



Judicial Attitudes to Freedom of Speech and Press With Particular Reference to Contempt of Court

by

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INTRODUCTION

THERE is high public interest in preserving the administration of justice from the effects of intimidation or the creation of prejudice against the parties. There is also a high public interest in preserving the freedom of the press to report matters of fact and comment upon them not least as they concern the administration of justice. The area of conflict between these two public principles is patrolled by the law of contempt.

In the general interests of the community, it is imperative that the authority of the courts should not be at risk and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, the purpose of the proceedings is not to buttress the dignity of the judges or protect them from insult; but to protect the rights of the public by ensuring that the administration of justice is not obstructed. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts should never impose any limitation upon free speech or free discussion beyond those which are absolutely necessary.

One of the main objections to the law of contempt has been its uncertainty, for the law is mostly judge-made; and its bite has been dangerously unpredictable. In the past, judges have sometimes been a mite overzealous or have misused the power, and the reports abound with cases where judges have been reprimanded and cautioned that the power to punish summarily for contempt is an enormous one which should be used sparingly and only in serious cases¹.

Contempt of court cases, naturally generate a lot of interest and controversy in the press, and the main purpose of this paper, is to examine judicial attitudes towards the offence in various jurisdictions and discover whether the courts, in considering the propriety of some conduct or speech or writing, have properly weighed one aspect of public interest against another aspect of public interest. After taking a brief look at the law of contempt generally and the constitutional guarantees of freedom of speech and the press, we shall concern ourselves primarily with three main areas of the law of contempt as it relates to the press namely; comments on cases pending before the courts, refusal to disclose sources of information and scandalizing the court or judge.

LAW OF CONTEMPT

"The essence of contempt is action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or obstruct the due administration of justice."²

Under the common law which also applies in Nigeria, contempt of court is generally classified under two heads (a) Criminal contempt which consists in acts tending to obstruct the due administration of justice, and (b) Civil contempt sometimes called 'contempt in procedure' which consists in disobedience to the judgements or orders of court. The distinction between the two types of contempt is not always clear cut and in recent times, the classification has been characterized as "unhelpful and almost meaningless."³ Be that as it may, this paper is concerned only with certain aspects of criminal contempt of court which itself can be divided into three categories.

- (i) Criminal contempt of court may consist of acts committed in the face of the court itself *in facie curiae* such as, for example, insulting behaviour to the judge or officers of the court present in court,⁴ and this applies whether the proceedings in question are themselves civil or criminal in form. This needs little explanation, for it is obvious that justice can only be secured within an orderly framework and against a background which lends itself to deliberation. Liability in this type of case depends on *mens rea* consisting of intention or recklessness.
- (ii) Criminal contempt of court may also consist of acts committed out of court *ex facie curiae* such as publishing matter or indulging in conduct⁵ likely to prejudice the fair trial of pending civil or criminal proceedings, whether through its effect upon the parties, the witnesses or the tribunal itself. It is of course this branch of the law of contempt which exists to prevent the growth of *trial by newspaper*. In this type of case, actual intention to prejudice the proceedings is immaterial.⁶ If a person knowingly publishes material or indulges in conduct which when viewed objectively creates a real and substantial risk of prejudice, the fact that the publisher neither knew or had reason to suspect that proceedings are pending is immaterial. To that extent the offence is one of strict liability.⁷
- (iii) At one stage removed, a criminal contempt may equally be committed by things done or said after judicial proceedings have ended. For example, victimizing a person for the part he has played in judicial proceedings.⁸ Again the justification is clear. If witnesses,

jurors or indeed judges or parties who participated in a trial could be punished in person or property, others would be far less willing to come forward in future cases and the administration of justice as a continuing process would accordingly suffer. For similar reasons, it is held to be a criminal contempt to *scandalize* a court or judge by publishing material such as allegations of corruption or partiality likely to undermine public confidence in the court or judge in question.⁹ It does not appear that actual intention to undermine confidence is required as an element of liability.¹⁰

In Nigeria contempt of court may be punished in accordance with ordinary criminal procedure under S.133 of the Criminal Code which provides for specific acts of contempt.¹¹ Subsections 4,5, and 9 are those which cover all cases of contempt of court relating to the press and provides as follows:

S.133. Any person who – (4) while a judicial proceeding is pending, makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of, or against any party to such proceeding, or calculated to lower the authority of any person before whom such proceeding is had or being taken, or (5) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or

(9) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken is guilty of a simple offence, and liable to imprisonment for three months”

In the North S.155 of the Penal Code also provides that:

Whoever intentionally offers any insult or causes any interruption to any public servant while such servant is sitting at any stage of a judicial proceedings shall be punished

The superior courts, of record in this country do not usually avail themselves of these provisions but act under the assumed inherent common law jurisdictions to punish summarily for contempt.¹² This is probably in view of the fact that contempt of court is a specie of offence which cannot admit of exhaustive categorization and is consequently unavailable in any written code. Another factor is that, the due administration of justice can sometime be hampered by the delay involved in pursuing the ordinary criminal process.

S.6 of the Criminal Code Act provides that:

Nothing in this Act or Code shall affect the authority of courts of record¹³ to punish a person summarily for the

offence commonly known as contempt of court... provided that a person is not punished for the same act both under the inherent powers of the court and under the provisions of S.133cc.

The question has been raised however whether this inherent power of the court has been preserved under the 1979 Constitution.

It seems obvious that despite the rule that nobody shall be convicted of a criminal offence unless that offence is defined and the penalty therefore prescribed in a written law¹⁴ and despite the absence of a specific provision such as could be found in S.22(10) of the 1963 Constitution expressly exempting the offence of contempt of court from this rule, the inherent powers of the court to punish, summarily for contempt are undoubtedly preserved by SS.6(a) and 36(3)(a) of the 1979 Constitution when read together with S.6 of the Criminal Code Act.¹⁵

S.36(3)(a) of the Constitution provides that:

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society:—

(a) for the purpose of... maintaining the authority and independence of courts.

← and S.6(a) of the Constitution provides that: “(6) The judicial powers vested in accordance with the foregoing provisions of this Section—

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law.”

The expression “inherent powers of a court of law” can only mean the inherent powers of a court of law in the common law countries of which Nigeria is one; which means that the said sections of the Constitution preserve for our courts all the common law rights of courts of the common law jurisdictions to deal with and punish for contempt of court.

The Criminal Code Act is an existing law within the purview of S.274(4)(b) of the 1979 Constitution and not being in conflict with any other existing law or any provision of the said Constitution, the provisions of S.6 of the Criminal Code Act undoubtedly also preserves the rights of common law of our courts of record to summarily deal with and punish for contempt of court.

In England, certain aspects of the law of contempt have for the first time, been put on a statutory footing by the Contempt of Court Act 1981 which was passed to implement the main recommendation of the Phillimore

Committees Report made in 1974.¹⁶ The Act now provides a clear and precise guidelines as to the circumstances in which a person may be held to have committed a contempt by publications¹⁷ made in relation to proceedings which are *sub-judice*.¹⁸ Its main concern is thus with contempt under the strict liability rule, that is, the rule whereby publication "may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."¹⁹ "Recent decisions in England²⁰ discussed below which have liberally interpreted the provisions of the Act, have been welcomed by the press in that country with great relief. It is submitted that, since the main problem of the law of contempt lies in its uncertainty which may have an unnecessarily inhibiting effect on the freedom of the press to impart information, a similar enactment would be most welcome in Nigeria.

CONSTITUTIONAL PROVISIONS ON FREEDOM OF SPEECH AND THE PRESS

S.36 of the 1979 Constitution provides that :

- (1) Every person shall be entitled to freedom of expression including freedom to hold opinion and to receive and impart ideas and information without interference.
- (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society—
 - (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts, or regulating telephone, wireless broadcasting, television or the exhibition of cinematographic films...

S.41(1) of the 1979 Constitution also provides that:

- (1) Nothing in section 36 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society —
 - (a) in the interest of defence, public safety, public order, public morality or public health,²¹ or
 - (b) for the purpose of protecting the rights and freedom of other persons."

These two sections read together make it clear that while freedom of expression is guaranteed to individuals generally and to the press, it was not

intended to give immunity to every possible use of language. As Blackstone²² said:

... the liberty of the Press is indeed essential to the nature of a free state but this consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal he must take the consequences of his own temerity.... To punish as the law does... any dangerous or offensive writings which when published shall be adjudged of a pernicious tendency is necessary for the preservation of peace, good order of government and religion the only solid foundation of civil liberty.

In other words, the guarantee of freedom of speech is not an absolute one and must be weighed against other competing public interests; and as stated earlier, it is the purpose of this paper to discover how the courts by the use of their jurisdiction to punish for contempt can maintain a proper balance between the public interest in freedom of speech and the public interest in non-interference with the due administration of justice.

COMMENTS ON CASES PENDING BEFORE THE COURTS

The most important function associated with the law of contempt is that of prohibiting conduct likely to interfere with the due administration of justice by prejudicing a fair trial in proceedings which are *sub-judice* or pending²³ before the court. Such conduct may take a variety of forms, for example, attempting to bribe or intimidate a judge, juror or witness. The offence is however most commonly committed through publishing matter carrying the same attendant risk whether the publication be in the press as will usually be the case or through any other medium of communication.

The right of free speech is guaranteed by the Constitution and must be properly guarded but nevertheless, it is recognized that it must not be abused or be permitted to destroy or impair the efficiency of the courts and public confidence and respect therein. To find the line where the right of free speech ends and its abuse begins is not always an easy task. This line which is difficult of abstract definition must be fixed at that point, where that which is spoken or published is calculated to obstruct the functioning processes of the court or to impede or impair the efficiency of its machinery then in motion.