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CONTEMPT PROCEEDINGS: ANTITHETICAL TO FAIR HEARING?*

Introduction

The English legal system has bequeathed so much to the world. One of its bequests is the abstraction of contempt of court. This notion dates back to the pristine age of the Common Law itself – right from the feudal days of the Norman Conquest, 1066 A.D, to the present age. The phenomenon called or referred to as contempt is an indispensable power which a court must as of necessity possess, if it must command respect in the eye of the general public.

The possession of the power to punish for contempt is not just for the fancy or the fun of it – it is manifestly necessary for the proper administration of justice but never to be invoked for the vindication of the judge. It is not a power to be used by the judge when he or she feels scandalized. The power to commit for contempt should be viewed as a lethal weapon of last resort and to be invoked sparingly, and for the interest of good administration of justice.

It is the concern of this paper, in the main, to examine generally the law of contempt, and the power of the court to punish for same. However, the writer will critically evaluate whether the law of contempt, as it has been practised down the ages, is in consonance or otherwise with the age-long, hallowed and cardinal principle of natural justice[1] (fair hearing), for in the learned words of Kayode Eso, J.S.C., "in proceedings instanter or trial *brevi manu*, the judge before whom is the contemnor, is the prosecutor, witness and judge"[2]

In the bid to attain the concern of this paper as herein stated, recourse will be had to case law, of Nigerian superior courts as well as that of other common law jurisdictions.

A glimpse of the law of contempt

The notion of contempt is an offshot of the common law. How has this aspect of the English Common Law fared down the course of English legal history? With the law of contempt, the hunter could become the hunted. One of the vagaries of a lawyer's practice, is that he may at times be caught in the whirlpool of contempt proceedings. It is a professional hazard - and every lawyer, especially those who practiced their art before the courts know this. A peep into English legal history bears this out.

Towards the close of the eighteenth century, in **1796**, William Stone[3] was tried for high treason. After the jury had retired for over two hours, they returned a verdict of not guilty. Following this verdict, there was immediately continued shout in the hall, "and a man of the name of Thompson jumping up in the middle of the court, waving his hat and hallooing" (the trial judge still being present in the court) was taken immediately into custody and fined twenty pounds.

In **1864**, Thomas Pater, a lawyer, had in his conduct of criminal proceedings use offensive words in court concerning the foreman of the jury. The Deputy Assistant Judge, J. Payne, immediately told him that that was a very improper observation to make and insisted upon its withdrawal and upon Pater declining to do so the Deputy Assistant Judge consulted the Assistant Judge, William Henry Hodkin. At the end of the criminal trial, the Assistant Judge came into the court presided over by J. Payne and recommended him to treat the matter of Thomas Kennedy Pater as a contempt of court, and to inflict upon him a fine of twenty pounds. Before the fine was inflicted, Thomas Pater said he wished to addressed the court but the deputy Assistant Judge, J. Payne, decline to hear him and the fine was imposed "without an opportunity having been given to him to show cause why the fine should not be inflicted. In his affidavit, Thomas Kennedy Pater had said that he made the observations which became the subject matter of his contempt in the face of the court *bona fide* "and according to the best of his judgment in the discharge of the duty which he owed to his client and had no thought of offering any contempt to the court"[4]

This case is a typical example wherein a counsel was cited for contempt of court. But Thomas Pater would not have the matter end there; he questioned his conviction by applying for a writ of sentence. This was refused by the court.[5] The court was of the view that a barrister may be punished for contempt of court, even for language professedly used in the discharge of his functions as advocate. Therefore, where on a trial for felony, counsel for the prisoner whose mode of conducting the case had been remarked upon by the foreman to the jury, in his address to the jury uttered word which reflected upon the foreman of the jury and being required by the judge to withdraw them refused, and was thereupon adjudged guilty of contempt and fined, his application for a writ of certiorari to remove the proceedings for purposes of being quashed should be refused. It is interesting to note that in the course of argument of counsel, Mr. Denman, in support of the

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[1] The cardinal principle of natural justice entails the twin pillar of *audi alteram partem* (let the otherside be heard) and *nemo judex* in causa sua (you cannot be a judge in your cause).

[2] Atake v. A.G., Fedration (1982) N.S.C.C., p. 472.

[3] R. v. William – Stone (1796) 6. T.R. 528 at 529; 101 E.R. 684

[4] See *Ex parte* Pater (1864)5 B& S 299 also 122 E.R. 842. This case was referred to by Idigbe, J.S.C. (Atake v. A. G., Federation)

while delivering the lead judgement. The learned Justice made a scholarly appraisal of this case in the said judgement.

[5] [Cockburn C.J. Blackburn, Mellor and Shee, JJ.]

application in this case, he had pointed out to the court that there was no precedent (at the time) for finding a barrister for contempt of court of his duty and the court had also remarked that the case "was of considerable importance as affecting the discharge of the duties of advocates"[6]

Let us venture outside of England. In 1866, a barrister of the Supreme Court of Nova Scotia was suspended form practising in that court for having addressed a letter to the Chief Justice reflecting on the judges and the administration of justice generally in the court. The letter had been written by the barrister in his private and individual capacity as a suitor, and having no connection whatever with his professional character or anything done by him professionally either as solicitor or barrister. In a portion of this letter the barrister in question – Thomas James Wallace – had stated " I could also recall cases where the decision was, believe, largely influenced, if not wholly based upon information received privately from the wife of one of the parties by the judge. Is this justice? I think a judge in England would be a little startled to hear that a judge in Nova Scotia listened to, much less decided upon, information obtained in this way." In the affidavit filed by Mr. Wallace, he stated he had not intention "whatever of impugning the conduct of any of the judges ('Puisne judges') of the Supreme Court and no intention whatever of offending or insulting either them or the Chief justice, his object being to state in temperate language the grievances of which he felt he had reason to complain. In his judgement by which the barrister was found guilty of contempt of court and punished by an order suspending him from practising before the Supreme Court in Nova Scotia, the Chief Justice observed:

> ***"This was not a contempt for non-payment of money, or for disobeying some order of the court in the progress of a suit, but a contempt leveled at the court itself, and which the court has the authority and right to adjudicate upon of its own motion, ... upon the production of the obnoxious letter by the judge to whom it was addressed."***[7]

Wallace, in the bid of shaking off his conviction, appealed to the Privy Council, which upheld the finding for contempt. The Council however held that the punishment should have been one of the committal to prison or a fine and not suspension from practicing before the Supreme Court.

> ***"We do not approve of the order. At the same time we desire it to be understood that we entirely concur with the judges of the court below in the estimate which they have formed of the gross impropriety of the conduct of the appellant".***

The case of Johnson (in 1887), a lawyer, is unique. This being so because the alleged contempt was not done in open court. Johnson who had attended the hearing of an application before a judge at chambers in the Royal Court of Justice, immediately after such hearing and while the parties were on their way from the judge's room to the entrance gate of the building made use of grossly abusive expressions and threatening gestures to the solicitor on the other side in relation to such application.[8] Upon application by the solicitor concerned (i.e the one to whom threatening gestures had been made) Kekewich, J. held that such conduct in relation to proceedings before a judge at chambers was a contempt of court punishable by attachment; and he ordered the appellant to be committed to prison.

The Court of Appeal[9] dismissed the appeal from the order of Kekewich, J. In his judgement Lord Esher, M.R. cited with approval the opinion of Wilmot J. (Later C.J.) in *R. v. Almon*[10]: "The question resolves itself at last into this simple point, whether a judge making an order at his house or chambers is not acting in his judicial capacity as a judge of this court, and both his person and character under the same protection as he was sitting by himself in court? It is conceded that an act of violence upon his person when he was making such an order would be a contempt punishable by attachment"; and continuing, Lord Esher, M. R. said, "The Chief Justice (i.e. Wilmot C.J.) was there speaking of contemptuous conduct directed towards the person or character of a judge so sitting in a judicial capacity, but the same principle applies, as it seems to me, to contemptuous conduct and expressions in relation to proceedings in the course of the administration of justice. If he is acting judicially in the office of a judge, he is acting as a judge of but of the High Court of Justice. If anyone attempts to interfere improperly with such judicial proceedings, provided it is done with sufficient nearness, it is a contempt; a contempt not of the judge, but of the High Court as a judge of which, he is acting."[11] Of the facts of this case, Idigbe, J.S.C., reasoned:

> ***"From the facts of this case, it seems pretty clear that it is not necessary that in order that certain conduct may constitute a contempt of court they should***

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6 See 5 B. & S. at 302-303 also 122 10 E.R. at 843-844.

7 See re Wallace (1866) L.R.I P.C. 283.

8 See in Re Johnson (1888)20 Q.B.D.

9 [Lord Esher, M.R., Biwen and Fry L.JJ]

10 R. v. Almon (1765) Wil. 243 at 256-257 also 97 E.R. 100

11 The Nigerian Supreme Court, per Idigbe, J.S.C., while delivering the judgement of the Court in Atake v. A.G. (Fed.), supra,
referred and considered this case.

take place in open court, or that they must take place in relation to a judge while sitting in court."[12]

Yet again, the Nigerian Supreme Court, while considering the case of *Atake v. A.G.* (Federation), referred to another English case, 'also involving a barrister in the conduct of his client's case[13]. The conduct of the said barrister was adjudged contemptuous; he was found guilty. The case is *Vidayasagara v. The Queen*[14], 1963. Here, a barrister was employed to conduct proceedings in an industrial court for settlement of an industrial dispute between a Union and one P. relating to the refusal of P to employ certain workmen who were members of the Union. The matter was heard *ex parte* in the unexplained absence of the Union – and a date was fixed for the award. Before the date arrived the court on an application of the union fixed a date for hearing *inter partes*. On that date the Union applied for an adjournment as their counsel (i.e. the barrister in the matter) was ill. Meanwhile there had been a sympathetic boycott of P. by another Union and so the court made an order in this terms: "I am willing to allow another date provided the Union instructs the (other) Union to lift the boycott immediately ... if the boycott is lifted before the date fixed for hearing) then the case shall proceed to inquiry; if not the *ex parte* trial shall stand." Then hearing was renewed, the sympathetic boycott had not been called off and the appellant (barrister) appearing as counsel for the Union read the following statement "... in the circumstances, the Union having felt that this court had indicated that an impartial hearing could not be heard before it had appealed to the Minister to intervene in the matter. The Union was therefore compelled to withdraw from the proceedings and will not consider itself bound by any order made *ex parte* which the Union submits would be contrary to the letter and spirit of the Industrial Dispute Act ..." The said barrister then withdrew from the case. On a complaint by the Industrial Court to the Supreme Court, the latter found him guilty of contempt of Court as he was in disrespect of the authority of the Industrial Court in making the above statement. His appeal to the Board of the Privy Council[15] was dismissed. This writer shall come back to this case *anon*.

This writer had gone down memory lane as far as the materials available for this research can permit, to show how far the law of contempt of court is part of the English legal system from antiquity. We have seen, through the cases, various instances, of words spoken, gestures offered, and written words, what could amount or constitute the offence of contempt of court. But even at this (the analysis inherent in the cases discussed so far) the question may still be asked "what words, gestures, behaviour, writings, mannerism etc will qualify to be dubbed contempt of court?"

What is Contempt of Court?

The phrase "contempt of court" seems not to be amenable to exact definition, just like most legal concepts. This difficulty in definition may have arisen due to the manifold nature of what may amount to contempt. A law dictionary puts it thus:

" conduct that defies the authority or dignity of a court."[16]

In a case that may be tagged the locus classicus on the subject in Nigeria, *Atake v. A.G., Federation*[17], the Supreme Court, per Idigbe, J.S.C., after a thorough analysis of the subject, described contempt as:

"It is, indeed, difficult to give exact definition of contempt of court, ...; but generally, it may be described as any conduct which tends to bring into disrespect, scorn or disrepute the authority and administration of the law or which tends to interfere with an/or prejudice litigants and/or their witnesses in the course of litigation."[18]

All the cases evaluated so far match the definition or description above: *R. v. William*[19] (1796) the contemptuous conduct was the act of jumping, shouting and hallooing by the contemnor in the court; *Ex parte Pater (1864)*[20], the contemnor, a lawyer, used offensive words in court concerning the foreman of the jury; *Re Wallace (1866)*[21], a barrister of the Nova Scotia Supreme Court, wrote to the Chief Justice, impugning the conduct of the judges; *Re Johnson (1888)*[22], the contemnor, a barrister, made threatening gestures to the solicitor on the other side; *Vidayasagara v. The Queen (1963)*[23], the contemnor, a barrister, appearing before an industrial court, made a statement in court that an impartial inquiry could not be expected from the court.

Still in Atake's case, Idigbe, J.S.C., in the course of the judgement held that:

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12 Atake v. A.G., Federation, supra, p.456.
13 Atake v. A.G., supra, p. 456.
14 (1963) A.C. 589.
15 (Lords Dilhorne, L.C., Evershed, Jenkins, Guest & Sir Malcon Hilbery).
16 Blacks Law Dictionary, eight edition, p. 336.
17 Atake v. A.G., Federation. More will be said of this case anon.
18 Atake v. A.G., Federation, supra, p. 452-453.
19 Supra.
20 Supra.
21 Supra.
22 Supra.
23 Supra.

"To sum up, it is my view that every insult offered to a judge in the exercise of the duties of his office is a contempt of court ... and it is even a grievous contempt where, as here, the object is mainly to taint the source of justice."[24]

In a Nigerian celebrated case, *Fawehinmi v. State*[25], a foremost Nigerian legal icon, Chief Gani Fawehinmi, herein a contemnor, the Court of Appeal[26] upholding the finding of the trial Court, held that a letter requesting transfer of a case from one judge to another could amount to contempt as it suggests bias. We shall return to his case shortly.

The Supreme Court of Nigeria, in *Omoijahe v. Umoru*[27], once again described what amounts to contempt of court:

"Although criminal contempts of courts may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

Contempt: How construed?

How does the court arrive at the finding that a set of circumstances amount to contempt of court? Is it when the alleged contemnor intends to be contemptuous? Or is it the opinion of the court that counts?

This issue often arises in contempt cases as the alleged contemnor often plead the defence that he/she never intended to malign or bring the court to disrepute or ridicule. In the popular Nigerian case, Atake v. A.G., the Supreme Court per Idigbe, J.S.C. held:

" ..., but also the fact that the courts have always considered the question, what exactly amounts to contempt of court (and particularly, contempt in curiae facie) subjectively (NOT) objectively), and the intention of the contemnor has nothing to do with its consideration of the matter. It matters not to the court that no offence or contempt was intended by the contemnor except that such an issue may be relevant on the degree of punishment."[28]

The contemnor, Senator Atake, a retired Judge, did make an issue of the fact that the learned trial judge, Anyaegbunam, J., did not point out to him which portion of the said first ground of appeal was contemptuous. Again, one of Atake's eight grounds of appeal to the Supreme Court, was the ground that the word "gratification" (which word he used in the alleged contemptuous ground of appeal) is capable of other interpretations.[29] In other words, his argument was that he never intended to sound contemptuous. On this, the apex Court, per Idigbe, J.S.C.[30], stated the law:

"when, therefore, the appellant claims that there is need on the part of the court to specify for his benefit which portions of the ground of appeal in issue amount to contempt, I regard the claim as, indeed, idle; one only need to look at the ground as a whole to see and appreciate quite readily the scandal which that ground of appeal imputes to the court presided over by the learned chief Judge. And if, in addition, one sets the entire contents of the said ground against the background of the proceedings of, and the statements of the appellant therein on, 13th March, 1981, where the learned Chief Judge, just about to give his ruling on the application for interlocutory injunction in respect of the claims in the substantive action before that court, was unnecessarily interrupted by the appellant, there can be no doubt whatsoever that the said ground of appeal sticks with contempt of that court."[31]

On what should be the meaning to be attached to the word 'gratification' in Atake's first ground of appeal, this writer considers the analysis of Uwais, J.S.C. (as he then was), who also heard the appeal, concurred with the judgement of the court, expository:

"It was further contended by the appellant that the learned Justices of the Federal Court of Appeal were wrong in attaching to the word "gratification" in the proposed ground of appeal in question the meaning of "reward, recompense, gratuity or bribe" when it could also mean "delight, pleasure or satisfaction". I do not think that this argument has in anyway affected the

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24 Atake's case, p. 457.

25 (1990) 5 N.W.L.R. (pt. 148) pages 1-125.

26 Consisting of Bolarinwa Oyegoke Babalakin, J.C.A. (presided), Kalgo and Akpabio, JJ.CA (read lead judgement)

27 (1999) 8 N.W.L.R. (pt. 614) p. 180.

28 Atake's case, p. 455.

29 See Atake v. A.G., supra, p. 451.

30 The other Justices who sat on the panel concurred: Sowemimo, Eso, Aniagolu, Uwais, J.J.SC.

31 Atake v. A.G., Supra, p. 457. The words italicized are so done by the writer for emphasis.

view which the learned Chief Judge took of the proposed ground, as a whole, to be contemptuous of his court. It is true that the word gratification has different meanings depending on the usage that one makes of it. But in the present case what matters is the meaning by which the learned Chief Judge understood it to have been used. Moreover, whether a particular word or conduct amounts to a contempt is a question of fact; so that language which might be perfectly proper if uttered or employed in temperate manner may be grossly improper if uttered or employed in different manner."

This dictum of his Lordship, Uwais, J.S.C., is in consonance with English case law discussed to far in this work. The court, still on Atake's case, stated what the test should be in cases of contempt of court:

"I have earlier on stated the test for what amounts to contempt of court in the face of the court is subjective[32] and it is for this reason that the court which decided to deal with the offence does not require any application by a third party or, for that matter, an affidavit (as it must have in matters of contempt NOT in curiae faciae) setting out the facts which ought to enable it to arrive at the decision whether or not an alleged contemnor is de facto or de jure in contempt of court.[33]

Given the test above, as formulated by the Court, the Supreme Court placed a contemptuous meaning on Atake's first ground of appeal before the learned trial Chief Judge of the Federal High Court:

"The scandalous imputation and inference to be readily drawn from the ground of appeal in question is that the learned Chief judge, having been offered a bribe (by the opposite party in the relevant proceedings i.e The President) in the form of award of national honour at a period between the conclusion of address by counsel in the interlocutory proceedings and the ruling thereon and being swayed from the path of rectitude and justice, ruled, in abuse of the authority of his office, in favour of the President."[34]

Why Have the law of Contempt?

Given what has been said so far on the indispensability of the law of contempt, the question may be asked, 'what is the basis of the law of contempt?'; in other words, what is the rationale for its existence?. What does it seek to protect?

Since its (law of contempt of court) voyage in the pristine waters of the Common Law, the courts and legal commentators have always made it (law of contempt) mission clear.

"The basis for this limitation, (i.e the power to punish for contempt of court[35]) however, is the need for the preservation of the authority of the courts and those who preside over them."[36]

In the ancient English case of The King v. Almon[37] (1765), commonly regarded as the locus classicus on the subject of contempt of court, though never delivered, the learned Judge, Wilmot, J. gave an informed opinion as to the basis of the law of contempt:

"Contempt of the court involves two ideas: contempt of their power and contempt of their authority. The word 'authority' is frequently used to express both the right of declaring the law ... and for enforcing obedience to it in which sense it is equivalent to the word power: but by the word 'authority' do not mean the coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.[38] Livy uses it according to my idea of the word, in his character of Evander: 'Authoritate magis quam imperio pollebat': it is not imperium, it is not the coercive power of the court; but it is homage and obedience to the court, from the opinion of the qualities of the judges who compose it[39]: it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands; that authority acts as the

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32 Italics by the writer for emphasis.
33 Atake's case, supra, p. 457.
34 Atake's case, supra, p. 457-458.
35 The words italicized and in bracket are the writer's.
36 Atake's case, supra, p. 455.
37 (1765) Wil. 243 at 256-257 also 97 E.R. 100.
38 Boldface type is of the writer and for emphasis.
39 Boldface type for emphasis.

great auxiliary of their power,[40] and for that reason the constitution gives them this compendious mode of proceedings against all who shall endeavour to impair and abate it ..."[41]

The quote above says it all: the basis or the essence of the power of the court to punish for contempt is not for the sake of the judges that man the courts; rather it is for the protection of the integrity of the courts as personified by the judges. The Nigerian Court of Appeal, in Fawehinmi v. State[42], per Babalakin, J.C.A, stated this when that court held that:

"The importance of the law of contempt cannot be over-emphasized because it plays a key role in protecting the administration of justice as it affects the courts, the judge and the individual person concerned[43]. Its application by the courts over the years had been varied and numerous so much so that different courts have applied different yardstick for punishing contemnor for the same conduct. To that extent the common complaint is that the law of contempt is too uncertain; but however uncertain its definition and scope may be, contempt of court is undoubtedly one of the greatest contributions the common law has made to civilized behaviour of a large part of the world."[44]

The dictum of the Court of Appeal above, underscores the spirit and the philosophy, that the power of the court to commit for contempt of court is not retained for the personal aggrandizement of the judge or whoever mans the court; the powers are created, maintained and retained for the purpose of preserving the honour and integrity and dignity of the court and so the judge holds the power on behalf of the court and by the tradition of his office he should eschew any type of temperamental outburst as would let him lose his own control of the situation and his own appreciation of the correct method of procedure.[45]

Still on the real essence of the power of the court to punish for contempt, an erudite justice of the Nigerian Supreme Court, Kayode Eso, J.S.C,[46] concisely summed up the essence of this power:

"The power is, no doubt, necessary for the advancement of justice and the good of the public."[47]

The power to cite for contempt: How used?

There is no gain saying the power to punish for contempt, as possessed by the courts, is enormous and far-reaching. How should the court use this power? The attitude of the court in respect of how it should wield the power to punish for contempt, have always being the concern of the courts and legal commentators down the ages. In the English case of **Balogh v. St Albans Crown court (1975)**[48], Stephenson, L.J. made an incisive observation which is considered germane here:

"... but when a judge of the High Court or Crown Court proceeds of his own motion, the procedure is more summary still. It must never be invoked unless the ends of justice really require such drastic means;[49] it appears to be rough justice; it is contrary to natural justice; and it can only be justified if nothing else will do."[50]

The restraint in the quote above was resounded by Eso, J.S.C.:

"I will however like to sound a word of restraint to judges of Superior Courts as regards the use to be made of their jurisdiction to punish for contempt committed in facie curiae. The power is, no doubt, necessary for the advancement of justice and the good of the public. It is a jurisdiction which belongs to all courts but as Lord Denning said in Reg. v. Commissioner of Police of Metropolis exparte Blackburn No.2 (1968).[51]

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[40] Italics by the writer and it is for emphasis.

[41] This quote from the judgement of Wilmot, J. was considered by the Nigerian Supreme Court, per Idigbe, J.S.C., in the case of Atake v. A.G. The quote here is from the judgement.

[42] Supra, p. 60.

[43] Boldface type is of the writer and for emphasis.

[44] Boldface type is of the writer and for emphasis.

[45] See the case of Deduwa v. State (1975) 1 All N.L.R. (pt. 1) at 16.

[46] Eso, J.S.C., retired from the Supreme Court Bench in 1990.

[47] Atake's case, supra, p.471.

[48] (1975) LQ.B.

[49] Boldface type for emphasis.

[50] Balogh v. St. Albans Crown, p. 88, italics is the writer's for emphasis.

[51] (1968)2 Q.B. 150 at p. 154.

"Which we will most sparingly exercise most particularly as we ourselves have an interest in the matter."[52]

That was a case where the Court of Appeal in England found itself considering an allegation of contempt against itself for the first time in the history of that court. The learned master of the Rolls give the following advice which I think should be adopted as a golden rule by all judges of superior courts:
"We must rely on our conduct itself to be its own vindication."

The learned law Lord, Eso, J.S.C., went on, still on the point, that the court should use its power to punish for contempt sparingly, cited another case, *Boyo v. A.G (Mid-West)* (1971)[53]:

"Whether the contempt is in the face of the court or not in the face of the court, it is important that it should be borne in mind by judges that the court should use its summary powers to punish for contempt sparingly[54]. It is important to emphasise the fact that judges should not display undue degree of sensitiveness about this matter of contempt and they *must act with restraint on these occasions."*[55]

In the case of *Boyo v. A.G (Mid-west)*, the Supreme Court cited with approval the admonition of Lord Russell in *R.V. Gray (1900)*[56] that:

"Jurisdiction to deal with contempt summarily should be exercised with *scrupulous care and only when the case is clear and beyond reasonable doubt."*[57]

For the court to charge every unseeming act as contempt of court would in most cases, tend to lower dignity of the court itself. A negative result could only be achieved and the authority of the court whittled down. It is for this reason that where the contempt is *in facie curiae*, it is preferable to go by indictment and ordinary criminal process, except in exceptional cases. For sometimes and in those exceptional cases, if one is to wait for that to be done by an ordinary criminal process and an ordinary trial, there might be great mischief done. It is true that an ordinary criminal process is slow and before the process is put into train in those exceptional circumstances, the mischief might have done and the due administration of justice hampered and thwarted. This admonition on the courts could be summed up in the epigram of the bard of Avon, William Shakespeare:

"It is excellent to have a giant strength; but it is tyrannous to use it like a giant."

And so the conduct of any court is only highlighted by its patience in the face of explosive situations. True it is, it might sometimes take the patience of job but patience, like respect it invites, takes nought of, but adds more. And in explosive situations, silence is always an option, and a good option too.[58] Eso, J.S.C.(as he then was) in the case of *Atake v. A.G. (Fed.)* recommended the coolness displayed by the court of Appeal in England in the face of a contempt committed by a lawyer.

"In the Court of Appeal in England was the case of a Miss Jones who was often in that court. She made an application before the court and the court refused it. She was sitting in the front row where she was so proximate to a bookcase. It was within her reach. Miss Jones picked up one of Butterworth's 'Workmen's Compensation Cases' and threw it at the judges. It passed between two of the Lord Justices. She picked up another. It went too wide. Miss Jones then said, 'I am running out of ammunition'. The court took little notice of Miss Jones who had hoped the court would commit her for contempt of court" just to draw more attention to herself. "But as the justices took no notice, Miss Jones went towards the door, and left saying:

'I congratulate your Lordships on your coolness under fire.[59]

The court has been advised to be tardy in the use of its power. This should not be construed as a licence by counsel and the general public. The courts should not hesitate to bare its fangs in deserving and appropriate cases, afterall the stealthy walk of the cat is not borne of cowardice:

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52 Boldface type by the writer for emphasis.
53 (1971)1 ALL NLR, 342.
54 Op. cit,. Boldface is of the writer's and it is for emphasis.
55 Op. cit., Boldface and italics is of the writer for emphasis.
56 (1900)2 Q.B. 36 at p.41.
57 Italics by the writer and it is for emphasis.
58 Atake v. A.G. (Fed.), Supra, per Eso, J.S.C., p.472.
59 Atake v. A.G. (Federation), per Kayode Eso, J.S.C., p.454.

> *"I do expect however, that the court's patience should not be taken as a licence for dragging the court into unnecessary controversy for as Lord Denning said in ex parte Blackburn (supra) and I agree –*
>
> > *"all we would ask is that those who criticize us will remember that, from the nature of our office, we cannot enter into public controversy. still less political controversy."*
>
> *I would, however after saying all these not wish to be misunderstood that the court should, where necessary, not preserve and guard its dignity. The court will fail in its duty if it carries restraint to the extent of permitting the court to be scandalized. And the instant case offers a classic {the case of Atake insinuating that the learned C.J. has received gratification in form of a national honour by a party (the President) before him (the C.J)[60] For if Anyaegbunam, C.J has not taken the stand he took in the instant action the court would have in my view been disgracefully scandalized."*[61]

In summing up this aspect of the paper, the writer considers the admonition of the court to counsel instructive and a wisdom nugget:

> *"However, it is my view that those lenient views (to wield the power to punish for contempt sparingly)[62] of this important offence of contempt taken by the highest court of the land should not be abused especially by senior members of the bar who ought to know that it is their duty to enhance the smooth administration of justice. A counsel who makes it a habit to scandalize the court is breaking the bridge over which he himself will cross. It is like someone living in a glass house throwing stone.*[63] *It is an act of indiscipline bordering on judicial rascality which is unbecoming of someone with good legal and moral culture.*[64]
>
> *The words and actions of counsel to the court should be characterized with decency and good decorum.*[65]
>
> *The incident of contempt of court will be reduced if lawyers desist from being rude and insolent to the court.*[66] *The court should also avoid re-acting rudely when found fault with or finding fault when angry!"*[67]

Procedure for Trial for contempt of court.

It is settled and trite law that contempt of court is a crime, and that the court has the inherent power and authority to punish for contempt.[68] Procedurally, how is the offence of contempt of court prosecuted? This question is very relevant qua the subject of this paper. It being so because quite a lot of cases on the subject particularly in Nigeria,[69] were quashed on appeal on the ground of improper procedure:

> *"In the case of Deduwa v. The state (1975)I All NLR (pt.I)I, the appellant had merely written a letter to the Registrar of Warri High Court requesting him to bring to the notice of the learned trial judge, Atake, J. (as he then was) their apprehension that they might not get justice in the case because both the learned trial Judge and the defendants in the case were Itsekiris. While they, the appellants were urhobos, and the subject matter of the proceedings concerned Itsekiri Communal Land Trust of which Atake, J. was said to be a beneficiary. They therefore requested that the case be transferred to a judge who was neither Itsekiri nor Urhobo. They were convicted of contempt of court by*

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[60] The words in the bracket are the writer's for clarification.
[61] Atake's case, supra, Eso, J.S.C., p.472.
[62] The words in the bracket are the writer's for clarification.
[63] Boldface type by the writer for emphasis.
[64] Italics by the writer for emphasis.
[65] Boldface type by the writer for emphasis.
[66] Italics type by the writer for emphasis.
[67] Boldface type by the writer for emphasis.
[68] The power to punish for contempt could also be statutory, see Fawehinmi v. State, supra, Omoijahe v. Umoru, supra.
[69] See Boyo v. A. G., Mid-west State, supra; Deduwa v. The State; Fawehinmi v. State, supra; Omoijahe v. Umoru, supra.

the learned trial judge.[70] ***On appeal to the Supreme Court it was held per Coker, J.S.C., that the letter was grossly contemptuous of the court, although the procedure adopted in their trial was defective.***[71]

Again, the Nigerian Supreme Court, in *Boyo v. A.G.,*[72] *Mid-west state of Nigeria*, quashed another ruling on a contemnor (a lawyer) by Atake, J., for want of proper procedure:

> ***"In the appeal before us however, the learned D.P.P. conceded that the contempt complained of was one not in the face of the court. We therefore do not have to decide the point. It is enough that both sides are agreed that the contempt complained of was not in the face of the court. What we are called upon to decide in this appeal is: as the contempt in this matter was not in the face of the court, was the learned judge correct in holding that his was the proper court to hear the matter.***[73]

The Supreme Court, on the point formulated above, held:

> ***"In the matter before us, we fail to se how Atake, J. would have avoided placing himself in the most invidious position of being an accuser, a witness, and also a judge if he was permitted to hear the matter of the contempt.***
> ***If even we use to hold that it is a matter within the competence of Atake, J. to hear, we feel compelled to say that we would have found it difficult to allow him to proceed to judge the contempt charge since the result of such a trial was a foregone conclusion judging from his own utterances and conduct of the case so far, from the record before us."***

The Court set aside the order of Atake, J. on the ground that his court was not the proper court to hear and determine the alleged contempt of court.

Yet again, in his own suit, Atake J., the hunter now the hunted, a convicted contemnor, still misconceived the procedure.[74] This is evident in some of the eight grounds of appeal filed in the Supreme Court. The second limb of the first ground of appeal, complained that he (Atake) was not given an opportunity to defend himself or show cause why he should not be committed for contempt of court.

Given the analysis above, as borne out by the dicta in the cases, it is beyond speculation that the right or correct procedure is as important as the alleged contempt itself.

To start with, it is the specie (type) of contempt that will determine the requisite procedure to be adopted. On this, the Nigerian Court of Appeal, in *Fawehinmi v. The State,*[75] per Akpabio, J.C.A. stated this:

> ***"The sum total of this judgement is that the offence of contempt of court can be divided into two broad categories viz:***
> ***(i) Those committed in the face of the court otherwise known as "in facie curiae" (or coram judice) and***
> ***(ii) Those committed outside the court hall or premises otherwise said to be "ex facie curiae" (or coram non judice).***[76]

It is the law that the procedure for the two types of contempt identified in the excerpt above differs. Still on the classes of contempt, Babalakin, J.C.A.[77] (as he then was):

> "Traditionally contempt is classified into either
> (a) Criminal contempt, or
> (b) Civil contempt

As Lord Diplock said in the case of Attorney-General v. Laveller Magazine Limited (1979) A.C. 440 at 449:

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[70] Italics by the writer for emphasis.

[71] Boldface type by the writer for emphasis. Per Akpabio, J.C.A., (delivered lead judgement) Fawehinmi v. The State, supra.

[72] Supra.

[73] Per Ademola, C.J.N. (Coker, Madarikan, Udoma, Sowemimo, JJ.Sc., concurring), Boyo v. A.G., Mid-west (1971) N.S.C.C., p. 338.

[74] The case is Atake v. A.G. (Fed.), supra. This case is arguably the locus classicus on the law of contempt of court in Nigeria. More will be said about it shortly.

[75] Fawehinmi v. State (1990), supra, p. 76.

[76] Fawehinmi v. State, supra, p. 76.

[77] Fawehinmi v. State, supra, p. 83.

"They all share a common characteristic: they involve an interference with the due administration of justice either in particular case or mime generally as a continuing process"

Contempt in the face of the court

When the alleged contempt is committed right under the nose of the judge, it becomes contempt in the face of the court. In this situation, the court has the inherent jurisdiction to try the contemnor summarily or *brevi manu* (instanter). There are avalanche of judicial dicta buttressing this principle of law right from England to the decisions of Nigerian Supreme Court. Idigbe, J.S.C., of blessed memory, in Atake v. A.G. (Federation) [78] (arguably Nigerian locus classicus on contempt of court), cited a passage from an English authority to the effect that:

"If contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned at the discretion of the judges." [79]

All the English cases referred to so far in this paper establish the principle that the court has summary power to try contempt committed in the face of the court. The power of the court to punish instantly has always been challenged, even in England and other Common Law jurisdictions. In the case of Atake v. A.G. (Federation), the Nigerian Supreme Court dwelt elaborately on this issue. Senator Atake, the contemnor in that case, among his grounds of appeal in the Nigerian Supreme Court, contended that he was not given an opportunity to defend himself or show cause why he should not be committed for contempt of court. The implication of this (Atake's argument as shown in the ground of appeal) is that, he questions the power of the trial court for the procedure adopted (trial *brevi manu*):

"The second issue raised in this appeal by the Senator related to the procedure adopted by the learned Chief Judge in committing him to prison. On this issue, I consider it ideal to set out the principal questions raised in the brief of the appellant; there read:

(a) Can the Chief Judge of the Federal High Court commit me for contempt without telling me specifically and distinctly what in the said ground (1) he considered a contempt of court?

(b) If even he told me what in ground (1) he considers a contempt of his court, can he commit me without giving me opportunity to being heard in answer to what he considers a contempt of his court; or in the time-honoured legal phraseology, can he commit me [to prison] without calling on me to show cause why I should not be committed for contempt?

(c) Does calling me by the Chief Judge to withdraw the said ground (1) and apologise for filling it amount in law to asking me to show cause why I should not be committed for contempt of court? [80]

It is the contention of the appellant that the answer to each of these questions must be in the negative. The learned Chief Judge, he submits, was under a duty to specify distinctly the charge against him and also tell him what exactly in ground (1) of his proposed ground of appeal amounts to contempt; the trial for contempt was criminal in nature and so, he contends, he (the appellant, Senator Atake) was entitled to have a charge setting out the specific grounds of particulars of offence read out to him; and in any event he must be given the opportunity of answering the charge against him. He contended that the procedure adopted by the learned trial judge and affirmed by the Court of Appeal, sitting in Lagos, was erroneous in law. According to Atake, even if the judge was dealing with a case of "contempt in the face of the court", the appellant (Atake) submits that this procedure must be followed and the requirement of a fair trial must be adhered to.

Against the issue of whether the court can deal and punish for contempt instantly without formal trial as it is the case in ordinary criminal trial, the Supreme Court, after evaluating the facts elucidated,:

"My Lord, the questions posed by the appellant in his brief arise from and I say so with respect to him – utter and complete misunderstanding for contempt in curiae faciae and the decisions of this court which he prays [81] ***in***

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[78] Atake v. A.G.(Fed.), supra, p. 459.

[79] Blackstone commentaries, 16th edition (1825) Book IV, page 286. all italics in this quote are the writer's for emphasis.

[80] Atake v. A.G. (Federation) (1982) N.S.C.C., per Idigbe, J.S.C., p. 458. All italics in this quote not of the writer, they are according to the author (of the quote) they are for emphasis.

[81] Senator Atake argued that the Court of Appeal ought not, in the face of the decisions of the Supreme Court in Abachom v. The State (1970)1 All NLR 69 at 78-9; Deduwa v. The State (1975)1 All N.L.R.I at 13, upheld the committal order of the learned Chief Judge based on a procedure so obviously wrong.

aid of his contentions. For a contempt in curiae faciae a superior court of record has inherent jurisdiction to deal with it, and punish for the offence either summarily (brevi manu) OR instanter; this is because "the usual criminal process to punish contempt was found to be cumberous and slow" [See: Oswald ... op. cit. pp.8-9]. I pause to quote from Oswald on the destination between committal and attachment and between contempt criminal and that which is not criminal:

> *"The origin of committal, as distinguished from attachment, is to be found in the practice of the court of Chancery. Where attachment issued, the offender was arrested by the Sheriff, and if the contempt required adjudication, was brought before the court and examined upon interrogatories, and upon the contempt being proved, committed to the fleet. In cases of assaulting or abusing a process server or speaking scandalous words of the court, an order was made for immediate committal, up ex parte motion supported by an affidavit of the facts [and this, as I will show later, must refer to occasions where scandalous words are spoken of the court NOT in the face of the court but outside the court which makes it necessary for the court to be so informed be deposition on affidavit in support of motion ex parte, and upon contempt in the face of the court [and this must include scandalous words spoken of the court in curiae faciae as in the instant case] and order for committal was made instanter, as at present ... "[Square brackets together with content as well as italics by me: see Oswald, op. cit. p. 22]*[82]

From the above, according to the Nigerian Supreme Court, the position, therefore is that, generally, contempts of court are either dealt with by *trial* summarily, that is *brevi manu* or on a simple indictment or on information, whether or not the contempt is *in curiae facieae* and trials for contempt of court by indictment or information are usually before another judge whose court was not the subject of the contempt. It is always open to the court, where the contempt is *in curiae facie*- depending on the nature or gravity of such contempt- to deal with the same *instanter* and without the process of a trial, but the case of contempt in such circumstances, however, must be quite clear and without doubt, and the contemnor must be taken to know from the circumstances what the contempt consists of. The Supreme Court have always stated this as the correct position of the law, for in the case of *Boyo v. Attorney-General, Mid-west*[83], the Court stated:

> *" These observations to which we have referred, to our mind, apply both in cases of contempt in the face of the court and also not in the face of the court, although in the first case, generally, the contempt cannot be dealt with efficiently except immediately and by the very judicial officer in whose presence the offense was committed. In cases of contempt not in the face of the court, there may be cases where the offence should be dealt with summarily i.e brevi manu, but such hearing must be conducted in accordance with cardinal principles of fair process..."*

Contempt not in the face of the court

When the fact, conduct, comment in any circumstance that constitute the alleged contempt was not carried out in the court or proximate to the court, such is described as contempt not in the face of the court (*ex- faciae curiae*). This (contempt *ex-faciae curiae*) was the basis why the Nigerian Supreme Court, in *Boyo v. A .G. (Mid-west)*[84], Derobed Ataka, J. of the garb of jurisdiction he erroneous clothed himself with. In this case, both parties conceded the fact that the alleged contempt was not in the face of the court. Then, the question that the apex Court was left to decide, was whether the learned trial judge was correct when he held that he had the jurisdiction to try the offence. The court held that, given the fact that the alleged contempt was not *in curia faciae*, he lacked the jurisdiction to try the matter.

The rationale for clothing another judge (as against the judge in whose court the alleged offence of contempt of court was committed) to try contempt, *ex- faciae curiae* is that there is the possibility of calling up witnesses to prove facts not before the judge:

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[82] Per Idigbe, J.S.C., Ataka v. A.G. (Federation), supra, p. 461

[83] (1971)1 ALL N.L.R. 342 at 353 – 354.

[84] Supra, see note 83.

> ***"Where the judge would have to rely on evidence or testimony of witnesses to events occurring outside his view and outside of his presence in court, it cannot be said that the contempt is in the face of the court. In such cases, a judge should not try a contempt in which he is involved. In the present case, the learned judge had stated, and it is on record, that he had witnesses he was going to call to testify to the contempt[85] and it is clear from the record before us that the learned judge was deeply involved" [86]***

The Canadian court in the case of Mckeown v. the Queen[87], per Laskin, J.said:

> ***"Where the judge has to be and is a witness of the facts which are in issue, he cannot, in my opinion, rely on a rule of discretion to justify him in proceeding to judge the issue. Trial of contempt charge by summary process does not necessarily mean trial before the very judge involved in the proceedings out of which the contempt arises.[88] indeed, it is the preferable course, where conditions do not make it impracticable, or where there will be no adverse effect upon the pending proceedings by the delay, to have another judge conduct the contempt charge...***
>
> ***The present case was not one in which the facts surrounding the alleged contempt were so notorious as to be virtually incontestable, nor was it one where the events upon which the contempt was based took place in the full view and appreciation of the court. It would have been the prudent course in this case either to have the Attorney-General assume the carriage of the proceedings before another judge... or to invoke the jurisdiction of the supreme court of Ontario..."***

Contempt Proceedings: Where lies fair hearing?

Having examined various aspects of contempt of court, the stage is now set to delve into the issue whether contempt proceedings is incongruous to the time-honoured expression, 'fair hearing'. Ordinarily, because of the peculiar nature of contempt proceedings, it triggers the question above (of whether the proceedings is in consonance with fair hearing). Fair hearing simply means that courts proceedings, especially in criminal matters, are conducted impartially. The importance of this concept is brought to the fore by its inclusion in the constitutions[89]. The Nigerian grundnorm, the Constitution of the Federal Republic of Nigeria,1999, from which other laws of the land derive their validity, provides:

> *"In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality"*[90]

Again:

> ***"Whenever any person is** charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing **in public within a reasonable time by a court or tribunal"***[91]

Under the Common Law, the doctrine of fair hearing comprises of two tenets. One, you cannot be a judge in your own cause *(nemo judex in causa sua)*; two, let the other side to a cause be heard *(audi alteram partem)*. The constitutional provisions on fair hearing cited above [section 36 (1), (4)] encapsulate the twin notation of the Common Law on fair hearing. Section 36 (1) provides that a court or a tribunal must be constituted in *such manner as to secure its independence and impartiality.*[92] The issue that falls to be determined here, is, given the law as its relates to contempt proceedings, can it be said that the law (as it concerns contempt trial and punishment) is fair – as provided by the Constitution and the Common Law? In proceedings *instanter* or trial *brevi manu*, the judge before whom is the contemnor, is the prosecutor, witness and

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[85] Boldfaced type is the writer's for emphasis.

[86] Boyo v. A.G.(Mid-west), supra, italics is of the writer for emphasis.

[87] (1971) S.C.R. 357-492at p. 477.

[88] Italics is of the writer's for emphasis.

[89] The Nigerian Constitution of 1979 and 1999.

[90] C.F.R.N., 1999, section 36(1). All italics and Boldface by the writer for emphasis.

[91] Constitutional of the Federal Republic of Nigeria, section 36(4). Italics in this quote are of the writer's for emphasis.

[92] Italics by the writer for emphasis.

judge[93]. When matched against the tenets of fair hearing of *nemo judex in causa sua*, – what do we get? The erudite jurist of the Nigerian Supreme Court, Kayode Eso, J.S.C. who concurred with the judgement of the Court in the case of Atake v. A.G.(Federation), obviously anticipated this question. He said:

> ***"Not that it is by reason** (the judge in contempt proceedings being the accuser, witnessed and judge)[94] **thereof illegal, as such trial ,though not prescribed in any written law, is part of the functions which have been associated from time immemorial with the inherent jurisdiction of any court[95] of record: (Deduwa v. the State)"***

Another related question, on the issue of the judge being accuser, witness and judge, is, could the situation have been otherwise? That is, can it be the case that when contempt is committed *in curiae faciae*, it should be tried by another judge, and not by the judge under whose nose the contemnor committed the alleged contempt? This question necessarily raises the rational for the judge in whose court the alleged contempt was committed to try the contempt. It is evident from judicial authorities, that the judge, before whom contempt is alleged to have been committed, is clothed with the power to try and punish the contemnor, instanter because to do otherwise (i.e to allow another judge try it) may not redeem the image of the court. For to allow another judge, delay comes in, and at the eventual trial, before another judge, the audience before whom the contempt was committed would have dispersed. This point is very logical in that the essence of the law of contempt in the face of the court is to salvage the image (integrity) of the court which the alleged contempt had eroded. This point was brought to the fore in the judgement of the Supreme Court of Nigeria:

> ***"In such a society, against the background of the present universal world of violence the necessity for, and, the duty of, a court subjected to contempt** ex-faciae, or in-facie **to quickly, and if possible in the immediate presence of those who witnessed the insult, restore the dignity and authority of the court by sharp, instantaneous importance[96]**. For a judge presiding over such a court to let such a contempt of his court to pass unpunished is for him, to use the phrase of Lord Diplock, to... "be quite irrational and subversive of the rule of law[97]... **(Chokolingo v. Attorney-General of Trinidad and Tobago (1981) W.L.R. 106 at 112).[98]***

Another Justice, who also heard the appeal (of Atake's case), shared the above view of Aniagolu, J.S.C:

> ***"I would ,however, after saying all these not wish to be misunderstood** that the court should, where necessary, not preserve and guard its dignity. The court will fail in its duty if it carries restraint to the extent of permitting the court to be scandalized. **And the instant case (Atake's case) offers a classic. For if Anyaegbunam, C.J. (the Judge under whose view Atake committed the contempt, the subject matter of appeal before the Supreme Court has not taken the stand he took in the instant action the court would have, in my view, been disgracefully scandalized."[99]***

From the discussion so far, it is evident that two precepts are competing – first, fair hearing, then, secondly, the need (and duty) to preserve and guard the dignity of the court, in the face of contempt *in curiae facie*. The scale, given the judgments, both in England, and other Common law jurisdictions, and Nigeria, tilts in favour of the second precept. This writer ventures a theory for this (for the need, and duty to preserve and guard the dignity of the court, in the face of contempt *in curiae faciae* overriding the precept of fair hearing. Perhaps, the doctrine of utilitarianism (as expounded by Jeremy Bentham) explains this. Upon this doctrine, which is according to its proponent, the greatest happiness to the greatest number, the need to guard the administration of justice (which concerns the public at large, should be given priority against individual procedural right of fair hearing. Although, it could be tenaciously contended that the individual(s) (contemnor(s)) is or are member (s) of the public, But then, whichever way it is viewed, the public (the greater number) is more than the contemnor(s), and therefore, should have the greatest happiness. Again, lets look at it this way. Supposing a court is truly scandalized, what is the implication? This will expose the administration of justice to the grave danger of inhibiting the appreciation by our people of our courts, and the necessity of the people confidently having recourse to our courts for the settlement of their disputes. Against the background of a largely illiterate society, talking of Nigeria, any diminution of the authority and respect of the court is an invitation to chaos and disorder. Given the chaos and disorder which will be

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[93] See Kayode Eso, J.S.C., Atake v. A.G., supra, p. 472. The words italicized and in bracket is the writer's and it is for clarification.

[94] The words italicized and in bracket are the writer's and it is for clarification.

[95] Atake v. A.G., supra, p. 472. italicized words by the writer for emphasis.

[96] Boldface type by the writer for emphasis.

[97] Italics by the writer for emphasis.

[98] This quote is from Atake v. A.G. (Fed.) per Aniagolu, J.S.C., p. 474.

[99] Per Kayode Eso, J.S.C., Atake v. A.G. (Fed.), supra, p. 472.

occasioned by the grave consequence of contempt, can anybody including the contemnor be able to assert or enforce any right (including the right of fair hearing)? The answer is unmistakably in the negative – you cannot place something on nothing and expect it to stand.

When contempt is *ex-facie*, there is no problem (if the judge who saw the contempt not being the judge to try the contempt) as the alleged contempt is tried before another judge and all the formal process of indictment, plea, etc is observed to the letter:

> ***"It is also well-settled by legal authorities that a contempt of court committed outside the court (ex facie curiae) being criminal in nature, cannot be punished summarily. In that case the contemnor must be arrested, charged before another court, full trial conducted and if found guilty punished according to law."***[100]

Nigerian cases on contempt: Atake and Fawehinmi.

In the course of this paper some Nigerian cases on contempt have been mentioned and commented upon, sometimes extensively and at other times tangentially.[101] Here, the writer will consider how the appellate courts have viewed the conviction of contemnors by trial courts, and examine two cases *(Atake v. Attorney-General of the Federation*, and the case of *Fawehinmi v. The State)*, which are considered special by reasons to be known soon.

In his well-written book,[102]Akpata, J.S.C. (as he then was) of blessed memory, commented:

> ***"Happily, I cannot readily think of a case where an advocate in this country, convicted by the lower court for contempt has not had his conviction quashed by the appeal court."***

The above comment by His Lordship, may well not have taken cognizance of Atake's case. Although, the question may well be raised whether Atake, given the fact that he appeared in person in the matter, can be regarded as an advocate. An advocate pleads the cause of another person – but Atake, though a lawyer, an ex-judge, pleaded his own cause. This seems not to have been lost on the court, which it said:

> ***"The clarity of the situation is even more so when that ex – judge (that ex-judge is Franklin Atake), as in the instant appeal, has been one who, as a trial judge, had,*** *in at least two celebrated cases (Goodwin Mogbeye Boyo V. A. U. Deduwa and others V. Emmanuel A. Okorodudu and others (1975)2 SC.37)* ***cited people in contempt of Court and dealt exhaustively with the salient law involved."***[103]

It would be an inchoate research to research on contempt of Court in Nigerian if the case of Atake is not discussed. It is a classic, – it is the locus classicus on the subject. Speaking on the novelty (as at then, 1982) of the case

> ***"As far as I know from my limited research...this is the first time this Court has been called upon for its specific judicial comment on the propriety of the procedure, for contempt in curiae faciae ..."***[104]

Facts of the case.

Senator Franklin Atake (herein referred to as the appellant), lawyer, ex-judge, had filed an application before the Chief Judge, of the Federal High Court for interlocutory injunction against the President of the Federal Republic of Nigerian and the Attorney- General of the Federation, seeking a declaration that section (2) of the Allocation of Revenue Act, 1981 is unconstitutional, void and of no effect having regard to section 149 (2) and 149 (3) of the Constitution of the Federal Republic of Nigeria, 1979 and also a perpetual injunction restraining the President (the first defendant) from operating the provisions of the said section 2 (2) and any other provisions of the Act.

The learned Chief Judge heard argument and reserved ruling thereon for 13th March, 1981. **As the learned judge was about to read his ruling on the adjourned date (13th March) the applicant (Atake) made an oral application for the Chief Judge to transfer[105] the proceedings before him to another judge for hearing and determination on the ground that in the opinion of the applicant he was unlikely to do justice in the proceedings because the first defendant had conferred on the Chief Judge the national honour of the Order of the Federal Republic (O.F.R.) six**

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[100] Per Kalgo, J.S.C., Omoijahe v. Umoru, supra, p. 194. All boldface and italics here are by the writer for emphasis.

[101] See Fawehinmi v. State, supra; Atake v. A.G. (Fed.), supra; Omoijahe v. Umoru, supra; Deduwa v. State, supra; Boyo v. A.G. (mid-west), supra; Agbachom v. The State, supra.

[102] Justice For All And by All, by E.O.I. Akapata (J.S.C.) (rtd.), 1994, B &C. Publishers Ltd., Lagos, Nigeria, p. 81

[103] Per Aniagolu, J.S.C., Atake v. A.G., supra, p. 473. All the words in bracket are inserted by the writer for clarification. All Boldface and italics in this quote are by the writer for emphasis.

[104] Per Idigbe, J.S.C., (as he then was), Atake v. A.G. (Fed.) p. 460.

[105] Boldface type for emphasis.

days before the ruling and after final addresses of counsel.[106] The Chief Judge stated that he would write a ruling on the application later and proceeded to read his ruling on the application for injunction for which he refused the appellant.

On a later date, the appellant then files a motion on notice to the defendants for leave of the Court of Appeal from the ruling. The learned Chief Judge first refused the application for transfer for hearing *and drew the appellant's attention to one of the grounds in his proposed grounds of appeal*[107]. **He asked the appellant to withdraw the ground and apologise within five minutes, the appellant refused and the Chief Judge committed him to prison for contempt in the face of the court.**[108]

The ground which the appellant refused to withdraw stated that he Chief Judge had received gratification/favour from the President/first defendant[109] *in the form of a national award, before he gave the ruling. However, the Chief Judge had stated in his ruling refusing the application of the appellant to transfer the hearing of the appellant to transfer the hearing of the proceeding to another Judge, that the President could not under the National Honours Act act on his own in awarding any member of the community any national honour*[110]. He also pointed out that the award of "O.F.R." on him was made on the Ist of October, 1981, while the actual investment was what was made on the 7th of march. 1981, six days before the ruling. *The appellant had filed the action against the Ist and 2nd defendants on the 4th of February, 1981, four months after the award was made to the chief Judge.*[111] **Atake's appeal to the then Federal Court of Appeal was dismissed unanimously.**"[112]

On appeal to the Supreme Court, the appellant contended that the learned Chief Judge erred in law in failing to tell him the precise portion of his proposed ground of appeal which amounted to contempt of court, that the proposed ground did not amount to contempt of court and finally that the Chief Judge erred in law in failing to put him in the dock, and specifically charge him with the offence of contempt of court, and prior to committing him to prison, calling on him (the appellant to show cause why he should not be committed to prison for contempt of court.

Critique

As it has been pointed out earlier in the course of this paper, this is a case that stands out, among many cases, on contempt of court in Nigeria, for some reasons, which have been discussed earlier. However, at the risk of appearing to sound repetitive, it may be stated, again, that Senator Atake is a lawyer of many years standing and experience; he was a magistrate for a number of years and was also on the High Court Bench in this country for many years before his retirement from the judiciary of this country prior to his election to the Senate.[113]

Importantly, as far as this writer knows from his limited research, as he does not claim to have had access to records of all decided cases, on contempt, in the Supreme Court, this seems to be the first case wherein the Supreme Court would affirm the conviction (for contempt) of a legal practitioner.

In the course of this writing, the writer has touched on many aspects of this case. In the circumstances, it would be vain labour to make an evaluation here of some salient issue (in the case) and the resolution thereof.

Gani Fawehinmi v. The State.[114]

This is one case that caused a lot of sensation. The fact of this case is rather lengthy; however, a brief account of the necessary fact will be given here.

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106 Boldface type for emphasis.

107 Italics for emphasis.

108 Boldface type for emphasis.

109 Italics for emphasis.

110 Italics for emphasis.

111 Italics for emphasis.

112 Boldface type for emphasis. The panel that heard the appeal at the Federal Court of Appeal was made up of: Ademola, Nnaemeka-Agu, Karibi-Whyte, J.J.C.A.

113 Atake v. A.G. (Fed.), supra, p. 450.

114 (1990)5 N.W.L.R. (Pt. 148) pgs 43-91

Following two judgments obtained against the appellant (Chief Gani Fawehinmi[115]) at an Ikeja High Court (Lagos) before Ilori, J.In suit Nos1D/312/88 and 1D/313/88 the appellant filed a motion of stay of execution of the said judgments at the said High Court. However, on the 10th October, 1989, Chief F.R.A. Williams, SAN who was counsel for the plaintiffs in the said suits, wrote a letter to the Acting Chief Judge of Lagos State requesting that the suits be transferred from Ilori, J. to another judge of the High Court of Lagos State on the ground that his youngest son was engaged to be married to one of the daughters of Ilori, J. Pursuant to that letter, Ayorinde, Acting Chief Judge, made an order transferring the suits from Ilori, J sitting in Ikeja Judicial Division to himself sitting in the Lagos Judicial Division.

On 5th December, 1989, when the motion for stay of execution was to be heard before Ayorinde, Acting C.J. of Lagos State, Chief Gani Fawehinmi, the appellant, filed a motion praying for an order transferring the said suits from the Acting chief Judge to another judge of the High Court of Lagos State for hearing and determination. The application was supported by a 17-paragraph affidavit, in which the reason for the transfer was stated in paragraph 8 thereof as follows:

> ***"8. That I have observed very seriously that since Ayorinde, J. became the Acting Chief Judge of Lagos State most of the cases filed by my chambers against either the Federal Government or Lagos State Government have been assigned to himself (Ayorinde, J.) and all his Lordship's decisions had been in favour of the Government."***

At the hearing of the application, on the 5/12/89, the appellant himself was not present in the court but sent one Barrister Tayo Oyetibo to represent him and move the motion on his behalf. The respondent in the motion was represented by one Barrister Ladi Williams, from the chambers of Chief F.R.A. Williams, S.A.N.

On commencement of proceedings, Mr. Oyetibo first moved his motion for transfer of the two cases to another Judge of the Lagos State High Court, supported by the said affidavit without any comment from the Judge. Thereafter Mr. Ladi Williams, who said he would not oppose the substantive application for stay for execution, nevertheless got up and oppose the application for transfer saying that the said affidavit was contemptuous of the learned Acting Chief Judge in that it impugned his impartiality and accused the Court of bias. He therefore urged the Court to punish the appellant for contempt *suo motu* in order to preserve his integrity. The Judge then rose to consider his ruling.

Thereafter the learned trial judge came out with a ruling in which he rejected the application for transfer and dismissed it. He then went further "in order to protect the integrity of our judges and court," and made an order ordering Chief Gani Fawehinmi (applicant) to appear before his court on 11/12/89 at 9.a.m.

On 11/12/89, the appellant, Chief Gani Fawehinmi, duly appeared before the learned Acting Chief Judge in obedience to his order. He was confronted with the said affidavit and told that paragraphs 7-14 were contemptuous of the Court and asked whether he still stood by them. He admitted swearing to the affidavit in support of his application for transfer, but said they contained statements of fact, and that it was the Court itself that inferred contempt from them. He demanded that he should be charged formally in line with the Constitution. Mr. Ladi Williams, counsel for the plaintiff/respondent in the substantive motion, demanded that he should be allowed to speak as he was the one that pointed out the alleged contempt to the Court. Chief Fawehinmi objected on the ground that he (Ladi Williams) lacked the locus since he was not a state counsel – contempt being a criminal offence should be prosecuted by the State. However, the Acting Chief Judge ruled that Ladi Williams should be heard and so called on him to speak.

In his brief address on the matter as an *amicus curiae*, Ladi Williams submitted that what the applicant did amounted to contempt of court committed "*in facie curiae*" and therefore should be punished *brevi manu* or *instanter* without resort to the usual criminal process. What constitutes contempt *in facie curiae* should be determined by the judge. He cited legal authorities to buttress his argument.

In reply to the above argument, the appellant, Chief Fawehinmi, raised three preliminary issues. First, that since the Court had on 5/12/89, heard and disposed of application in support of which the said affidavit was filed, the contempt

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[115] Chief Gani Fawehinmi, SAN, of blessed memory, was a foremost human right activist. As a matter of fact his appeal (on contempt) was an off-shot of an action he filed against two army officers, Colonel Halilu Akilu, the then Director of Military Intelligence and Lt. Colonel A.K. Togun, Deputy Director of the State Security Services (S.S.S.) for the alleged murder, on 19th October, 1986, of Mr. Dele Giwa, a journalist of great renown and Editor-in-chief of a weekly Magazine, NEWSWATCH. Mr. Giwa was killed in his residence at Ikeja in Lagos State by a parcel bomb. Up till today, like many of such deaths, Mr. Giwa's death is still unresolved. Likewise, until Gani's (as he was fondly and popularly called) death, he (Gani) put up a very strong clamour for the need to find the killer(s) of late Dele Giwa. Gani's case against the said army officers were fought up to the Nigerian Supreme Court, see, (1987)1 N.W.L.R. (pt. 51)554 – at the Court of Appeal; (1987)4 N.W.L.R. (pt. 67) 797 – at the Supreme Court. These army officers in return sued Chief Gani Fawehinmi for libel in the High Court of Lagos in Suit No. ID/312/88 and No. ID/313/88. the courts found for the army officers, and award damages of three million naira each against Chief Gani Fawehinmi. Gani appealed to the Court of Appeal, and duly filed a motion for stay of execution of the said judgements in the libel suit. It was in relation to this stay of execution that the action of contempt against Gani arose.

proceedings was incompetent. He submitted that the dismissal of the application put an end to the application together with the affidavit for all purposes. He cited four decided cases to back up this point. Secondly, that the said affidavit contains statement of fact which could not be controverted and that none of the ten factual conclusions made by the Court could be found in the said affidavit. After all those conclusions which were made in his absence, the learned trial Judge was no longer in a position to try him, as he had been virtually convicted unheard. The learned trial judge had become the prosecutor or complainant and the Honourable Judge at the same time. He then cited the case of Boyo v. A.G (Mid-Western State) (1971) 1 All N.L.R. 342 to 355 to support this submission. The third objection was that by the order that he should appear, the Court had indicated the offence that he has committed. It indicated a violation of s. 133(4) and (9) of the Criminal Code and section 6 of the Criminal Code. He then submitted that since he was brought under S.133, the learned trial Judge could not try him. Another Judge must try him. At the end of his preliminary objection, the learned trial Judge announced that there will be no ruling, and that Chief Fawehinmi should carry on. He there proceeded into the "merit of the matter." His submission was briefly that what he did, did not amount to contempt.

In a reserved ruling of fourteen pages, the learned trial Judge found the appellant guilty of contempt of his Court and sentenced him to a term of imprisonment for twelve months without option of fine.

Evaluation of the case.

This case raises a number of interesting issues. Lets take the issue of whether the affidavit (of the appellant, Chief Fawehinmi) amounted to contempt in law. This writer has examined some cases in the course of this paper, wherein the courts have laid down the principle of gauging what amounts to contempt of court, whether spoken, written (in letters or affidavits).

It is the law that the standard test for evaluating that which amounts to contempt *in curiae facie* is subjective, and not objective. If the trial Judge holds that it is contempt, them contempt it is.[116] Again, the intention of the contemnor has nothing to do with the consideration of this matter. Therefore on appeal, the Court of Appeal, did not agree with Chief Fawehinmi that his affidavit was not contemptuous. We should recall that Atake put up this specie of argument.[117] The Court of Appeal, per Akpabio, J.C.A, was of the view, and rightly too, that Chief Fawehinmi was "politely" contemptuous of the learned trial Chief Judge:

> ***"I have myself carefully studied the said affidavit and find as a fact that there is nowhere in it that the words "bias" or Government Judge" were ever used to described the learned Ag. C.J. yet it is my considered view that to set out a catalogue of four previous cases in which the learned Ag. C.J. had consistently given judgment in favour of the government against the appellant appeared to me to be nothing but "unnecessary palaver finding", especially when none of those judgments had been tested on appeal and found to have been erroneous.***
>
> ***To me the action of the appellant was similar to reporting a woman to her husband that his wife has been seen entering a hotel to spend the night with four different men at different times. Will that not amount to calling the woman a harlot or adulteress even though the words "harlot" or "adulteress" were never used in the complaint? Similarly one can call a man a "thief" without using that word, but by merely setting out instances in which the person took away peoples' properties without their owners' consent or knowledge"[118]***

In view of the analogies made by the Court above, and previous cases of the Supreme Court on the issue, the Court held that the content of the affidavit was in contempt of the Court. Under our law, it is an act of contempt to suggest whether directly or indirectly that one cannot get justice from a particular judge. "Indeed to charge a court with bias is a very serious thing indeed. To ask for court's assurance is more serious still."[119]

Another issue, and this is quite important,[120] *is the procedure adopted by the learned acting Chief Judge in convicting the contemnor*. In order to determine the *correct procedure*, invariably the question "was the alleged contempt *in facie curiae* or *ex- facie curiae*? arises. "The Court of Appeal dealt extensively with this issue, and queried :

> ***"....But in our instant case the appellant was not present in court when the content of his affidavit were brought to the notice of the learned Ag C.J. It became necessary therefore to issue a paper, be it a warrant or an enrolled***

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[116] See the judgement of Idigbe, J.S.C., Atake v. A.G. (Fed.), supra, p. 453. See also the judgement of Uwais, J.S.C., at p. 476, in the case of Atake v. A.G., supra.

[117] See Atake v. A.G., supra, p. 456-457.

[118] Fawehinmi v. State, supra, p. 75.

[119] Per Kayode Eso, J.S.C., Architects Registration Council of Nigeria (No. 2) v. Fassasi (1987)3 N.W.L.R. (Pt. 59)1.

[120] Bearing in mind the case of Boyo v. A.G. (Mid-Western State) in which Atake, J. misconceived the procedure in contempt *ex-facie*.

> ***order to invite him to come, and he did attend court at a later date.*** *Since appellant was not present in court when the said affidavit was brought to the attention of the court, and it became necessary to bring him on another day, can we seriously say that the contempt in this case was committed in facie curiae, so as to be amenable to punishment brevi manu or instanter instead of being tried formally?"*[121]

It was the view of the court, that, to commit contempt of court "*in facie curiae*" both the offensive document and its author must be present in the court when the matter is being considered. If it becomes necessary to bring the author to court, long after the matter has been considered and disposed of then whatever contempt that was committed will no longer be *in facie curiae, and will be tried by the normal criminal process if it is to be tried at all.*[122]

What then should have been the correct procedure (not taken by the learned Acting Chief Judge)? The Court itself answered it most elaborately, relying, expectedly, on judicial precedent:

> ***"In my view, the correct procedure should have been what was adopted in Atake's case, i.e. immediately the Judge saw or read the offensive document he should re-act sharply by calling on the author of the document to withdraw it at once and apologise.*** *If he did not do so, he should be put in the dock if there was one (not in the witness box), but if there was none he should be allowed to stand wherever he was, and that place considered as the dock.*[123] ***He should then be asked to show cause why he should not be punished for contempt. If he did not show good cause, he should then be "committed to prison (not sentenced) until he purges his contempt. This procedure was elaborated upon repeatedly by the Supreme Court in Atake's case. Anyaegbunam the Acting C.J. of the Federal High Court was praised for adopting that procedure correctly, while Atake, J. (as he then was) was castigated in Deduwa's case***[124] ***for not adopting the same procedure."***[125]

On the whole, the Court held that the alleged contempt was ex- facie, and should have been tried by another judge via a charge and its attendants features. The conviction of the appellant was quashed, and the imposed sentence set aside.

Summing Up

The power possessed generally by courts is very far-reaching. This is the way a retired judicial officer puts it:

> ***"The judicial officer wins all the time. He is the master of his court. When he is on his pedestal, his exalted seat, he is the Lord of all he surveys. He is armed with the sword of justice which he is in a position to use for any other purpose. As a human being he is an admixture of good and evil."***[126]

The above opinion of Ephraim Akpata, J.S.C, correct of course, has always been the view of legal commentators in other clime. In the learned justice's well-written book, from which the above quotation was taken, he cited the submission of Henry Cecil, that:

> ***"The judge is in a unique position. Not merely is everything said by him during a case absolutely privileged, but he cannot be shouted down as in parliament or even answered back if he refuses to allow it. He can cause great misery and cause frustration to parties, witnesses and advocate. The harm that a judge can do is not merely in actual injustice, that is wrong decision, but in sending***

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[121] Per Akpabio, J.C.A., Fawehinmi v. State, supra, p. 80. Boldface type by the writer for emphasis.

[122] Italics by the writer for emphasis.

[123] Italics by the writer (for emphasis). As regard the words in italics, see, the judgement of Eso, J.S.C. in Atake v. A.G., supra, p. 473.

[124] In Deduwa's case, just like Fawehinmi's, the words used in the document "stinks of contempt", but the Nigerian Supreme Court quashed the conviction of the contemnor for want of requisite procedure.

[125] Fawehinmi v. State, supra, p.81.

[126] See, Justice for All and By All, supra, p. 96-97. The quotation above is by the writer, Hon. Akpata, J.S.C., he was a Chief Magistrate from Feb., 1969 to Sept., 1973 when he was appointed judge of the High Court of the then Mid-western State of Nigeria. He became a justice of the Court of Appeal on the 4th of Jan., 1983. He became a justice of the Supreme Court on the 10th April, 1990, thus becoming the first judicial officer from the southern part of the country to have passed through three courts, the Magistrate Bench, the High Court and Court of Appeal and still made it to the Supreme Court. His retirement from the Supreme Court took effect from the 15th of April 1992 having attained the compulsory retiring age of 65 years. He is now of blessed memory.

litigants (and advocates) away with a feeling that their cases had not been properly tried."[127]

The power to punish for contempt is one of the composite power of the court, as shown above. This power, necessary though, could be abused in the hand of an irritable and irascible judge. A good example of this is discernible in the Supreme Court of Nigeria's case of *Boyo v. A.G.(Mid-Western state).*[128] Here, the Court admonished the learned trial Judge, Atake, J., first, for not sending the complete record of proceedings to the Supreme Court:

"In other words, the record of proceedings by that court was attacked as not containing the true proceedings in court. The learned trial Judge by a counter-affidavit admitted the corrections of many part of this document[129] *and corrected some,..."*[130]

The Court continued and castigated Atake, J.:

"If these are part of the proceedings, as certain parts appear to be, we must express our surprise that the Judge had not forwarded a complete record of proceedings to this Court for purposes of appeal but had left out what he thought was unfavourable to him."[131]

Secondly, on the issue of a dialogue between the learned trial Judge and the lawyer-contemnor, which the Supreme Court dubbed 'theatrical performance', the court rebuked:

"If on the other hand it was a mere explanation to members of the Bar,[132] *we must deprecate the conduct of the Judge in making the court a forum for his theatrical performance with Mr. Boyo in the dock."*[133]

In conclusion, on the part of counsel, on the matter of contempt, the antidote offered by the Nigerian Court of Appeal, per Akpabio, J.C.A. is here adopted and recommended to all ministers in our hallowed temple of justice, that:

" The words and actions of counsel to the court should be characterized with decency and good decorum. The incident of contempt of court will be reduced if lawyers desist from being rude and insolent to the court. The court should also avoid re-acting rudely when found fault with or finding fault when angry!"[134]

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127 Henry Cecil, The English Judge, p.56, cited by Akpata, J.S.C. in his book, Justice For All and By All, p. 97.

128 Supra, p. 338 – 339, 3342.

129 "This document" is a 12 page document, claimed by the appellant as containing the correct proceedings before Atake, J.

130 Atake v. A.G., supra, p. 338.

131 Atake's case, supra, p.339.

132 Atake, J. stated that he did not consider the part of the proceedings which was alleged to have been left out as forming the record of the Court. He said it was nothing but mere explanation to members of the Bar on why he had to arrest Mr. Boyo.

133 Atake v. A.G., supra, p. 339. Boldface type and italics by the writer.

134 Fawehinmi v. State, supra, p.88.