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CONTEMPT OF COURT: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND ETHIOPIA

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ABSTRACT: The crime of contempt of court deals with unlawfully and intentionally violating the dignity, repute or authority of the court. Punishing contempt of court as a crime has the objective of promoting obedience and respect by society towards the court so that it can attain its mission successfully. On the other hand, punishing the crime of contempt of court has an impact upon the constitutional rights of the accused: it limits her/his constitutional rights. This procedure of punishment, summary procedure, limits the constitutional right to a fair trial of the citizen provided in most constitutions. Farther contempt of court outside the room of the court, *ex facie curiae* contempt of court, also has the effect of limiting other constitutional rights among which the right to free speech and media is one. Hence, when and how should the court punish an act of contempt of court so that one can say it is a justifiable limitation? is the point of this article.

KEYWORDS: Contempt, Accused, Court, Fair Trial, *in facie curiae*, *ex facie curiae*

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CONTEMPT OF COURT: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND ETHIOPIA

1. INTRODUCTION

Contempt of court is a broad, common law crime. The crime of contempt of court deals with unlawfully and intentionally violating the dignity, repute or authority of the court.¹ Punishing contempt of court as a crime has the objective of promoting obedience and respect by society towards the court so that it can attain its mission successfully. The rules embodied in the law of punishing acts of contempt are intended to uphold and ensure the effective administration of justice.² Further, the law regarding contempt of court gives the court the power to take the necessary and appropriate measures against an individual who interferes with its work.³

However, punishing the crime of contempt of court has an impact upon the constitutional rights of the accused: it limits her/his constitutional rights.⁴

In South African and Ethiopian⁵ criminal law, the crime of contempt of court particularly *in facie curiae* contempt of court is punishable summarily.⁶ This procedure of punishment limits the constitutional right to a fair trial of the citizen provided in the constitutions of the respective countries.⁷ The summary procedure used to punish *in facie curiae* contempt of court, inter alia, limits the defendant's right of adducing evidence, challenging evidence brought against him, cross examining witnesses, the right to be heard before a neutral tribunal, the right to legal

¹ Snyman *Criminal law* 325.

² Yosef *Summary Power of Ethiopian Courts* 13.

³ Review of Contempt Proceeding by Habeas Corpus 840.

⁴ Louw *Specific Crimes* 93.

⁵ Ethiopia has a continental legal system. In the 20th century, especially in the 1950's and 1960's the Ethiopian legal system developed from a system of customary laws to a uniform law. (Fasil *Constitution for a Nation of Nations* 89.) During the 20th century, laws were adopted from Western Europe and drafted in different codes. (Moradu *Background to Some Legal Traditions of the World* 67.) Since the drafters were nationals from countries of continental legal systems, the content of the codes were highly influenced by foreign values. Therefore, Ethiopia has adopted its modern laws from France, Germany and other European countries, which influenced the legal system of the country. (Moradu *Background to Some Legal Traditions of the World* 69). On the other hand, South Africa has a "hybrid" or mixed legal system made of the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system inherited from indigenous Africans. These traditions have had a complex interrelationship with English influence most apparent in the procedural laws and the method of adjudication, and the Roman-Dutch influence most visible in its substantive private law. (Russell and Cohn *Law of South Africa* 334.)

⁶ See, Louw *Specific Crimes*, Magistrates' Courts Act 32 of 1944 of South Africa and Article 49 of Ethiopian 1996 Criminal Code.

⁷ Supra note 4.

representation, the right to be informed of the charge with sufficient detail, and the right to be presumed innocent.⁸ However, both jurisdictions recognise the right to a fair trial under their respective Constitutions. Section 35(3) of the South African Constitution provides a long list of rights to realise the fair trial rights of individuals. Among these rights, the right to be informed of the charge with sufficient detail to answer it; to have adequate time to prepare his defence; to choose, and be represented by a legal practitioner and to be informed of this right promptly; and to adduce and challenge evidence are pertinent. The Ethiopian Federal Democratic Republic's Constitution (EFDR Constitution) which is the supreme law of the land,⁹ also clearly recognises these right to a fair trial.

The constitutionality of the crime of contempt of court is not limited to the above mentioned point: *ex facie curiae* contempt of court also has the effect of limiting other constitutional rights among which the right to free speech and media is one.¹⁰ In a democratic society, freedom of expression is recognized as a basic right, and freedom of the press is the prominent component of the right to freedom of expression.¹¹ Contempt of court by publication referring to a pending case is the most common way of committing *ex facie curiae* contempt of court and it could arise when a person publishes any matter as to the suspect's guilt or innocence, or by attacking or praising his character, or by demeanor or credibility of the witnesses while the case is still pending.¹²

Similar to the right to fair trial rights the right to freedom of expression is also clearly recognised under section 16 of the South African Constitution and article 29 of EFDR Constitution.

The point here is the constitutional validity of the above mentioned limitations. For example, can it be justifiable if the judge acts as a witness, a judge and prosecutor at the same time? Furthermore, when the state prohibits the publication in the press or other media of any information or commentary upon a matter pending before the court on the ground of *ex facie curiae* contempt of court, the justification is that the commentary may have the effect of influencing the mind of the court, and thereby affecting impartiality.¹³ But when and how should

⁸ Ibid.

⁹ Ethiopian Federal Democratic Republic Constitution, *Federal Negaret Gazette No. 1* 1995, article 9.

¹⁰ Burchell *Principles of Criminal Law* 950.

¹¹ International Seminar of promoting freedom of expression *Freedom of expression and Contempt of Court* 7.

¹² Supra note 10 at 948-949.

¹³ S v Mamabolo, 2001(5) BCLR 449,454 (SA)

the court punish an act of publication or comments on the judicial activities as *ex facie curiae* contempt of court so that one can say it is a justifiable limitation?

Section 36 of the South African Constitution contains the limitation clause by which all rights (including the above-mentioned rights) can be limited. Section 39(2) of the South African Constitution, on the other hand, provides that when a court (or other tribunal) develops the common law, it must promote the spirit, purport and objects of the Bill of Rights. In other words, it should ensure that the common law is consistent with the fundamental rights set out in the Bill of Rights. Accordingly, the point of this study is how the limitations of constitutional rights of the accused to punish the crime of contempt can be made consistent with the fundamental rights set out in the Bill of Rights. On the other hand, one cannot find a similar limitation clause under EFDR Constitution. Hence, the validity of limiting an accused's constitutional rights under the guise of contempt of court by Ethiopian courts is the other point that should be analysed.

Therefore, the author will analyse the law on contempt of court in Ethiopia and South Africa in light of the aforementioned points.

The article consists of five parts. The first part introduces the topic. The second part covers the general concept of contempt of court. The third and the fourth parts deal with the crime of contempt of court under Ethiopian and South African law, and the constitutionality of contempt of court under both jurisdictions respectively. The final part deals with concluding remarks and the recommendations.

2. CONTEMPT OF COURT IN GENERAL

2.1. DEFINING CONTEMPT OF COURT

Scholars like Goldfarb and Snyman define the concept of contempt of court differently. The former defines the concept in a broad sense; the latter defines the same concept in a narrow sense.

Goldfarb defines contempt as “*An act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority, such as a court or legislative body, for which a summary procedure is usually exacted.*”¹⁴ As per this broad definition, contempt is not only an act of disobedience of the court order or unlawfully and intentionally violating the dignity, repute or authority of the court but it also means disregard for or disobedience of the rule or orders of the legislative body of government. However, the writer does not support this definition of the concept. Since the summary procedure is exacted for any act constituting the crime of contempt, employing such a broad definition adversely affects the constitutional right to a fair trial of the accused.

On the other hand, contempt is also defined in a restricted manner by Snyman as: “*Contempt of court is intentionally violating the dignity, reputation or authority of a judicial body or judicial officer in his judicial capacity; or publishing information or comment concerning a pending judicial proceeding which has the tendency to influence the outcome of the proceeding or to interfere with the administration of justice in that proceeding*”¹⁵

As per this definition, contempt of court can be committed either by any act that has a tendency to harm the dignity, reputation or authority of a judicial body or judicial officer, or by publishing information or comment concerning a pending judicial proceeding.

Moreover, in this definition, unlike the broad definition, for an individual to be liable for the crime, an alleged act should only be related to an act, which harms the dignity, authority or reputation of the judicial body or judicial officer. However, unlike the definition given by Goldfarb above, this definition does not deal with the procedure to be followed to punish an act of contempt of court. There is no uniform procedure between countries to punish the crime of

¹⁴ Goldfarb *The Contempt Power* 1.

¹⁵ Supra note 1.

contempt of court i.e. depending upon their respective legal systems some use a summary procedure while others use the ordinary one. Most continental law countries like France, Switzerland and Belgium, for example, use the ordinary procedure to punish the crime of contempt of court while most common law countries including South Africa use the summary one.¹⁶ However, there are other countries like Ethiopia, which deviate from this trend.¹⁷

The definition given for contempt of court under Ethiopian and South African law does not differ much from the restricted definition given to contempt of court above. The Ethiopian criminal code or any other statute of the country does not directly define the concept of contempt of court. However, the definition is apparent from article 449 of the new Ethiopian criminal code:

(1) Whoever, in the course of a judicial inquiry, proceeding or hearing,

(a) In any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge in the discharge of his duty; or

(b) In any other manner disturbs the activities of the Court, is punishable with simple imprisonment not exceeding one year, or fine not exceeding three thousand Birr

The Court may deal with the crime summarily.

As per this article, contempt of court consists of insulting; holding up to ridicule; threatening or disturbing the court or a judge in the discharge of his duty; or it is disturbing the court in any other manner while it is in the course of a judicial inquiry, proceeding or hearing. There are acts listed in the article as being contumacious though it is not an exhaustive list. They are cited in order to enforce the respect due to the court or the administration of justice and the necessity of protecting them against interruptions.

The definition of the crime under South African law is similar to the above definition given under the criminal code of Ethiopia. As discussed above, Snyman has defined the concept of the crime under South African law.

¹⁶ Graven *Summary Power of Courts* 3.

¹⁷ As per article 449 of 1996 Ethiopian criminal code, even though the country follows civil law legal system, courts have a power to punish contempt of court summarily. This procedure will be dealt in greater depth in chapter four of this work.

2.3. THE PURPOSES OF PUNISHING THE CRIME OF CONTEMPT OF COURT

Contempt of court is punishable by imprisonment, fine, or both,¹⁸ and punishing the crime has its own rationale or purpose under South Africa and Ethiopian laws.

The purpose of punishing the crime is to protect the administration of justice and the integrity of the judiciary.¹⁹ Hence, it is punishable because of the necessity of maintaining the dignity of and respects towards the courts and their decisions.²⁰ Thus, rules embodied in the law regarding contempt of court are intended to uphold and ensure the effective administration of justice.

Punishing contempt of court can also serve as a tool to protect the integrity of the court by maintaining a balance of power between the three organs of government: legislative, executive and the judiciary.²¹ The judiciary will not compete with the other two bodies of government in areas of politics, finance and military. Its power of existence largely depends upon the public trust, and the court will not properly function without this support of the community.²² Thus, any malicious act that has potential to create doubt as to the impartiality of the court and that can negatively influence the trust of society towards the court has to be punished. The rationale of the crime is not to vindicate the dignity of the individual judicial officer, but the crime was created and has been kept extant to protect the administration of justice.²³ The remedy of contempt is also not intended for the benefit of an individual judge concerned and should not be used to grant him any additional protection against defamation other than that available to any person by way of civil action for damage.²⁴ Generally, one can conclude from the above discussion that three main interests are protected in punishing the crime of contempt of court under South African and Ethiopian laws: protecting the integrity of the court, protecting the administration of justice and maintaining the confidence of the public in the judiciary.

¹⁸ Under the Ethiopian criminal code, contempt in *facie curiae* is punishable by simple imprisonment not exceeding one year, or by a fine not exceeding three thousand birr. Contempt of court committed outside the court is punishable by simple imprisonment not exceeding six months, or by a fine not exceeding one thousand birr. The amount and/or kind of punishment under South African law is also similar to that of Ethiopia. For example, S. 108 (1) of the Magistrate Courts' - Act, 32 of 1944 provides that a person who commits the crime of contempt of court is punishable to a fine not exceeding R 2 000 or in default of payment to imprisonment not exceeding six months.

¹⁹ Barrie and Lowe *The law of contempt* 1.

²⁰ Ibid.

²¹ In re Chinamasa, 2000(12) BCLR 1294, 1302(ZS).

²² Ibid.

²³ Supra note 1 at 326.

²⁴ Corpus Juris Secundum *Contempt* Sect 62(2).

3. ETHIOPIAN AND SOUTH AFRICAN LAWS ON CONTEMPT OF COURT

3.1. ETHIOPIAN LAWS ON CONTEMPT OF COURT

The relevant provisions of the law that deals with contempt of court under Ethiopian law are stated under article 449 of the 1996 Criminal Code and articles 480 and 481 of the 1965 Civil Procedure Code. Although the Civil Procedure Code does not refer to those provisions as “contempt of court”, the concept of contempt can be inferred from the general purpose of the articles. The crime of contempt of court under the criminal code of Ethiopia will be discussed hereunder.

3.1.1. ACTS CONSTITUTING CONTEMPT OF COURT

Acts that amount to contempt of court are listed under Article 449 of the Criminal Code. These are: (a) insult (b) holding up to ridicule (c) threat (d) disturbance (e) attack or violence committed while the court or the judge is sitting in the course of judicial inquiry, proceeding or hearing. Thus, not every act of insolence is considered as contempt of court under Ethiopian law.

Insult is an independent offence provided for under Article 583 of the Criminal Code. However, it is also made a different crime under article 449 of the Criminal Code as constituting contempt of court. In this provision, an insult directed to the judge or to the court in the course of a judicial inquiry, proceeding or hearing will amount to contempt of court. However, categorizing words as insulting or not is somewhat difficult. While there are some words which are obviously insulting, others may not but would be held to be so according to the tone and manner in which they are said.²⁵ For example, a court may be insulted by the most innocent words uttered in a particular manner or tone. Thus, whether or not the language used amounts to insulting the court is a question of fact that needs to be proved.

It is not from any exaggerated notion of the dignity of the individual that insulting the judge is not allowed but because it is the duty of the court to prevent any attempt to interfere with the administration of justice.²⁶ The objective of punishing such act as the crime of contempt under

²⁵ Supra note 19 at 12.

²⁶ Halsbury *Contempt* 7.

Ethiopian law is also not different: it is not to protect the individuals' dignity but to secure the due administration of justice.

The other classic way in which contempt of court may be committed under article 449 is holding up to ridicule. It is difficult to give any comprehensive definition of it and to particularise the acts or words which can or cannot constitute holding up to ridicule.²⁷ This is the reason why one cannot easily find a case in which a court punished an individual committing this act. Similar legislation does not exist in South Africa.

Apart from the above, under Ethiopian law, acts committed with coercion or violence in open court or during judicial proceedings also constitute contempt of court. Article 449 (3) refers to article 441 of the Criminal Code. Even though the wording of the latter article shows an attack or use of violence directed against public servants, when we look at this article in the context of the former, it can be fairly assumed that attack or use of violence upon a judge or a court is contempt of court and punishable under the later article of the code.

Generally, under Ethiopian law, any other act that cannot disturb the court in the performance of its judicial activity is not an act of contempt of court by the mere fact that the act is unlawful and committed in the course of a judicial inquiry, proceedings or hearings.

3.1.2. WHO ARE CONTEMNORS?

It is sometimes difficult to determine who will be punished for contempt of court and who will not be. For example, in one case the registrar was punished for contempt of court though he contended that his acts would fall under administrative action but not under contempt of court.²⁸ However, article 449 of our new code has avoided the problem. It states, "*Who so ever.....is punishable for contempt of court*". Hence, we can understand from the article that it is not referring to any specific individual or category of persons and that it has no limited scope. If the commission of an act constituting the crime of contempt of court is proved, it is always punishable irrespective of the identity of the person who commits it.

²⁷ Abebe *Contempt of Court under Ethiopian Criminal Code* 54.

²⁸ Hailmelokt V.R/Sup. Imp. ct (1965) ETH (FSC) (789).

3.1.3. AGAINST WHOM AND WHEN SHOULD THE ACT BE COMMITTED?

Under article 449 of the Ethiopian Criminal Code, an act of contempt of court, to cause punishment, must be committed against the court or the judge. The code requires that an act of contempt should be committed while the court or the judge is in the course of judicial inquiry, proceeding or hearing. An act of contempt can be committed against a judge unless s/he is not performing a judicial inquiry or proceeding in the court when an act of contempt is committed.

Article 449 of the Criminal Code expressly indicates that whosoever, in the course of a judicial inquiry, proceeding or hearing, in any manner insults, holds up to ridicule, threatens or disturbs the court will be punished for contempt of court. Accordingly, the acts enumerated as constituting contempt of court must be committed in the course of judicial inquiry, proceedings or hearings. However, in Ethiopia, there is no direct legal definition given to judicial inquiry, proceedings or hearings.

An inquiry is judicial if the act is to determine a judicial relationship between one person and another or a group of persons; or between itself and the community generally, and a judge acting without such view in mind is not acting judicially.²⁹

As per article 449, contempt of court can also be committed in the course of judicial proceedings or hearing. Judicial proceedings include any proceedings of the whole trial process by which the rights and obligations of the litigants will be determined.³⁰ Hence, a hearing is part of the judicial proceedings.

Generally, the essence of contempt under article 449 is to maintain due respect for courts and to protect them from unnecessary interruptions of their proceedings. An act can be punished as a crime of contempt of court only if the insult or acts which holds up to ridicule or threat or disturbances are committed when the court or the judge is in the course of judicial inquiry, proceedings or hearing. But all activities in the court will not necessarily be judicial by the mere fact that a judge is involved, and in order to be judicial the act must relate in some way to the administration of justice or the ascertainment of any right or liability thereof.³¹ One cannot think

²⁹ Pekelist *Legal Technique and Political Ideologies* 939.

³⁰ Supra note 2.

³¹ Ranchhodhar and Thankore *The Criminal Procedure Code* 6.

of contempt of court when there is no judge engaging in judicial inquiry or proceeding. Hence, as far as article 449 is concerned, the term contempt would have legal significance only if it is committed when judges perform their judicial functions.³²

3.1.4. WHERE AN ACT OF CONTEMPT CAN BE COMMITTED?

Article 449 of the Ethiopian Criminal Code indicates that there is a notion of classification of acts under the article that includes contempt of court: contempt of court committed in or outside the presence of the court. Acts constituting contempt of court can be committed either when the court is in session or outside the presence of the court. The nature of proceedings to be followed for both types of contempt is also different: when contempt is committed in open court judges are mostly empowered to punish the act summarily while they use the ordinary procedure for the crime of contempt of court committed outside the court.

3.2. SOUTH AFRICAN LAW ON CONTEMPT OF COURT

Like other common law countries, South Africa has no Criminal Code. The principles of Criminal law are part of the common law and can be found in judgments of the courts and in textbooks.³³ However, this does not mean that South Africa is devoid of criminal law statutes. The Criminal Procedure Act 51 of 1977 is one example. It can be said that the sources of criminal law in South Africa are both legislation and common law. Thus, it can be fairly concluded that the sources of the crime of contempt of court in South Africa are legislation and common law. The South African crime of contempt of court will be discussed under the following headings.

3.2.1. ELEMENTS OF THE CRIME

To discuss the elements of the crime of contempt of court, one has to look at the definition given by Snyman to the crime:

Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or judicial officer in his judicial capacity; or Publishing either in writing or orally information or comment concerning pending judicial proceedings which has

³² Abebe *Summary Contempt Power of Ethiopian Courts* 8.

³³ Van der Merwe *Introduction to the Law of South Africa* 36-50

*the tendency to prejudice or interfere with the administration of justice in a pending judicial proceeding”*³⁴

According to this definition, contempt of court has the following elements:³⁵ (a) judicial body or judicial officer (b) mens rea (c) unlawfulness and (d) contempt. Even though it would not be possible to discuss all these elements in detail, it is pertinent to examine the first two elements of the crime.

“Judicial body” is one of the essential elements of the crime of contempt of court in South Africa. An act, to be punishable as a crime of contempt of court, should be committed against the court or the judge i.e. as the main purpose of punishing the crime of contempt of court is to protect the judicial integrity, an act constituting contempt must be committed with intent to bring a court or a judge into disrepute.³⁶

The other element of the crime is Mens rea. To punish the crime of contempt, like any other crimes, it should first be proved that the accused committed the act intentionally.³⁷ It has now been decided³⁸ that the principle of mens rea applies to the South African law of contempt of court.³⁹ The case of *S v L Samaria*⁴⁰ was set aside as the guilty mind of the accused was not proved by the Magistrate. In addition, in giving due recognition to the mens rea requirement of section 108, the court stated in one case⁴¹ that:

“It is not useful to apply the common-law definition of contempt in an effort to decide what is contemplated by s 108. One of the elements of contempt is an intention to violate the dignity of the court. It is conceivable that misbehavior within the meaning of that word as used in s 108 could include conduct not necessarily designed to insult a judicial officer, but still serious enough to justify the invocation of the discipline created by s 108.”

³⁴ Supra note 1

³⁵ Supra note 10 at 948.

³⁶ Supra note 13.

³⁷ Memani 1994(1) SA 515(W) 5171 - 518C.

³⁸ *S v Harber* (315) 1988(3) SA 396(A).

³⁹ Supra note 10 at 952.

⁴⁰ *S v L Samaria* 2010 (1) SA 1760

⁴¹ Memani 1994 (1) SA 515 (W)

Thus, punishing the crime of contempt always requires proof of mens rea of the accused, and hence, to make a person liable for contempt of court, this mens rea requirement should be fulfilled.⁴²

3.2.2. CLASSIFICATION OF DIFFERENT TYPES OF CONDUCT CONSTITUTING CONTEMPT

Similar to that of the Ethiopian crime of contempt, the definition of the crime of contempt of court given by Snyman above⁴³ envisages two types of contempt of court: contempt of court committed before the court and contempt of court that can be committed outside the court.

The first type of conduct, known as *in facie curiae* contempt of court, encompasses any word spoken or act done within the precinct of the court that obstructs or interferes with the due administration of justice, or is calculated to do so.⁴⁴ It occurs when an act of contempt is committed while the court is in session.⁴⁵ However, the mere fact that certain misbehavior is committed in the court by the accused does not necessarily constitute the crime of contempt of court, and the court, before acting against such act, should be conscious enough as to whether the act constitutes the crime of contempt seen in light of the objective that the crime is meant to secure.

The other type of crime of contempt, *ex facie curiae*, occurs outside the court. This type of conduct is usually in the form of words spoken or published or acts done outside the court which are intended to interfere, or are likely to interfere with the due administration of justice.⁴⁶

Snyman further sub-divides this type of the crime into two: contempt *ex facie curiae* referring to pending cases and contempt *ex facie curiae* not referring to pending cases.⁴⁷

Ex facie curiae contempt of court referring to pending cases is the crime of contempt of court committed in relation to some specific case which is pending. Potentially prejudicial publications, interfering with witnesses or judicial officers, insulting the court and default of

⁴² Lavhengwa 1996 (2) SACR 453 (W) 465g.

⁴³ Supra note 1.

⁴⁴ Lavhengwa 1996 (2) SACR 453 (w) 465g.

⁴⁵ Supra note 1 at 327.

⁴⁶ Supra note 44.

⁴⁷ Supra note 1 at 337.

attendance are best examples of this type of contempt of court.⁴⁸ Among these ways of committing contempt of court, it is illustrative to discuss *ex facie curiae* contempt of court by publication referring to pending case.

In South Africa, protecting prejudicial publications, *sub judice*, is perhaps the most significant role of law dealing with contempt of court issues.⁴⁹ Under this jurisdiction contempt of court by publication referring to pending case is committed if a person publishes any matter in relation to whether the suspect/accused is guilty or innocent, or by attacking or praising his character, or by challenging the credibility of the witnesses while the case is still pending.⁵⁰

The other type of *ex facie curiae* contempt of court is contempt of court that does not refer to a pending case. This kind of contempt of court includes insulting the court, simulating court processes, obstructing court officials and disobeying court orders.⁵¹ Among these, scandalizing the court is the best known way of committing the crime.

The crime of scandalizing the court has its origin in English common law and is a subspecies of the offence of contempt.⁵² Scandalizing involves criticism of a judge or court. Unlike the *sub judice* rule, which is applicable to a pending case, this act of committing contempt of court is applicable to a case which is not pending, and its aim is more general: protecting public confidence in the administration of justice.⁵³

⁴⁸ Supra note 10 at 948-949.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Supra note 13.

⁵² *The King v Almon*, 97 Eng. Rep 94(K.B. 1765).

⁵³ Supra note 10 at 952.

4. THE CONSTITUTIONALITY OF CONTEMPT OF COURT

4.1. CONSTITUTIONALITY OF THE SUMMARY POWER OF COURTS TO PUNISH THE CRIME OF CONTEMPT

As discussed in the preceding chapter, contempt of court can either be *in facie curiae* or *ex facie curiae*. *In facie curiae* may be committed in a variety of forms and has the exceptional feature that an offender may be summarily convicted.⁵⁴

It will be apparent when reading the section on contempt of court *in facie curiae* that any interruption, disruption or misbehavior may be summarily dealt with in terms of section 178 of the Criminal Procedure Code or section 108 of the Magistrate Court Act of South Africa. Similarly, under Article 449 of the EFDR criminal code, the court is empowered to punish *in facie curiae* contempt of court summarily.

The summary contempt power of court involves the procedure in which the contemnor will be punished without affording him a procedural guarantee available in ordinary proceedings.⁵⁵ The court can punish without formal written accusation and other procedural safeguards.⁵⁶ It is characterized by the court's inherent ability of its own motion against those who disrupt proceedings or who threaten people involved in the proceedings.⁵⁷ During *in facie curiae* contempt of court there is no summons or indictment, nor is it mandatory for any written account of the accusation to be furnished to the contemnor.⁵⁸

The procedure is fraught with possible abuse because it can deprive the alleged contemnor of a clear and distinct charge and also his best possible defence. More importantly, punishment being meted out on the spot usually precludes the alleged contemnor from seeking legal advice or representation.⁵⁹ And punishing *in facie curiae* contempt of court has an impact on the right to a fair trial of the accused.⁶⁰

⁵⁴ Supra note 4.

⁵⁵ Kuhns *Contempt of Court* 457.

⁵⁶ Jacob *Some aspects of the Law of Contempt of Court in Canada, England and the United States* 231.

⁵⁷ Belayab *Contempt of Court* 123.

⁵⁸ Supra note 10 at 952.

⁵⁹ Ibid.

⁶⁰ Supra note 52.

There are arguments for and against the summary contempt power of courts. The proponents of the summary power of courts to punish the crime of contempt try to formulate two principal arguments in defence of the procedure and to justify the above mentioned constitutional limitations.⁶¹ Their first argument rests on its *necessity* as a deterrent to disorderly behavior in court and as a protection for the administration of justice. The second line of their argument rests on the *overt* nature of the offence. These proponents have noted that even though such power of the court is repugnant to all the fundamental principles of criminal justice applicable to other criminal acts, courts have to be empowered to remove all obstructions to their proceedings.⁶² They further hold that since the judge saw everything that constituted the contemptuous behavior, a hearing may be dispensed with because the judge's knowledge is so complete that there is virtually no possibility that the hearing would shed any more light on the matter.⁶³

However, the above justifications are criticised by the opponents of the summary power of courts. The *necessity* justification is criticised on the ground that it is not a reasonable justification to necessitate the limitations of the accused's rights since the ordinary procedure having the same effect can be employed without compromising the constitutional rights of the accused.⁶⁴ The rationale in relation to the *overt* nature of the crime has also been criticised on a number of grounds.⁶⁵ First, the atmosphere in court can be stressful and thus reduce capacity to perceive complex events. Secondly, contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament: even when the contempt is not a direct insult to the court or judge, it frequently represents a rejection of judicial authority, or interference with the judicial process or with the duties of the officers of the court. Hence, one can conclude from their argument that since a fair trial constitutional guarantee cannot be fulfilled by the nature of summary contempt proceedings, there is a potential for bias or at least the appearance of bias in every summary contempt proceeding.

Seen in light of the above two divergent arguments, even though both South Africa and Ethiopia accepted the summary power of a court to punish *in facie curiae* contempt of court, the way to exercise the power in both jurisdictions is not the same. South Africa, in the majority of cases,

⁶¹ Harper *Lawyers Troubles in Political Trial* 11.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ The Law Reform Commission Ardilaun Centre *Contempt of Court* 256.

⁶⁵ *Ibid.*

limited the summary contempt power of its judges. In Ethiopia, however, there is no limitation on the summary contempt power of a judge, and hence, it can be said that the impact of this procedure on the right to a fair trial of the accused is overlooked.

In the summary proceedings the judge acts as prosecutor, witness and a judge, and this is an undesirable state of affairs.⁶⁶ And empowering the same person with different responsibilities is against the principle of natural justice.⁶⁷ Above all, in summary contempt power it is the judges' perception and attitudes that determine the matter. Thus, limiting such power of a judge is a legitimate measure to avoid the unnecessary effects of the procedure on the right to a fair trial of the accused.

Accordingly, to limit this power of a judge and to make the fair trial right limitation of the accused justifiable under the rights limitation clauses, South African appellate courts employ different mechanisms. First, a judge should use the summary power only when it is absolutely necessary to maintain the order or dignity of the court. For a judge to be justified in using the summary contempt power, the gravity of the alleged act of contempt must warrant the summary power.⁶⁸ White J set out in *S v Nyalambisa* 1993 (1) SACR 172 (TK) that:

*"The summary proceedings referred to in s 108 (1) should be exercised cautiously and only when such procedure is absolutely necessary to maintain the order or dignity of the court. Although there are undoubtedly cases of contumacious behavior which required prompt and summary action, in the majority of cases it will suffice if the magistrate orders that the perpetrator be arrested and tried in the normal course for contempt of court"*⁶⁹

The case of *S v Lavhengwa*,⁷⁰ supporting the idea set out in *S v Nyalambisa* above, indicated the fact that a judge should not immediately use the summary contempt power by the mere fact that certain misbehavior has been committed in the court room. As per the case, in using the summary contempt power, the magistrate should first carefully consider whether or not s/he

⁶⁶ *Duffey v Munnik and another* 1957 (4) SA 390 (T).

⁶⁷ *Ibid* at 283.

⁶⁸ *S v Azov* 1974 (1) SA 808 (T).

⁶⁹ *S v Nyalambisa* 1993 (1) SACR 172 (TK) 12-13

⁷⁰ *Lavhengwa* 1996 (2) SACR 453 (W) 495- 496.

should resort to the normal procedure of referring the matter to the public prosecutor or use the summary procedure. And this depends upon the gravity of the alleged act.⁷¹

Moreover, in South Africa, checking whether an act of insulting is uttered towards the magistrate personally or not also helps to determine the absolute necessity of using the summary contempt power. If the act is towards the magistrate personally, it would be better for the magistrate to take the normal route of referring the matter to a public prosecutor rather than resorting to the summary procedure.⁷² The fact that a judge is personally involved and that the accused is given less than the usual opportunity of defending himself makes it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it.⁷³

Secondly, a number of South African court decisions indicate that in order to use the summary procedure the commission of the crime has to be proved beyond reasonable doubt, and if there is some reservation it is the ordinary procedure that has to be employed.⁷⁴

When the court punishes *in facie curiae* contempt of court it has to respect the right of the accused to be heard, and this is the third mechanism that has been employed in South Africa to limit the summary contempt power of courts.⁷⁵ A court should afford a person an opportunity to explain or defend his or her conduct.⁷⁶

Therefore, it can be said that, in South African courts, the limitation of the right to a fair trial of the accused to punish *in facie curiae* contempt of court essentially involves a balancing of the impact of the limitation on persons' rights against the benefit sought to be achieved by the infringements.

As compared to South Africa, however, the current contempt power of courts in Ethiopia is not justifiable to limit the constitutional rights of the accused either under the constitution per se or

⁷¹ Ibid.

⁷² R v Lloyd H (1905) 22 SC 347.

⁷³ Supra note 70 at 87.

⁷⁴ For example, the main issue in the case of S v Samaria 2010 (1) SA 1760 and one of the reasons that caused setting the case aside was the fact that the learned magistrate failed to prove the commission of the crime beyond reasonable doubt.

⁷⁵ Supra note 75.

⁷⁶ Supra note 56 at 245.

in light of other international laws adopted by the country.⁷⁷ This is because, firstly, judges usually act as a witness, prosecutor and a judge on the crime of contempt *in facie curiae* including the act of contempt privately committed against a judge. In the case of *S v Asaye*,⁷⁸ for example, the alleged contentious act was a direct insult uttered to the judge while the latter pronounced a sentence on the accused. And it was this judge himself who used his summary contempt power to punish the accused being a witness, a prosecutor and a judge. The same is true if we look at other similar court decisions.⁷⁹ Thus, it is submitted that, in Ethiopia, there is no limitation on the summary contempt power of a judge. Secondly, acts that warrant the summary contempt power of courts are not proved beyond reasonable doubt and they are usually not adequate to disrepute justice. *R v Mohammed*⁸⁰ is a popular contempt case and pertinent in this regard. It was an appeal to the Federal High Court. The appellant was sentenced to one month imprisonment for contempt of court pursuant to Article 449(1) of the Criminal Code. In this case the lower court upheld the summary contempt conviction of an attorney whose non-verbal conduct was deemed to be a threat to the dignity of the court.

Mohammed who was an attorney and represented a defendant requested a court not to admit certain evidence alleging that it had no relation to the case at hand. The court denied the request and accepted the evidence. Mohammed, soon after the admission of the evidence by the court, smiled and rolled his head, and the court exercised its summary power against this non-verbal conduct of the appellant and convicted him thereof.

The appellate court, in dismissing the appeal, held that the trial court properly exercised its summary contempt power. In this case, it was a non-verbal emotional reaction that was deemed an adequate threat to justice and warranted a summary contempt conviction. In light of the South

⁷⁷ Article 13(2) of EFDR constitution states that the fundamental rights and freedoms specified in the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia. The constitution further provided that these international laws adopted by Ethiopia become the law of the land.

⁷⁸ *S v Asaye* (1994) ETH (FHC) (7360) case.

⁷⁹ For example, in the case of *R v Menbere* (2000) (FHC) (3445) it was a judge himself who used his summary contempt power to punish the accused being a witness, a prosecutor and a judge although the alleged contentious act was a direct insult uttered to the judge.

⁸⁰ *R v Mohammed* (1999) (FHC) (2641).

African court decisions discussed above, such summary power of the court is constitutionally infirm to warrant summary contempt power.⁸¹

Generally, compared to South Africa, in Ethiopia there is a potential abuse of the summary contempt power of courts in punishing contempt *in facie curiae*, and there is a need to impose limitations on the summary contempt power that are designed to minimize this abuse.

4.2. THE RIGHT TO FREEDOM OF EXPRESSION AND THE CRIME OF CONTEMPT OF COURT

Ex facie curiae contempt of court can consist of either scandalizing the court or unfairly prejudicing court proceedings.⁸² Both these variants of *ex facie curiae* contempt can restrict the constitutional right to freedom of expression.⁸³ The experience of South Africa and Ethiopia regarding the constitutionality of each of these will be considered in turn.

4.2.1. SCANDALIZING THE COURT

As it does in many other jurisdictions, the crime of scandalizing the court exists in South Africa and Ethiopia in much the same form. The primary purpose of the crime is to protect the integrity of the court.⁸⁴ However, in both South African and Ethiopian courts, the crime creates an inherent tension between two fundamental objectives. On the one hand, these jurisdictions hope to protect an individual's right to freedom of expression.⁸⁵ On the other hand, countries need to preserve the integrity of their judiciary. Thus, balancing these conflicting interests triggers the constitutionality issue.

Balancing the protection of the right to freedom of expression and protecting the administration of justice usually requires a two-step process: determining whether the alleged act falls within the scope of the crime of scandalizing the court or not, and balancing the act against the constitutional rights provided that it falls within the scope of the crime.⁸⁶ The first step is

⁸¹ For example, in the case of *S v Lavhengwa* it was recommended that it would be better for the court to take evasive action such as removing the accused from the court or an adjournment or requesting an apology from the accused than using the summary procedure when it faces acts which are minor.

⁸² *Supra* note 10.

⁸³ *Supra* note 10.

⁸⁴ *Supra* note 52.

⁸⁵ See Article 16 of 1996 South African Constitution and Article 29 of EFDR Constitution.

⁸⁶ *S v Chinamasa*, 2000 (12) BCLR 1294, 1304(ZS).

determining whether the act falls within the scope of the crime of scandalizing or not. Accordingly, if statements made on a matter of public interest are not malicious or do not compromise the judiciary's impartiality, they are outside the scope of the crime of scandalizing.⁸⁷ The other point which is equally important and hence, should have to be recognized to determine the scope of the crime is checking whether the utterance is directed towards the magistrate personally or not.⁸⁸ Because the crime is not meant to protect the private interest of individual judges, and to fall within the scope of the crime of scandalizing, the act should be committed against the court which exists for public good.⁸⁹

The second step is deciding whether punishing the alleged act (which falls within the scope of the crime of scandalizing) can be justified as seen against the individual's right to freedom of expression, on the one hand, and the need to protect judicial integrity, on the other. To properly balance these two interests, different jurisdictions use different standards. Those jurisdictions which attach more weight to the right to freedom of expression require the extremely high threshold to be satisfied that the crime of scandalizing the court is committed.⁹⁰ The United States and Canada, for example, utilize the "clear and present danger" test to punish an act as the crime of scandalizing the court.⁹¹ According to this standard, in order to accord the crime of scandalizing court with the constitutional right to freedom of expression, the alleged act of contempt must be shown as it causes a real, substantial and present or immediate danger to the administration of justice.⁹²

On the other hand, other jurisdiction adopted a lower standard in comparison to that of the United States. In the case of *Solicitor- General v. Radio Avon Ltd*,⁹³ for example, New Zealand adopted a "real risk" test rejecting the "clear and present danger" test of the United States.

Seen in light of the above discussions, to punish an act as scandalizing the court, South African courts have adopted this two-step enquiry approach in their different decisions. The case of *S v Mamabolo* is one such decision.⁹⁴

⁸⁷ Ibid.

⁸⁸ Supra note 13.

⁸⁹ *The King v Davies* 32, 40 (1960) (Eng).

⁹⁰ *R v Mohammed* (1999) (FHC) (2641).

⁹¹ Ibid.

⁹² Ibid.

⁹³ *Solicitor- General v Radio Avon Ltd* (1978) 1 NZ 225, 234(NZ).

The case of *S v Mamabolo* is a seminal South African constitutional decision under which the court analyzed the constitutionality of the crime of scandalizing courts. Mr. Russel Mamabolo was an official of the Department of Correctional Service in South Africa and he appealed to the Constitutional Court of South Africa against his conviction for contempt of court resulting from the publication criticising the court order. The principal issue on appeal was whether the law relating to scandalizing the court unjustifiably limited the right to freedom of expression of citizens.

In the noted case, the South African constitutional court, after establishing the general nature and purpose of the crime, focused on determining the scope of the crime. In doing so, the court argued that the alleged crime of scandalising should be public injury.⁹⁵ Hence, in South Africa, the crime is not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalising the court. In determining the scope of the crime, the court further focused on determining what type of speech or criticism should be protected. The court held that “*no wrong is committed by any member of the public who exercises the ordinary right of criticism in good faith in private or public the public act done in the seat of justice*”⁹⁶ Therefore, if an individual exercised her/his constitutional right to free speech in criticising the judiciary in good faith, the crime of scandalizing the court would not have occurred.

The court also employed the second step enquiry to determine the justifiability of the crime under question. In doing so, it rejected the “clear and present danger” test of the United States arguing that the United States, unlike South Africa, attaches more weight to the right to freedom of expression.⁹⁷ The proper standard for the court was whether the alleged act likely damages the administration of justice.⁹⁸ Hence, under this approach of the court any conduct that is likely to do damage to the administration of justice can be punished as an act of scandalizing the court. In different South African court decisions, the same standard has been followed.⁹⁹

⁹⁴ Supra note 13 at 463.

⁹⁵ Supra note 13 at 463.

⁹⁶ *Id* 464.

⁹⁷ *Id* 469-470.

⁹⁸ *Id* 470.

⁹⁹ For example, the court holds the same position in *S v L Samaria* 2010 (1) SA 1760 case.

However, some magistrates do not agree with this standard alleging that it will not meet the constitutional requirement of limiting the right to expression. In the case of *S v Mamabolo*, for example, Judge Sachs did not agree with the decision of the court. He argued that the constitutional standard of reasonableness and justifiability is met only when the alleged conduct causes a real and direct threat/risk to the administration of justice before it is categorized under the crime of scandalizing the court.¹⁰⁰

It is submitted that the standard adopted by the court does not comply with the limitation clause of the Constitution. It would have to balance the right to freedom of expression of citizens against the requirements provided in the limitation clause of the Constitution. As per this section, while limiting constitutional rights, the nature of the right, the importance of the purpose of the limitation, and the nature and extent of the limitation has to be considered. Accordingly, even though the right to expression should not hold the highest rank over all other rights in South Africa, it is a determinant right to promote democracy than any other rights.¹⁰¹ In addition, the limitation of the right to expression, for that matter the limitation of any Bill of Rights, has to be only to the extent it is reasonable and justifiable. And the “likely to cause damage” test employed by South African court in the above case is so broad. Hence, it cannot be reasonable and justifiable to limit the right to expression as such limitation can deter a fair criticism of the judiciary. This in turn, inter alia, adversely affects the right to freedom of expression of the citizens.¹⁰² Therefore, it is submitted that even though South African courts have been employing the two-step enquiry approach to limit the right to freedom of expression, seen with the limitations clause, the standard adopted by courts to balance an individual’s right to freedom of expression and the need to protect judicial integrity is not justifiable.

On the other hand, in comparison to South Africa, Ethiopian courts do not follow the above two-step enquiry approach properly, and this in turn becomes one of the reasons for most court decisions to be constitutionally unjustified. For example, courts do not determine the scope of the crime of scandalizing before punishing the act i.e. they do not check whether the alleged act can fall within the scope of the crime of scandalizing or not and a mere criticism of the judiciary is enough for punishment. The decision of the court on the Reporter newspaper case is pertinent

¹⁰⁰ Supra note 15 at 482.

¹⁰¹ *S v Mamabolo: Post trial speech in post-apartheid South Africa* 460-470.

¹⁰² *Id* 449.

in this regard.¹⁰³ The Reporter newspaper whose editor-in-chief was Assefa Abraha was published with the headline “Judges Wrangle on the bench” on December 5, 2008. The article described the disagreement of two judges on the bench in such a manner that observers could logically deduce that one judge in particular was unhappy with the proposed ruling of one of his colleagues.

The court, in convicting the editor-in-chief, held that he knowingly publicized a false report that casts aspersion upon the court’s honor and disturbs the court in the discharge of its duties, and hence, committed an act that makes him guilty of contempt of court. The court, however, failed to determine whether the alleged act can fall within the scope of the crime of scandalizing the court or not: it convicted the accused without proving the malicious behavior of same.

However, similar to the experience of South Africa, different court decisions indicate that our courts have adopted the second step enquiry discussed above to punish contempt *in facie curiae* i.e. balancing the constitutional guarantee of freedom of expression and the need to protect judicial integrity. But the standards used by courts to balance these conflicting interests are not uniform: while some courts use a lenient standard/test to balance these interests, others require a high threshold in order to accord the crime of scandalizing the court. For example, the court adopted a lenient standard in deciding the Reporter newspaper case above. Limiting this right has always been balanced against the legitimate benefit that sought to be gained by the infringement.¹⁰⁴ Punishing such act as the crime of scandalizing the court will be less favorable since it is believed that the damage it causes far exceeds its benefits: punishing such simple act as a crime of contempt of court will result in a chilling effect on individuals i.e. a fear of prosecution may cause citizens to abstain from any kind of criticizing the courts.

In deciding the case of Girma Waggira v Federal High Court, on the other hand, the Ethiopian Federal Supreme Court employed the “clear and present danger” test.¹⁰⁵ It was an appeal case from the Federal High Court. The court convicted the special prosecutor and sentenced him to one month imprisonment for contempt of court pursuant to article 443 of the former penal code.

¹⁰³ Federal Anti-Corruption v Assefa Abraha, (2008) (FSC) (7366).

¹⁰⁴ Supra note 96.

¹⁰⁵ R v Public Prosecutor 1992 (FSC) (630).

In giving its judgment, the court first held that the fundamental rights and freedoms specified in the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia as per article 13 of EFDR constitution. Accordingly, the court argued that limiting the right to freedom of expression should be seen in light of this article of the constitution. Having established the nature and purpose of the right to freedom of expression, the court turned its focus to the merits of the case. It argued that unless the fact that justice has been brought into disrepute results in a clear and imminent or present danger to the fair and effective administration of justice, the limitation of the right to freedom of expression by creating or maintaining such crime will not be justified. Then the court, acquitting the accused, concluded that the alleged act of the defendant in the case at hand did not fulfill this standard.

It is submitted that the standard that is followed by the court in this latter case is constitutional. But it is not uniformly applied in our courts, and different court decisions indicate that, in the majority of cases, the “likely to cause damage” test is employed by our courts.¹⁰⁶ This is because, inter alia, in EFDR constitution, unlike that of South Africa, there is no requirement that courts should uniformly consider when the need to limit constitutional rights arises.

In general, however, the limitation of the right to freedom of expression in punishing the crime of scandalizing is not constitutionally justifiable in Ethiopian courts.

4.2.2. THE *SUB JUDICE* RULE

This branch of *ex facie curiae* contempt of court involves publication or any communication concerning the case which is still ongoing in such a manner that it can unduly influence the court.¹⁰⁷ The main rationale of the rule is that prejudicial publicity may impact on the litigants’ case primarily by influencing the judge or jury presiding over the case.¹⁰⁸ This rationale is stronger when the decision- makers are juries and not judges mainly because the latter will not be easily influenced by such publicity.¹⁰⁹

¹⁰⁶ Supra note 57 at 137

¹⁰⁷ Fenwick and Phillipson *Media Freedom Under the Human Right Act* 247.

¹⁰⁸ Ibid.

¹⁰⁹ *Banana v Attorney General* 1991 (1) BCLR 27, 36 (ZS).

The *sub judice* rule, in preventing prejudice on pending cases, requires the court to balance the right to freedom of expression with the constitutional right to a fair trial of the accused. These rights are recognized under both the South African and Ethiopian Constitutions. Similar to the crime of scandalizing the court, however, different jurisdictions use different standards to balance these rights. The standards that South African and Ethiopian courts have been employing to balance these rights in preventing prejudice on the pending case through publication is also not the same. The experience of these jurisdictions regarding the constitutionality of these standards will be considered in turn.

As some former South African decisions indicate, courts had been applying a lenient standard/test to limit the right to freedom of expression of the accused. However, a few recent decisions indicate that South African courts employ the standard that most common law countries like England and Canada have been applying to limit this constitutional right of the accused. The seminal case in this regard is *Midi television Ltd/e-TV v Director of Public Prosecution*.¹¹⁰ In this case, e-TV wished to broadcast a documentary concerning a pending case. The documentary included the interview conducted with individuals who were the witness of the state in the alleged case. The High court interdicted the publicity on the ground that it would prejudice the trial. Later e-TV appealed to the Supreme Court and Nugent JA, nullifying the interdict, summarized his idea as follow:

“In summary, a publication will be lawful, and then susceptible to be prohibited, only if the prejudice that the publication might cause to the administration of justice is substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that the prejudice might occur is not enough. Even then publication will not be unlawful unless a court is satisfied that the advantage of curtailing the free flow of information is far better than its disadvantage. In making that evaluation it is not only the interest of those who are associated with the publication that need to be brought to account but, more important, the interest of every person in having access to information. If a risk of that kind is clearly established and if it cannot be prevented by using other means, a ban of publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.”¹¹¹

¹¹⁰ *Midi television Ltd/e-TV v Director of Public prosecution* 2007 (5) SA 540 (SCA).

¹¹¹ *Ibid.*

This approach of courts proposes that the publication must present a substantial risk so that the prejudice to the litigation is serious in order to be contemptuous. Therefore, it is submitted that, in South Africa, to ban publication on a pending case, the risk must be a practical risk and it shall seriously impede or prejudice the course of justice in the judicial proceedings.

In comparison to the recent developments of South African law, Ethiopian courts apply a lenient test to prevent prejudice on the pending case i.e. in Ethiopian courts it is not necessary to show that the words used in the publication have actually influenced the administration of justice; it is enough if it tends to influence the administration of justice.¹¹² Courts usually follow the requirement that if an act of publication on a pending case tends to prejudice or interfere with the administration of justice, it is reasonable and justifiable to limit the right to freedom of expression. Hence, to apply this test, the question to be answered by the court is whether the fact set out in the publication could influence the proceeding before the tribunal if it was to be accepted by it.¹¹³ In the Reporter Newspaper Case,¹¹⁴ for example, the Federal Supreme Court confirmed that the crime of contempt is committed when the words in the publication would likely influence the judge's mind. Similarly, the *sub judice* rule, as recently formulated in an Ethiopian leading case, *S v Addis Lisan Newspaper's case*,¹¹⁵ constitutes the crime of contempt if the statement or the document tends to influence the administration of justice. The court, in convicting the editor-in-chief, held that the publication tends to prejudice or interfere with the administration of justice on a pending proceeding and it failed to establish beyond reasonable doubt that the article actually influenced the judicial proceeding as the "substantial risk" test requires.

Therefore, it can be concluded that, in light of the current standard that has been used by South African courts in relation to the *sub judice* rule, Ethiopian courts employ a lenient standard to limit the constitutional guarantee of freedom of expression of the accused and thereby to avoid the adverse effect of publications on pending cases. It is submitted that such limitation is not a justifiable limitation in a democratic society.

¹¹² Yasin *Summary Power of Ethiopian Courts* 56.

¹¹³ *S v Harber and another* 1988 (3) SA 396,490 (A) 420.

¹¹⁴ *S v Assefa Abraha* (1964) ETH (FSC) (7366).

¹¹⁵ *S v Mulu Hunachew* (1994) ETH (MC) 91.

CONCLUSIONS

South Africa and Ethiopia accepted the crime of contempt of court in their legal systems and this is evident from their various court decisions and statutes. Under both jurisdictions, the objective of punishing the crime is to maintain due respect to courts which are ordained to administer justice and to protect them from unnecessary interruptions of their activities. The procedure that the court follows to punish the crime under both jurisdictions is also similar: while the summary procedure is used to punish *in facie curiae* contempt of court, courts are not empowered to apply the summary procedure to punish contempt *ex facie curiae*.

Unless all necessary care is taken punishing the crime of contempt or the procedure followed to punish the crime can adversely affect the constitutional rights of the accused. The summary procedure used to punish *in facie curiae* contempt of court can limit the accused's right to a fair trial. At the same time the citizen's right to freedom of expression can be limited in punishing the crime of *ex facie curiae* contempt of court. However, this does not mean that the constitutional rights of the accused/citizens should not be limited. Rather the point is that before limiting the rights of the citizen it is necessary to test how and when such limitations can be justified.

Section 36 of the South African Constitution clearly stated the conditions under which the Bill of Rights can be limited. The application of this limitation clause essentially involves a balancing of the impact of the limitation on persons' rights against the benefit sought to be achieved by the infringements. Accordingly, the experiences of South Africa indicate that the summary contempt power of courts is limited to punish contempt *in facie curiae* so that the use of the procedure can be justified under this section of the Constitution. Under this jurisdiction, courts shall have to consider different factors before they exercise this summary contempt power. A judge exercises the summary contempt power only when it is **absolutely** necessary to maintain the order or dignity of the court. To determine the absolute necessity of using the power, courts have to consider different factors. First, it should examine the gravity of the conduct i.e. if the act is not important or something minor, the magistrate has to take other actions such as the removal of the accused from the court or an adjournment or requesting an apology from the accused instead of using the summary power. Secondly, provided that the gravity of the alleged act warrants the use of the summary contempt power, the court must determine whether the record adequately reflects the contempt. Thus, in South Africa, for a judge to be justified in using the summary contempt

power in punishing *in facie curiae* contempt, not only the gravity of the alleged act of contempt must warrant the summary power but also the commission of the crime has to be proved beyond reasonable doubt. Once the court decides to exercise the summary power, it should offer the parties a chance to explain or retreat and defuse the situation. Accordingly, different decisions of South Africa indicate that courts follow the above mentioned steps and this caused the use of the summary power to punish contempt *in facie curiae* justifiable.

On the other hand, the position of judges regarding summary power of courts to punish *in facie curiae* contempt of court and the extent of this limitation is not yet clear in Ethiopian courts. Different decisions on contempt *in facie curiae* envisage that the current contempt power of courts to limit the constitutional rights of the accused is not justifiable either under the constitution per se or international laws adopted by Ethiopia. Firstly, this is because judges usually act as a witness, prosecutor and a judge on the crime of contempt *in facie curiae* including the act of contempt privately committed against a judge. Secondly, acts that warrant the summary contempt power of courts are not proved beyond reasonable doubt and they are usually not adequate to disrepute justice.

The constitutionality of the crime of contempt of court is not limited to the above mentioned point: *ex facie curiae* contempt of court also has the effect of limiting other constitutional rights. The crime of scandalizing the court and unfairly prejudicing court proceeding are the two types of *ex facie curiae* contempt of court that have an impact on the right to freedom of expression of the accused.

In South African law, to constitute the crime of scandalizing the court, statements made on a matter of public interest must be malicious or should compromise the judiciary's impartiality. In addition, the utterance made should not be against the individual judge privately as the crime is not meant to protect the private interest of individual judges. Once these two requirements are fulfilled, whether punishing the alleged act is justifiable or not will be determined balancing the need of protecting the individual's right to freedom of expression against the need of protecting judicial integrity. Different jurisdictions use different standards to balance these conflicting interests. South African courts are not in agreement as to which standard shall be applied i.e. when some judges support the use of the "likely to cause damage" test rejecting the "clear and

present danger” test, others argue that the “likely to cause damage” test is a lenient test and cannot justify the limitation of the constitutional rights to freedom of expression.

On the other hand, in Ethiopia, the limitation of the right to freedom of expression of individuals to punish the crime of scandalizing the court is not constitutionally justifiable. Unlike the South African practice, Ethiopian courts do not test whether the alleged act by itself can be considered as the crime of scandalizing or not i.e. the mere comments made on the judiciaries can constitute the crime of scandalizing the court. Further, even though our courts usually balance the right to freedom of expression and the need to protect judicial integrity before punishing the act, the standard adopted to limit the right to freedom of expression is not clear: some courts use a lenient standard/test while others use the “clear and present danger” test of the United States. But in the majority of cases the “likely to cause damage” test received recognition. This is, inter alia, the result of the absence of a constitutional right limitation clause in the constitution i.e. there is no parameter in the constitution against which the court tests the justifiability of the limitation while deciding such cases using the summary procedure.

Finally, in relation to the *sub judice* rule, South African practice and the recent court decisions in particular show that the publication has to cause a substantial risk on the impartiality of the judge so that limiting the right to freedom of expression can be justified. It can be said that the South African standard is more acceptable as compared to the current practice in Ethiopia: to punish an act of publication on a pending case, Ethiopian courts consider whether publication on the pending case would likely influence the judge’s mind.

In general, it can be said that, in South African courts, the limitation of the accused’s right to a fair trial in punishing *in facie curiae* contempt of court essentially involves a balancing of the impact of the limitation on a persons’ rights against the benefit sought to be achieved by the infringements. As compared to South Africa, however, it is submitted that the current contempt power of courts to punish *in facie curiae* contempt of court in Ethiopia is not justifiable mainly because courts have overlooked the adverse effect of the procedure on an accused’s right to a fair trial and most importantly, the act that warrants the summary contempt power of court is usually not adequate to disrepute justice under this jurisdiction. On the other hand, the standards used by both jurisdictions to limit the accused’s constitutional right to freedom of expression in punishing *ex facie curiae* contempt of court particularly to punish the crime of scandalizing the

court are not uniform. However, as compared to Ethiopia, it is submitted that the standards used by South African courts to balance the constitutional guarantee of freedom of expression and the need to protect judicial integrity is justifiable: in the majority of cases Ethiopian courts employ a lenient standard to balance these interests.

Accordingly, on the basis of the conclusions above, the writer recommends the following:

- ❖ The summary contempt power of courts to punish *in facie curiae* contempt is not justifiable in Ethiopia. Hence, a mechanism to limit the summary contempt power of judges should be designed and implemented to minimize the abuse. In this regard the current South African experience is the best mechanism to be adopted to control the summary contempt power of Ethiopian judges i.e. for a judge to be justified in using the summary contempt power in punishing *in facie curiae* contempt, the gravity of the alleged act of contempt must first warrant the summary power and the commission of the crime has to be proved beyond reasonable doubt. In addition, once the court has decided to exercise the summary contempt power, it should offer the party a chance to explain or retreat and defuse the situation.
- ❖ Most South African judges support the use of the “likely to cause damage” test to balance the individual’s right to freedom of expression and the need to protect judicial integrity in punishing the crime of scandalizing. But the standard cannot justify the constitutional limitation in a democratic society; courts shall employ the “clear and present danger” test.
- ❖ In Ethiopia, the limitation of the right to freedom of expression of individuals to punish the crime of *ex facie curiae* contempt of court is not constitutionally justifiable. This is because, inter alia, there is no parameter in EFDR constitution against which the limitation can be tested. However, even in the absence of such clause, courts would not have to apply the current standard. Hence, first, the parameters against which the court can test the justifiability of the limitation shall be included in the EFDR constitution. But until the amendment of the constitution, courts shall refer a case requiring constitutional interpretation (like a contempt case) to the body having a legal mandate to interpret the document rather than interpreting same by themselves and apply the current “likely to cause damage” test. Secondly, the body having a legal mandate to interpret the constitution (The House of Federation) shall adopt the “clear and present danger” test to make the limitation justifiable.