principles are intended to establish internationally accepted standards of ethical conduct of judges in order to realise the judicial independence necessary for the maintenance of the rule of law. At the national levels, various countries have established their own national codes of conduct which are intended to be supplemented and not derogated by the Bangalore Principles. In Kenya, we have our own Judicial Service Code of Conduct and Ethics established under section 5(1) of the Public Officer Ethics Act, 2003 with which every judicial officer is on appointment supplied and expected to observe co-extensively with his holding of judicial office. The

question as to the consequences of breach of the code of conduct and the principles is the subject of judicial accountability, which I address next.

JUDICIAL ACCOUNTABILITY

It is now generally accepted that the Judiciary, like its counterparts in the executive and the legislature, must be held accountable to the discharge of its constitutional mandate of judicial function. Indeed, accountability has been called the other side of the coin of the independence of the Judiciary. The only question that arises is as to who it is to be accountable to and the method or mechanism of accountability. The executive is accountable to Parliament by the vote of no confidence and to the Court by the judicial review mechanism. Parliament's power is checked by the executive's right of dissolution and is accountable to the electorate through the general election. The judiciary is not accountable to any other institution of the government. Judicial accountability, therefore, is the process by which the judiciary is responsible to the people on whose behalf it exercises the judicial power under the Constitution and the law of the country.

In understanding the concept of judicial accountability, distinction should be made between the conduct of the judge in the discharge of his judicial function and the actual judicial decision or determination. Accountability relates to the former and not the latter except where the decision is the product of judicial misconduct. This is because there are or ought to be mechanisms for the supervision of his judicial decisions or determinations. Indeed, under Article 16 of the United Nations Basic Principles of the Independence of the Judiciary, professional immunity of the judges is given as follows:

“WITHOUT prejudice to any disciplinary procedure or to any right of appeal or to compensation from the state, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”

Similarly, under section 6 of the Judicature Act, Chapter 8 of the Laws of Kenya provides for judges' professional immunity in these terms:

“No judge or magistrate and no other person acting judicially, shall be liable to be sued in a civil court for an act done by him in the discharge of his duty whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of...”

Independence of the Judiciary: Accountability and Contempt Of Court

The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government encapsulates judicial accountability in these words:

“Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on the grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensue fairness.

The Criminal law and contempt of court proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.”

The Latimer House Principles also provide for oversight of government by establishment of scrutiny bodies and mechanism to oversee government and enhance public confidence in the integrity and acceptability of government’s activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-Corruption Commissions and similar oversight institutions are proposed. The role of the media, in ensuring government transparency and accountability is also emphasized.

In order to guard against interference with our judicial independence, we in the Kenya Judiciary have preferred internal accountability mechanisms rather than the external institutions. We have therefore established biennial reviews on the integrity and performance of the Judiciary through the Ethics and Governance Sub-committee of the Judiciary. There is also the continuous complaints system under the Office of the Chief Justice, through which litigants are able to seek corrective redress on the workings of the process of the Court. We are also considering the establishment of a disciplinary procedure to deal with breaches of the Judicial Code of Conduct that do not warrant the ultimate process for the judge’s removal from office.

While, as stipulated by the Latimer House Principles, that criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial function, such proceedings will be employed to guard against interference with judicial independence as a means of upholding the Rule of Law.

CONTEMPT OF COURT

The power to punish for contempt of court is inherent to the constitution of the court as an adjunct to the judicial function. Wilmot J. in the celebrated opinion in *R v. Almon* (1765) Wilm. 243 at p.254 cited in *Borrie and Lowe on Contempt*, at p. 319) said:

“The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice.”

The Court must be able to enforce its decisions if its authority and respectability is to be upheld. As the author of *Oswald on Contempt of Court* 2nd ed. (1895) at pp. 10 and 11 writes:

“There is probably no county in which Courts of law are not furnished with the means of vindicating their authority and preserving their dignity by calling in the aid of the executive in certain circumstances without the formalities usually attending a trial and sentence. Of this the simplest instance is where the judge orders the officers to enforce silence or to clear the court.

It is the undoubted right of a superior court to convict for contempt; and there is no necessity to specify the particular matter which constitutes the contempt. But the practice now requires that the alleged offence should be specified. The usual criminal process to punish contempt was found to be cumbrous and slow, and therefore the Courts early assumed jurisdiction themselves to punish the offence summarily, *brevi manu*, so that cases might be fairly heard, and the administration of justice not interfered with. A Court of Justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community.”

Let me clarify the object of contempt jurisdiction. It is not a vehicle to punish or compensate the judge's injured feelings; it is calculated to protect the due administration of justice and maintenance of law and order. The

power to punish for contempt is vested in the judges not for their personal protection only, but for that of the public who have an interest in the due administration of justice. Erle, C.J., in *Ex parte Fernandez* 30 L.J.C.P. at p. 32 cited in *Oswald on Contempt* 2nd ed. p. 12 discussed the power to punish for contempt of court as follows:

“There are many ways of obstructing the court. Endeavours are not wanting either to disturb the judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods according to the emergency of the occasion, to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free; powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible. It is this obstruction which is called in law contempt, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes, they have been uniformly exercised for the good of the people”.

As the editors of Borrie and Lowe’s *Law of Contempt* 2nd ed. 1983 observe at page 1:

“The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in *A-G v Times Newspapers Ltd* they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase ‘contempt of court’ might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants.” and at page 5:

“Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process.”

ENFORCEMENT OF THE LAW ON CONTEMPT

The jurisdiction to punish for contempt in Kenya is by virtue of Section 5 of the Judicature Act which is similar to that of the High Court of Justice in England. Where the contempt also amounts to a criminal offence under section 121 of the Penal Code, the same may be prosecuted as a criminal

charge in the usual way. The English law that we are obliged to apply has a Contempt of Court Act of 1981 which supplements its common law contempt of court offences. A question may then arise whether the law applicable in Kenya is the common law before the enactment of the Contempt of Court Act, 1981 or the law as it exists today. Section 5 of the Judicature Act appears to import the law as it exists and is applied at the time an application is made as it provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is “for the time being” possessed by the High Court of Justice in England. For the sake of upholding the sovereignty of our State and Parliament, section 5 of the Judicature Act should be repealed and replaced by a substantive enactment on Contempt of Court Act of Kenya. I welcome discussions and contributions on this proposal.

In cases of civil contempt, it is the parties that move the Court for punishment for contempt of the Court, while in criminal contempt it is the Attorney-General who charges the alleged contemnor as happened in the two famous Kenyan cases of *Republic v. David Makali and 3 others*, Court of Appeal Criminal Applications Nos. 4 & 5 of 1994 and *Republic v. Tony Gachoka and Another*, Court of Appeal Criminal Application No. 4 of 1999. A question arises whether the Court may act on its own motion and initiate prosecution for contempt of court. I have no hesitation in holding that the Court can in a proper case issue summons, notice to show cause or even a warrant of arrest for the alleged contemnor to be brought to court to answer contempt charges. It matters not that the contemnor is a senior government official or the lowest litigant, and it matters not that the person is not a party to the present proceedings if his conduct or statement is likely to affect the due administration of justice generally.

In a recent case (HCCC NO. 1278 of 2004), I summoned the Attorney-General to appear personally before me to explain why he had not attended court on a previous occasion whether by himself or representative despite having been served with a mention notice. The Attorney-General duly appeared in person together with counsel who should have appeared in court and the head of litigation department of the Attorney-General's Office and the issue of non-attendance was sorted out after the necessary purging of the contempt by profuse apology. Similarly, in Zambia the Hon. Chief Justice Earnest L. Sakala in February, 2005 summoned the Vice-president of the Republic of Zambia, Enoch Kavindele, to show cause why he should not be committed for contempt in the matter of prejudicial remarks regarding the presidential petition then pending before the Court. The Vice-president appeared in Court and apologized stating that he had not intended to

Independence of the Judiciary: Accountability and Contempt Of Court

injure the Court or to bring it into disrepute. The Court then directed the Attorney-General to issue a statement to correct the impression created by the Vice-president's remarks.

The Court of Appeal in England in the case of *Balogh v Crown Court at St Albans* [1974] 3 All E.R. 283 held that at common law a judge had jurisdiction to punish summarily, of his own motion, for contempt whenever there had been a gross interference with the course of justice in a case that was being tried, was about to be tried or was just over, whether the judge had seen the contempt with his own eyes or it had been reported to him and the jurisdiction was not limited to contempt committed "in the face of the court". The case involved an attempt by the appellant to release laughing gas into the court while proceedings relating to pornographic films which he considered boring were going on. Lord Denning M.R. in the leading judgment of the Court at p. 287 said:

"Gathering together the experience of the past, then whatever expression is used, a judge of one of the superior courts or a judge of assize could always punish summarily of his own motion for contempt of court whenever there was a gross interference with the court of justice in a case that has being tried, or about to be tried, or just over - no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others - whenever it was urgent and imperative to act at once.

This power has been inherited by the judges of the High Court and in turn by the judges of the Crown Court."

At p. 288 Lord Denning went on:

"This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: see *R v. Gray* by Lord Russell of Killowen CJ. But properly exercised, it is a power of the utmost value and importance which should not be curtailed."

Again in *Re Lonrho PLC and others* (1989) 2 All E.R. 1100, the House of Lords in England itself initiated the contempt proceedings. The Court should not therefore suffer in frustration when its orders are flouted with

impunity when the parties and the Attorney-General will not move to initiate contempt proceedings for the protection of the due administration of justice in the particular case and generally. Once the alleged contemnor(s) is/are brought to Court by a notice to show cause or warrant of arrest, the Court may pending the determination of his/their contempt proceedings release him/them on suitable bail/bond terms. Furthermore as held in *Yianni v. Yianni* (1966) 1 All E.R. 231 the court has power to call witnesses who may help to determine the truth relating to alleged contempt without the consent of the parties in civil contempt matters.

THE TRIAL FOR CONTEMPT OF COURT

Contempt of court, be it civil or criminal contempt, is a crime sui generis which is prosecuted by summary process. The standard of proof is that applicable to criminal cases so that breach must be proved beyond all reasonable doubt. As Lord Denning MR said in *Re Bramblevale* (1970) 1 Ch. 128, (1969) 3 All E. R. 1062:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man has asked about (his failure to produce certain books belonging to the company as ordered by the Registrar), he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence”.

A common legal problem relating to the enforcement of contempt of court is the impact of lack of service of the court order on the defendant. Many judges have felt unable to find defendants guilty of contempt on the ground that the order and a notice of penal consequences had not been served personally on the defendant. The rules regarding the proper means of bringing the terms of an injunction to the notice of the defendant are enumerated in Order 45 rule 7 of the Rules of the Supreme Court. The general rule is that no order can be enforced unless a copy of the order has been served personally on the person required to do or refrain from doing a specified act and a penal notice must be endorsed. However, paragraph 7 of this rule provides an escape route where the Court has power to dispense with the service of the requisite documents in order to found an order of committal for disobedience of an order requiring him to do a given act within a given time if he has had notice of the order and is evading service thereof.

As can be seen from these provisions, the court is not helpless in enforcing its orders whether prohibitory or mandatory where the defendants deliberately evade service.

As regards the application for committal itself, there should be strict compliance with the rules of procedure particularly those designed to protect the alleged contemnor. In my dissenting judgment in *Tony Gachoka v. Republic*, supra, I emphasized the need to strictly comply with the rules of procedure in these terms:

'To Mr. Chunga's submission in reply, the response of the first respondent with leave of the Court and which response was confined to Order 52 of the Rules was that under rule 6(4) of this Order he was entitled to give oral evidence and if he was denied that right then he cannot have had a fair trial in these proceedings. This court then reserved its judgment to today, 20th August, 1999 at 10.00 am.

Order 52 rule 6(4) of the Rules provides that:

"6(4): If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf he shall be entitled to do so."

.... In the application before us, failure to allow the first respondent to give oral evidence on his own behalf after he has expressed his wish to do so would amount to a breach of one of the rules of procedure under which the said application was brought to this Court. Such a breach would be a material irregularity disentitling the first respondent a fair trial in these proceedings with the result that in whichever way the final adjudication of the applicant's application turns a mistrial will have occurred. This court being a court of last resort in this country, once that stage has been reached, there would be no way of re-agitating this matter. I shudder at the thought that with clear provisions of the law entitling the first respondent to give oral evidence on his own behalf after he has expressed his wish to do so, this court would be blind to obvious miscarriage of justice. As I think that the trial of the respondents for contempt of this Court is not concluded until the final decision of the Court is pronounced, I would correct the prejudicial error by allowing the first respondent to give oral evidence on his own behalf as he has expressed his wish to do so in terms of Order 52 rule 6(4) of the Rules and thereafter I would finally adjudicate on the applicant's application for the issue of an order of committal against the first respondent and such other order as may be appropriate against the second respondent for their contempt of court.'

The need for the strict compliance with rules of procedure was also emphasized by Cross, J. in *Re B (FA) an infant* (1965) Ch. 1112 at pp. 1117-1118 in these words:

“Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.”

The Privy Council decision in *Maharaj v. A-G of Trinidad and Tobago* (1977) 1 All E.R. 411 is an authority that the charge must be specific enough for the accused to know the conduct alleged to amount to contempt in order to afford him an opportunity to answer the charge.

CONTEMPT OF COURT AGAINST MINISTERS

Since the House of Lords decision in *M v. Home Office* (1993) 3 All E.R. 537 it is established that a finding of contempt may be made against a government department or against a minister of the Crown both in his official and personal capacity. In this suit the minister had breached an undertaking given by counsel that the applicant, a Zairean asylum seeker, would not be deported from the United Kingdom pending the hearing of an application for leave to move for judicial review. After taking legal advice the minister decided to challenge a mandatory order for the return of the applicant who had then been deported, and to withhold action to return the applicant in the meantime. The House of Lords held that:

“if a minister acted in disregard of an injunction made against him in his official capacity the court had jurisdiction to make a finding of contempt of against him or his government department. Although contempt proceedings against a government department or a minister in his official capacity would not be either personal or punitive, a finding of contempt would demonstrate that a government department had interfered with the administration of justice and an order for costs could be made underline the significance of the contempt. It would then be for Parliament to determine the consequences of that findings.”

The matter of contempt of court against ministers of the Crown was put into perspective by Lord Templeman at pp. 540- 541:

“Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law....The judiciary enforce the law

against individuals, against institutions and against the executive. The judges cannot enforce the law against the crown as a monarch because the crown as monarch can do no wrong but judges enforce the law against the crown as executive and against individuals who from time to time represent the crown. A litigant complaining of breach of the law by the executive can sue the crown as executive bringing his action against the minister who is responsible for the department of state involved----- . To enforce the law the courts have power to grant remedies -----against a minister, ----- in his official capacity. If the minister has personally broken the law, the litigant can sue the minister..... in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court. ----- the arguments that there is no power to enforce the law by -----contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity.”

The necessity to obey the law by all individuals and institutions stems from the need to uphold the rule of law and the due administration of justice. As noted by Lord Cross of Chelsea in *Attorney General v. Times Newspapers Ltd.* (1973) 3 All E. R. 54, at p. 83:

“Contempt of court” means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to any one who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender, yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard”.

There are clear similarities between the facts in *M v. Home Office* supra and the recent position taken by the Speaker of the National Assembly in the matter of the late Dr. Ouko Parliamentary Probe Report. While a suit was pending before the High Court a State Counsel gave an undertaking on behalf of Parliament that it would not deliberate on the Report pending further hearing of the matter in Court. The Speaker took the view that no express instructions were given to the State Counsel to give the undertaking

on behalf of Parliament and proceeded to have the Report tabled, discussed and adopted by Parliament in breach of the undertaking given to the Court. This was a clear case of contempt of Court by the Speaker and Parliament as an institution of government. There have been several other incidents where ministers of the government have acted in flagrant disobedience of the Court orders in particular cases before the Courts. For instance, the Narok evictions by the Ministry of Lands and the County Council of Narok have proceeded with evictions in breach of express Court orders.

While the greater responsibility for enforcement of Court orders lie with the litigants in cases of civil contempt and the Attorney-General in criminal contempt, the Court may also properly utilize its jurisdiction to initiate contempt proceedings of its own motion where the contempt threatens the due administration of justice and requires urgent action. Further in lieu of contempt proceedings, the Court may make use of the practice of judicial warnings where the judge warns alleged offenders against repeating particular acts after summoning them before the judge to explain their conduct. The judicial warnings may be given either publicly in open Court or privately in Chambers against committing contempt in a particular case or generally. The Court may also report cases of contempt to the Attorney-General who should then prosecute the offender in accordance with the rules.

CONCLUSION

The promotion of the Rule of Law and the due administration of justice require the concerted effort of the three institutions of the government acting within constitutional principles of separation of powers and with mutual respect between the institutions for the constitutional function of each institution. Where, however, the administration of the law is threatened by disrespectful conduct towards the Judiciary by the members of the executive and the legislature, it is in the public interest that the contempt of court be punished to uphold the authority of the Judiciary as the defender of the rule of law.

The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government provides under clauses I and II that:

- "I. Each commonwealth country, parliaments, executives and judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good standards of honesty, probity

and accountability.

- II. Relations between Parliament and the judicial should be governed by respect for Parliament's primary responsibility for law making on the one hand and the Judiciary's responsibility for the interpretation and application of the law on the other hand. Judiciaries and Parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner .

The Honourable Chief Justices of Southern African Development Commission (SADC) countries together with those of Kenya and Uganda meeting under the auspices of the Conference of the Southern African Judges Commission on 11-13 August, 2005 at Windhoek, Namibia adopted a statement on the independence and accountability of the Judiciary which is relevant to the theme of this presentation and which I here below set out in full:

“Statement Adopted by the Southern African Judges Commission:

1. The Southern African Judges Commission reaffirmed the principle of the independence of the judiciary as indispensable in the safeguarding of the Rule of Law, the protection of Human rights and Good Governance.

Governments and heads of judiciaries are enjoined to promote and protect this independence.

2. Governments are urged to do all in their power to guarantee the institutional independence of the judiciary through the institution and implementation of appropriate legislative and other measures. For their part,, members of the judiciary must not deviate from their commitment to do justice to all with impartiality and without fear, favour or prejudice.

3. The commission acknowledges the impotent role of the media and freedom of expression as one of the pillars of democracy. In the quest to inform the public of court decisions, accurate reporting is essential and may be enhanced by appropriate consultation between the media and the judiciary.

4. Insisting on judicial independence does not mean that judicial officers are not accountable for the way they discharge their duties. Trials and other court proceedings are held in open court to which the general public, including the media, have access. Reasons must be given for decisions taken in such matters, and those decisions are ordinarily subject to appeals and reviews by higher courts to ensure that all relevant issues have been taken into account and

that the proceedings have been conducted fairly.

5. It has stressed that accountability calls for more than this. Judicial officers must perform their duties in accordance with the high ethical requirements of their office, and that all who appear before them must be treated fairly and courteously.

6. It is essential that there be mechanisms, including adequate complaints systems, for ensuring that these standards are met. The Chief Justices urged those jurisdictions that do not yet have adequate means for dealing with these to adopt mechanisms for this purpose, including codes of conduct consistent with international instruments such as the Latimer House Guidelines and the Bangalore Principles.”

Bibliography

1. *The Challenge Of Law Reform* By Arthur Vanderbilt (1955)
2. *Times Of Zambia* Newspapers.
3. *Contempt Of Court, Committal And Attachment & Arrest Upon Civil Process* By James Francis Oswald (1895).
4. *Borrie And Lowe's Law Of Contempt* By Nigel Lowe, LLB - Second Edition (1983)
5. *Administrative Law* By H.w.r. Wade - Sixth Edition (1988)
6. *Constitutionalism In The Emergent States* - By B.O.Nwabueze
7. *The Commonwealth (Latimer House) Principles* (2003)
8. *United Nations Basic Principles On The Independence Of The Judiciary* (1985)
9. *M v. Home Office and another* (1993) 3 All E.R. 537
10. *Balogh v. Crown Court at St. Albans* (1974) 3 All E.R. 283
11. *The Bangalore Principles Of Judicial Conduct*
12. *Heatons Transport v. TGWU* (1972) 3 All E. R.101
13. *Lewis v. Lewis* (1991) 3 All E.R. 54
14. Order 45 and Order 52 Rules of the Supreme Court
15. *A-G v. Times Newspapers Ltd.* (1973) 3 All E.R. 54
16. *Yianni v. Yianni* (1966)1 All E.R. 231
17. *All England Law Reports Index* (1936 - 2002)
18. *Republic v. Tony Gachoka & Anor*, Court of Appeal Criminal App. 4 of 1999
19. *Republic v. David Makali & 3 others* Court of Appeal Criminal App. 4 & 5 of 1994 consolidated)
20. *Statement Of The Conference Of The Southern African Judges Commission On The Independence And Accountability Of The Judiciary* (11- 13 August 2005) Windhoek, Namibia.
21. *Liyana v. The Queen* (1967) 1 A.C 259
22. *Re Lonrho Plc & others* (1989) 2 All ER 1 100
23. *Black's Law Dictionary* Eighth Edition
24. *Re B. (JA) An infant* (1965) Ch 1112