OF LOWER COURTS & SUPERIOR COURTS: GUARDING THE ADMINISTRATION OF JUSTICE AGAINST CONTEMPT. A BEFITTING BURIAL TO *REPUBLIC V DISTRICT COURT GRADE I, DUNKWA-ON-OFFIN; EX PARTE OWUSU*

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ABSTRACT

"An inferior court which attempts to punish a contempt committed out of court is clearly a usurper trying to clothe itself with a jurisdiction its very nature or origin denies it; or is assuming an authority its very constitution bereft it of" – so says Kpegah J (as he then was) in Republic v District Court Grade I, Dunkwa-On-Offin; Ex Parte Owusu. The case draws a stark line between contempt of court which takes place in the face of the court known as contempt in facie curiae and contempt which takes place outside the court known as ex facie curiae. According to the holding, lower courts can only punish the former as an inherent right but the latter is only inherent in superior courts. The author traces the underlying reasons for the regime of contempt of court in a bid to assess Kpegah J's holding. The literature and judicial development in other Common Law territories reveal that the respected judge was behind his time by some one hundred years. The present writer thus urges the Legislature to atone for the wrong done to lower courts by conferring this all-important power on them.

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INTRODUCTION

Brethren, with little or perhaps no dispute, the administration of justice would ground to a halt should parties and counsel be at liberty to decide whether or not to obey the orders of the courts before whom they appear. Likewise, the courtrooms will no doubt be no different from the marketplace or worse, a noisy fighting arena, if judges had no powers to enforce quiet and order in their courts. This is the bedrock on which the law of contempt of court rests.[2] Resultantly, the Common Law has always held the position that the power to commit a person for direct contempt of court was inherent in the tribunals. They did not need an external authority to confer that power on them.[3] The essence of this power is captured in the dictum of Akufo-Addo CJ in ***Republic v Liberty Press Ltd and Others***[4] where the learned judge says:

> The courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason, any conduct that tends to bring the authority and the administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the courts **but against the entire community which the courts serve.** Such conduct constitutes the offence of contempt of court…[5] (Emphasis mine).

The need to uphold the above-mentioned respect for the courts is so crucial and time is of the essence in restoring the dignity of any court whose authority has been smeared by a recalcitrant. This authority is exercised through the court's powers to punish for contempt or to allow the contemnor to purge himself of the said contempt. In ***Republic v Mensa-Bonsu,***[6] Bamford Addo JSC underscored the need to waste no time

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2 See: dictum of Bamford Addo JSC in *Republic v Mensa-Bonsu [1995-96] 1 GLR 377: the purpose of contempt is not to vindicate any particular judge but to protect the whole system of administration of justice.*

3 Per Kweku T. Ackaah-Boafo: Contempt of court is part of a court's inherent jurisdiction and, as it is not precisely prescribed or enacted... See: The Republic v Francis L.A. Brown and Francis Kpakpo Brown Ex Parte: Victor Aggoe Briandt. - Suit No. CR/517/2018

4 [1968] GLR 123 at page 135

5 Ibid

6 [1995-96] 1 GLR 377

in asserting the court as a citadel of respect among the community which it serves.

Per Bamford Addo:

> The public must have confidence in the law and the courts and any attempt by anyone to erode such confidence must be viewed very seriously **and must be punished swiftly to restore the integrity of the court which administer the law.**[7] (Emphasis mine)

Despite the provisions mentioned above, (i.e.) the communion between the courts and the communities they serve as well as the need for *swift* restatement of the court's integrity as an enforcer of law and justice, the prevailing position of the law is that the closest courts to the people, the District Courts and Circuit Courts lack the capacity to enforce the orders they give to litigants who appear before them; the prevailing authorities also shun the ability of these courts to punish any slander committed against them, in so far as such slander was committed outside of the court. The excuse for this is that these are lower courts and they wield no powers except those that are expressly given them by statute unlike the superior courts of judicature which wield all powers except those expressly taken away by statute.[8]

It is the submission of the present writer that this distinction between superior courts of judicature and lower courts in relation to the powers to punish for contempt of court has become obsolete and is an anachronism serving no useful purpose to the administration of justice and the need to keep the said process of justice delivery sacred as espoused by Akufo-Addo CJ in the Liberty Press case. To discharge the burden of proving this assertion, this paper examines the scope and nature on contempt of court as applied by the Ghanaian judiciary. Next, the paper discusses the relevance of the two types of contempt—civil and criminal and whether the said distinction is relevant to the current trends. The essay also looks into detail why the courts punish the identified types of contempt and who may institute such contempt proceedings and the courts with the power to entertain the procedure. This part challenges the present law which denies lower courts the power to punish contempt committed outside of court, taking into account the overriding importance of the law itself and draws comparisons from other jurisdictions and how they have developed the law through legislation. Based on the discussed inferences, this paper

7 Republic v Mensa-Bonsu [1995-96] 1 GLR 377

8 Re: A County Court Judge; Ex Parte Jolliffe (1873) 28 LT 132.

proposes the best means of consolidating the law on contempt of court in Ghana, having regard to the desires of the Ghanaian people to enact laws which ensure justice, probity and accountability.[9]

THE NATURE OF CONTEMPT OF COURT AND ITS TYPES

The fundamental principle of criminal law is captured in the Latin maxim *nullum crimen, nulla poena sine lege praevia lege poenali,* meaning simply: *no punishment without law.* In the Constitution 1992, the principle is reflected in Article 19 (5) and 19 (11). Which provide that:

> (5) A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.
>
> (11) No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law

Like most legal concepts, the principle of legality stated above is not without exception and the surviving lone wolf which defies the bar against common law offences in Ghana's criminal jurisprudence is contempt of court.

The power to punish contempt of court is thus, a power possessed by the courts by their very existence. And for superior courts, the laws on any sort of contempt need not be written anywhere for the courts to apply them. Coussey JA in the West African Court of Appeal case of ***Timitimi v Amabebe***[10] described the nature of these powers saying:

> Want of jurisdiction is not to be presumed as to a court of superior jurisdiction; nothing is out of its jurisdiction but that which specially appears to be so.[11]

The term itself, due to its undefined nature, suffers a widely accepted definition. Many conducts can constitute contempt. To streamline the exercise of that power, many jurisdictions have legislated to put some semblance of definition on the regime. In Ghana however, the courts still wield absolute discretion on what sort of conduct constitutes contempt. It ranges from disobeying an order of the court, insulting an officer of the court—especially a judge, engaging in riotous or otherwise unruly behavior

9 See: The Preamble to the 1992 Constitution of Ghana

10 (1953) 14 WACA 374 at 376

11 Ibid

in the courtroom in a manner as to disrupt proceedings or maligning the court in the media. In all circumstances, the guiding principle is that the contemnor intends to undermine the justice administration process. The power is not to be exercised as a judge's personal score with someone who undermines him personally. Perhaps the most cogent definition of contempt of court is found in the opinion of Acquah JSC in *In Re: Effiduase Stool Affairs (No.2); Ex Parte Ameyaw II*[12] where the respected Justice of the Supreme Court says:

> In brief, contempt is constituted by any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.

In the Merriam-Webster's Dictionary of Law, contempt of court is defined as follows:

> Wilful disobedience or open disrespect of the orders, authority, or dignity of a court or a Judge acting in a judicial capacity by disruptive language or conduct or by failure to obey the court's orders.

In his book Contempt of Court (2nd Ed.) (1895) at page 6, Oswald states as follows:

> Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

Justice Acquah's and these other definitions lend credence to the discussion thus far on the nature on contempt. The next issue to consider is its classification by the Courts into criminal and civil contempt. The relevance or otherwise of this classification will soon be brought to fore.

CIVIL CONTEMPT

Civil contempt interferes with a party's right to enjoy their victory in court. This happens when a party to a litigation refuses or neglects to follow or obey the orders made by the court. The affected party must draw the attention of the court to arrest and deal with the said contempt. The elements of civil contempt, thus constitute:

12 (1998-99) SCGLR 639

a. The existence of a judgment or order made by the court
b. The order directs a party to do an act or refrain from doing an act
c. The order must be specific as to show exactly what the party is to do or refrain from doing
d. A failure to comply by the affected party
e. It must be shown that the failure was willful[13]

CRIMINAL CONTEMPT

On the other hand, criminal contempt relates to scandalizing the court. It is a direct affront to the power of the court in a manner calculated to thwart the course of justice. **See:** ***Ackah v Acheampong & Another.***[14] In the cited case, Atuguba JSC described the entire contempt regime as quasi-criminal and indeed, since its application by the Common Law courts to present day, it is evident that the judiciary never intended to pat a contemnor on the back and simply say "*you may go*" after slapping them with some amount to pay as would be done in an entirely civil matter. The punishment of contempt is severe. In Ghana, the punishment may carry a fine or imprisonment or both.[15] The punishment for the two identified types of contempt diminishes their classification and in fact, in ***Home Office v Harman,***[16] Lord Scarman pointed out 'the distinction between the two may have less relevance today.'[17]

The story is no different elsewhere as seen in the opinion of USA writers JUSTIA who state while writing on the topic that:

> In *Shillitani v United States*[18] defendants were sentenced by their respective District Courts to two years imprisonment for contempt of court, but the sentences contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing

13 See: The Republic v Roger Edward Gillman and Another Suit No. CR 250/2017
14 [2005-2006] SCGLR 1
15 The Republic v The Acting Chief Labour Officer, Ex Parte Blue Skies Staff Association Suit No. INDLM/7/2010
16 [1983] 1 AC 280, p. 310
17 Elikplim Agbemava v Attorney-General Consolidated Writ Nos. J1/20/2016J1/21/2016J1/23/2016
18 384 U.S. 364 (1966)

> sentence. Here, the purpose was to obtain answers to the questions for the grand jury, and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence.[19]

This latter power, to enforce criminal contempt, the US courts have held, includes the power to nominate or to appoint special counsel who would prosecute the said criminal contempt.[20]

Although authorities such as ***O'shea v O'shea***[21] firmly insist on the classification of contempt into civil and criminal, due to the former not being a crime or offence but the latter being an offence or crime, the present writer aligns with the more contemporary thinkers; asserting that the difference between the two serves nothing more than mere cosmetic effect. Afreh JA, one of the torchbearers for this position states in ***Republic v The Governor, Bank of Ghana and Others; Ex Parte Gavor***[22] thus:

> The difference between civil and criminal contempt should not be exaggerated. A contempt of court is an act or omission calculated to interfere with the due administration of justice. Since the case of Attorney-General v Newspaper Publishing Plc. [1987] 3 All ER 276, CA the widespread acceptance of classification of contempt as being either civil or criminal has become less important. As Sir John Donaldson MR said: Despite its protean nature, contempt has been classified under two heads, namely 'civil contempt' and 'criminal contempt'. Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely

19 JUSTITIA, 'The Contempt Power' https://law.justia.com/constitution/us/article-3/11-the-contempt-power.html Accessed on 20th July 2024

20 Young v. United States ex rel. Vuitton, 481 U.S. 787, 793–801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801–802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802–08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. See also United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of certiorari after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. See 28 U.S.C. § 518.

21 [1890] 15 PD 59

22 [2001-2002] 1 GLR 112

> the criminal standard, and there are now common rights of appeal[23].

CONTEMPT IN FACIE CURIAE VERSUS EX FACIE CURIAE – WHY THE DISTINCTION?

Perhaps, the most prevailing distinction in the law of contempt in Ghana is contempt *in facie curiae* and contempt *ex facie curiae*. The former refers to an attack on the authority of the court in the face of the court as discussed while the latter refers to what happens outside. This distinction is still relevant to Ghana as it regulates which court can entertain the proceedings for contempt notwithstanding the court which suffers the attack.

Kpegah J *(as he then was)* in ***Republic v District Court Grade I, Dunkwa-On-Offin; Ex Parte Owusu***[24] passed probably the most damning sentence on the power of lower courts to guard against contempt against themselves. The facts of the case are that:

> The applicant was alleged to have violated an order embodied in a judgment of the District Court in a land case which was before the said court. The adversary of the applicant then brought a motion in the District Court seeking to have the applicant committed for contempt of the District Court in not obeying its express, orders. The magistrate demonstrated a determination to proceed with his investigations into the allegations of contempt. The applicant, therefore, brought an application for an order of prohibition against the said court on grounds of lack of jurisdiction.

After narrating the holding in some long abandoned English cases,[25] Kpegah restrained the District Court from proceeding to hear the contempt case.

The ratio decidendi probably influenced then drafters of the Constitution 1992. In Ex Parte Owusu, Kpegah posits:

> When, therefore, it comes to the consideration of contempt proceedings in the inferior courts,

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23 Ibid

24 [1991] 1 GLR 136

25 The Ex Parte Owusu case came before Kpegah J at the High Court in 1988 by which time legislation in England and elsewhere had been passed to confer the power of contempt on lower courts.

> a distinction must be made between contempts committed in the face of the court during proceedings, and contempt committed outside court. **For the power to commit for contempt committed outside the court never belonged to inferior courts** and they can only seek protection from the superior courts in such cases. An inferior court which attempts to punish a contempt committed out of court is clearly a usurper trying to clothe itself with a jurisdiction its very nature or origin denies it; or is assuming an authority its very constitution bereft it off. It is inferior precisely because it has no more jurisdiction than is expressly granted it. (Emphasis mine).[26]

Essentially, the holding in ***Ex Parte Owusu*** was dead at birth as would soon be seen.

Be that as it may, Constitution 1992 will later go on to endorse the capacity of the superior courts to punish contempt against them[27] but go silent on contempt against lower courts which by name, (i.e.) *lower courts*, may mislead one into undermining their role but who in fact and by statute are fully fledged courts of competent jurisdiction only bereft of powers which have not been conferred on it by the statutes creating them, a power of creation given by the Constitution itself.

In order to guard against contempt *ex facie curiae* against lower courts, Kpegah J *(as he then was)* says the lower courts should seek the protection of superior courts of judicature but the respected judge neglects to mention how the said protection of the superior courts is to be sought. The Constitution 1992 while saving the powers of the courts to punish for contempt, follows suit in restricting same to superior courts as mentioned above. How then should the administration of justice be kept sacrosanct and be revered by litigants and the public at large when dealing with the so-called inferior courts? As is usually the case, when municipal law is lacking in a certain respect among Common Law countries, the safety net is to look at what goes on in other Common Law territories.

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26 Ibid

27 Clause (11) of this article shall not prevent a Superior court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed. AND The Superior Courts shall be superior courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this Constitution. See: Article 19 (12) AND Article 126 (2) of the 1992 Constitution. The provisions are repeated in the Court Act, 1993 (Act 459) at Section 36.

'PRACTICE DIRECTION' FROM THE CANADIAN JUDICIAL COUNCIL

The Canadian law on contempt of court, deriving its roots from England, just as Ghana, is not entirely different from the provisions in Ghana— which require that for the lower courts to enforce contempt *ex facie curiae,* they must seek the protection of the superior courts. In a *'practice direction'* from the Canadian Judicial Council in 2001 lower courts are to register their decisions with the superior courts of judicature in order to have them protected from being contemptuously disregarded. These superior courts with whom these decisions are registered will then wield the power to punish those who deliberately flout them, committing the offence of contempt *ex facie curiae.*

The guideline goes on:

> In United Nurses of Alberta v. Alberta (Attorney General), it was decided by the Supreme Court of Canada that such enforcement was constitutional and permissible under Canadian law. Of particular note in this decision is the finding that this sort of enforcement does not constitute the exercise by a provincial tribunal of powers only exercisable by a Section 96 court. In enforcing the order of the inferior tribunal, the superior court is exercising powers within its own jurisdiction. Furthermore, the provincial legislation that provides for the registration of the order with the superior court does not invade the exclusive federal jurisdiction over criminal law – such legislation engages but does not create criminal law.[28]

The Canadian law further echoes what Kpegah says in ex parte Owusu:

> In C.B.C. et al. v Cordeau et al. it was decided that inferior tribunals do not have jurisdiction to punish contempt not in the face of the court. Beetz, J., speaking for the majority, said: Accordingly, I think it is fair to conclude that the Anglo-Canadian authorities on the power to punish for contempt committed ex facie curiae have been firmly established for more than two hundred years. According to these authorities, **this power**

28 Some Guidelines On The Use Of Contempt Powers - Page 21

> **is enjoyed exclusively by the superior courts.**
> (Emphasis mine)

How does such a cumbersome system provide for ***"swift"*** dropping of the axe on persons who undermine the orders made by these lower courts? The present writer queries.

To reiterate the underlying reasons for the law on contempt and its overriding importance as a mechanism for justice delivery and protecting the justice system, the dictum of Justice Wilmot in ***Rex v Almon***[29] is of the essence:

> And whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and…calls out for a more **rapid and immediate** redress than any obstruction whatsoever, not for the sake of the Judges as private individuals but because they are the channels by which the King's justice is conveyed to the people. (Emphasis mine).[30]

This writer submits that the distinction between the superior courts and the lower courts vis-à-vis the power to commit contemnors to punishment be it *ex facie curiae* or *in facie curiae* be washed away. In pre 20th Century England when these rules developed, the county courts were made subordinate to the crown courts because the latter more represented the authority of the King and contempt of the King's Court was disdain to the monarch himself. The powers to punish such disdain were thus bestowed on the King through his court which had more experienced practitioners.[31] Of what use does this distinction do to us today? Our courts are all creatures of enactment—be it the Constitution or Acts of Parliament, they all represent the power of the state and thus require the attendant power to enforce such representation. Unlike the earlier times in England and Ghana where the lower courts were manned by non-legal practitioners which created fear of abuse—justifying the restriction of their powers of contempt, Ghana, like England, now has lawyers with a number of years under their belt at the Bar presiding over these courts.[32] The beleaguered holding on to an outmoded reasoning that some courts can enforce an insult unto themselves and some cannot is therefore a travesty of the spirit

29 (1965) Wilm 243

30 Law Commission of India, 274th Report, Review of the Contempt of Courts Act, 1971, April 2018

31 Rahul Agarwal, 'Contempt of Court viz-a-viz Restriction on Freedom of Speech and Expression - A Critical Analysis' (2021) 9

32 See: The Courts (Amendment) Act, 2004 (Act 674),Section 46

of justice which binds the entire judicial and justice administrative system.

Interestingly, my position is not a novelty. The decision of the Federal Court of Appeal in Chrysler *Canada Ltd. v Canada (Competition Tribunal)*[33] suggests that legislation can confer upon a tribunal the power to punish for contempt committed ex facie. Per: Gonthier J:

> In order for the tribunal to have the power to punish for contempt committed ex facie, it is therefore necessary that there be a statutory provision giving it that power. He then holds: quoting from the reasons of Dickson J. in Cordeau, that any such statutory provisions must be strictly interpreted. In the absence of clear, unambiguous and express language investing a tribunal with broader powers, legislation will be interpreted as conforming to the common law, and under the common law, an inferior court or tribunal can only punish for contempt committed in facie.[34]

More so, the mother of the Common Law Tradition, England, now permits Magistrate Courts to punish persons who flout their orders,[35] a contempt *ex facie curiae*.

> **Disobedience to certain orders of magistrates' courts.**
>
> (1) The powers of a magistrates' court under subsection (3) of section 63 of the Magistrates' Courts Act 1980 (punishment by fine or committal for disobeying an order to do anything other than the payment of money or to abstain from doing anything) may be exercised either of the court's own motion or by order on complaint.
>
> (2) In relation to the exercise of those powers the provisions of the Magistrates' Court Act 1980 shall apply subject to the modifications set out in Schedule 3 to this Act.

In the United States, all courts have the power to punish for contempt without discrimination as to superior courts or inferior courts. They all wield the power by virtue of their being courts of competent jurisdiction. Justitia writes:

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33 [1992] 2 SCR 394

34 Ibid, See: note 25

35 See the Contempt of Court Act 1981 *(As amended)* https://www.legislation.gov.uk/ukpga/1981/49 <date of access>

> An Inherent Power.—The nature of the contempt power was described Justice Field, writing for the Court in Ex parte Robinson,[36] sustaining the act of 1831: The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.[37] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.[38]

The opinion continues:

> By 1911, the court was saying that the contempt power **must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal**.[39] (Emphasis mine)
>
> In Michelson v. United States,[40] the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[41] relating to punishment for contempt of court by disobedience of injunctions in labor disputes.

36 86 U.S. (19 Wall.) 505 (1874).

37 86 U.S. at 505–11.

38 JUSTITIA, 'The Contempt Power' https://law.justia.com/constitution/us/article-3/11-the-contempt-power.html Accessed on 20th July 2024

39 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). See also In re Debs, 158 U.S. 564, 595 (1895).

40 266 U.S. 42 (1924).

41 38 Stat. 730, 738 (1914).

> The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the state where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that **"the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative."**
>
> The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," **and the power to enforce mandatory decrees by coercive means.**[42] (Emphases mine).

The need to balance this seemingly unbridled power with judicial restraint and decorum cannot be overemphasized. The power to commit for contempt is to protect justice delivery and not to bandage the wounded egos of one judge and thus, the power must be exercised only in blatant and rare cases no matter the court wielding same.[43] This was stressed in ***Spallone v United States***[44] where the court held that a district court had abused its discretion.

Per Justitia, it did this

> …by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

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42 266 U.S. at 65–66. See Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924).

43 Suit No. CR 250/2017

44 493 U.S. 265 (1990). The decision was an exercise of the Court's supervisory power. Id. at 276. Four Justices dissented. Id. at 281.

THE GHANAIAN NARRATIVE

The foregoing comparisons from India, Canada, The UK, and the United States unravel that unlike Ghana which still leaves the entire development of the law on contempt of court to the judges, our Common Law brethren have long abandoned this. The protection of justice delivery and upholding the courts as a beacon of respect is too much a task to leave to judges alone and the present writer fully endorses the need to develop the law in Ghana via legislation; and posits that this legislation would in no way infringe on the doctrine of Separation of Powers espoused by Baron de Montesquieu[45] and reflected in the Constitution, 1992. This will streamline the regime and better educate the public on what to expect and to have a better appreciation of which conduct may constitute the offence of contempt of court and also advice judges on which should not constitute contempt.

Firstly, such legislation should prioritize arriving at a nearest estimate definition of contempt of court. This will reduce the attacks the courts face in politically charged cases where justices of the superior courts face the daunting task of holding politicians to account for their besmirching of the court or to kowtow to some public opinion which refers to these comments as justified criticism.

From the authorities already discussed, this author proposes that such a legislation should define contempt of court to include

a. Any unjustified verbal or written attack on the court or officers of the court in the media or elsewhere

b. Any conduct which interferes or is calculated to or is likely to interfere with smooth court proceedings

c. Any deliberate or negligent disregard for a court judgment or order or ruling

The proposed definition, the writer submits, incorporates the so called civil and criminal contempts, a distinction already submitted as unnecessary.

In a solemn tribute to Article 19 (11)[46] of the Constitution 1992, I submit that the punishment for contempt of court be defined in the proposed legislation. Such punishment regime should embody the existing tenets which govern punishment which include reformation and the need to serve a warning and deter the offender and like-minded people from

45 Sunny Agu, 'Separation of Powers in Baron de Montesquieu: Philosophical Appraisal' (2024) 2 Indonesian Journal of Interdisciplinary Research in Science and Technology 37.

46 Article 19 (11) No person shall be convicted of a criminal offence unless the defined and the penalty for it is prescribed in a written law.

engaging in acts which constitute contempt of court.

In *Isaac Amaniampong v The Republic,*[47] the majority of the Supreme Court, speaking through Owusu (Ms.) JSC held:

> Punishment is justifiable as a deterrent not only to the criminal himself, but also, and even more importantly, to those who may have similar criminal propensity. A way must be found to protect society from the activities of these criminals and to me, this way is confinement for a considerable length of time.[48]

As a guide the UK makes extensive laws which regulate punishment for contempt of court. The UK Act states in part:

> **Proceedings in England and Wales.**
>
> (1)In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.
>
> (2)In any case where an inferior court has power to fine a person for contempt of court and (apart from this provision) no limit applies to the amount of the fine, the fine shall not on any occasion exceed £2,500.[49]

BALANCING OF RIGHTS: THE FREEDOM OF SPEECH NARRATIVE

As argued by this writer in a previous article[50], those who wield office must be ready for the accountability that attends the role. In a democratic society like Ghana, the judiciary is not beyond criticism and any legislation which seeks to protect the courts from vilifying attacks which impede its

47 J3/10/2013

48 Ibid

49 Contempt of Court Act, 1981 (UK), section 14

50 The Battle of Rights: Silence versus Fear & Panic. Dissecting Ghana's Regime on Freedom of Speech, Expression and Media Freedom - https://oswaldazumah.com/2023/03/the-battle-of-rights/

ability to be a fountain of justice must also be weary of the tendency of making demigods out of the courts. They are institutions of the people and must be ready to endure just criticism no matter how harsh. This can be summed up in the opinion of the European Court of Human Rights in *Handyside v The United Kingdom*[51] when it melodiously observed:

> Freedom of expression…is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, **but also to those that offend, shock or disturb the state or any sector of the population.** (Emphasis mine).

PREROGATIVE OF MERCY AND PUNISHMENT FOR CONTEMPT OF COURT

I now deal with the question as regards the President's powers of pardoning convicts by exercising his prerogative of mercy under the Constitution[52] vis-à-vis the courts' powers to punish for contempt. There are two prevailing schools of thought here. The first is that the president wields the executive power to pardon any convict as spelt out in the Constitution. The Supreme Court faced this question after the president exercised his powers under Article 72 of the Constitution 1992 in relation to some contemnors. The majority of the bench upheld the President's powers that he was entitled to pardon any criminal including those against whom the superior courts of judicature commenced contempt proceedings and incarcerated after finding them guilty. Anin-Yeboah JSC *(as he then was)* dissented alongside Dotse JSC. The learned Anin-Yeboah in his dissent, opined that the proper interpretation of the law would not permit the president to pardon contemnors who were punished on the court's own motion. Per Anin-Yeboah:

> …If contempt proceeding is initiated by the

51 Handyside v. The United Kingdom, 5493/72, Council of Europe: European Court of Human Rights, 4 November 1976, < https://www.refworld.org/cases, ECHR, 3ae6b6fb8.html > accessed 20 July 2024. The European Court of Human Rights held that Handyside's conviction constituted an interference with the right to freedom of expression which had been 'prescribed by law' and pursued the legitimate aim of protecting morals; at issue was whether the interference had been 'necessary in a democratic society'.

52 Article 72 of the Constitution provides that: (1) The President may, acting in consultation with the Council of State—
(a) Grant to a person convicted of an offence a pardon either free or subject to lawful conditions; or
(b) Grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; or
(c) Substitute a less severe form of punishment for a punishment imposed on a person for an offence; or
(d) Remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

> Attorney-General who is the principal legal adviser and a Minister of State under Article 88(1) of the 1992 Constitution, the President, upon the conviction of the contemnor can exercise his powers under Article 72 of the constitution as the initiation of the proceedings would be deemed to have been done on his behalf.
>
> However, under Article 126(2) where the initiation of the criminal contempt proceeding is done by the Superior Court ex proprio motu, the powers of the President, in my respectful opinion is ousted. For Article 126(2), beyond the fact that it is an acknowledgment of the Superior Court's inherent power to commit for contempt, it is in my opinion superfluous for it to be even stated in the constitution. It is indeed inherent in every Superior Court to convict for contempt of court.

I agree!

Endorsing these views as well, Boakye[53] writes:

> The rationale being that, this power of the Superior Courts should not be subjected to any interference from the President and other organs of state when it convicts any person for contempt summarily under it. This will safeguard the dignity and confidence of the ordinary Ghanaian in our law courts, being able to utilize its inherent contempt powers to quench the worst terrors of the oppressors that tend to obstruct the course of justice and bring the entire administration of justice to its knees.[54]

I liken the power of the courts to punish for contempt and the inability of the President to forgive such contemnors to the Holy Bible which teaches that 'all manner of sin and blasphemy shall be forgiven unto men: but the blasphemy against the Holy Ghost shall not be forgiven unto men'.[55] In this analogy, the courts of competent jurisdiction serve as the Holy Ghost,

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53 Charles Boakye, 'Dignity and Confidence in Our Courts: The Scope of Contempt of Court as Wrought by Ghanaian Precedential Laws' (2021) 12 International Journal of Scientific and Engineering Research 746, 746-764

54 Ibid

55 The Gospel According to Matthew: 12:31-32

guarding justice delivery and grace for the realm of mankind, a sin against this spirit is thus unforgivable.

OF LOWER COURT AND SPEEDY DELIVERY OF JUSTICE – THE NEW DAWN

As has been painstakingly repeated in this brief, the purpose of the contempt powers of the court is to protect justice delivery. The wheels of justice will clog should we allow this power atrophy. Similarly, jurisprudence will become stagnant and decay should we watch on while the anachronistic mischief created by *Ex Parte Owusu* remains in our laws. We must update the regime on contempt and the time for change is now! To quote the revered jurist and ex Justice of the Supreme Court of Ghana; Date-Bah JSC, in his book Reflections on the Supreme Court of Ghana:

> Change has thus been a dominant feature of Ghana's judicial history. The response by those with responsibility for tasks within the court system whose chequered history, with its discontinuities, has been outlined above should therefore be to adopt a flexible outlook that is willing to adapt to change.[56]

The need for speedy and effective dispensation of justice cannot be any less undermined as denying some courts the power to uphold their integrity as competent courts of jurisdiction.

CONCLUSION

This brief has detailed the law on contempt of court in Ghana. The writer first identified the types of contempt (i.e.) criminal and civil contempt and argues, as some judges have, that due to the consequences which follow both types of contempt, the distinction between the two has become merely syllabic. The paper then appraises the overriding principles, importance and basis on which the courts wield their powers to punish contempt against them. This reason is captured poetically by Bamford Addo JSC in the *Mensa-Bonsu*[57] case where the renowned judge writes:

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56 Samuel Kofi Date-Bah, Reflections on the Supreme Court of Ghana, (Windy Simmonds and Hill Publishing 2015) 9

57 [1994-95] GLR 130

> The Constitution gives the court the power to ensure that they are able to maintain their dignity and aura of respect, which dignity and respect is important in the courts performing their primary function as the bastion of justice. The atoning language of Article 125 is so solemn. It says Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to the constitution…The sacred role of the judiciary cannot be sacrificed on the altar of ridicule, scorn, opprobrium or impudence of any individual to the disadvantage of society at large.[58]

The essay also describes the interference in judicial independence by the Executive in pardoning contemnors punished by the court on its own motion.

Drawing parallels from other Common Law territories including England itself, the writer posits that the leading case in Ghana, *Ex Parte Owusu* which bars lower courts from exercising the court's powers of contempt in relation to contempt *ex facie curiae* is outdated. The Constitution persisted in this relic and left out the lower courts when it rationed out the powers to commit contemnors to punishment. The general principle of law is that superior courts have all powers except those expressly taken away and lower courts have no powers except those specifically conferred—it is the submission of this author therefore that the lower courts also represent the state's judicial power and are now being manned by experienced hands; thus, need the power of contempt in all forms to guard this glory and hence same ought be bestowed onto them *ex debito justitiae.*

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58 Ibid