

Press Freedom, Freedom of Information and National Security: Misconceptions, Truth and Perceptions

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Abstract

This article presents a critique of some provisions of Freedom of Information Act (foIA) in Nigeria. It likewise discusses some salient provisions of the 1999 Constitution of Nigeria. The article identifies areas of conflict between the media and the government in respect of the right of the media to access information held by public bodies referred to as the practice of opening up government to citizens. The article also examined the failure, neglect and or refusal of successive governments to see the press as a partner in ensuring good governance, rule of law, due process and foundation of a free society. The article examined the challenges of Freedom of Information Act to national development and also various acts of intimidation, state violence, harassment, humiliation, culture of impunity, brutality, and stifling of the media by government and its security operatives by government justificatory claim in the protection of security information and national interest.

Key Word: Press, Freedom, Information, National Security Misconception, Perception

1. INTRODUCTION

Freedom of speech and press are the foundations of a free society. The right to speak and to write *critically* about the most important and controversial issues in governance should not be

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impeded. The cornerstones of any liberal democracy are the rights to speak freely, and to criticize government openly. Freedom of speech therefore is not an abstraction; it is recognized as a crucial bulwark against repressive governance or institutions. Free speech applies to all people at all times – and that no government, lobby group or court may unjustly curtail its expression. Mass media exercising this right by publishing articles on national security to ensure the continued security of the Nation and the freedom of its citizens. Of course, there is no such thing as the absolute freedom to speak, and there are indeed legitimate constraints on speech such as obscenity, defamation or incitement to immediate violence, therefore, it is perfectly legitimate for anti-hate laws to be used to increase the punishment for crimes that are racially and maliciously motivated.

2. BACKGROUND AND LEGAL PROVISIONS FOR PRESS FREEDOM

Freedom of the press is the right to circulate opinions in print and other channels without censorship by the government.

The concept of press freedom is well entrenched in the laws of Nigeria.¹ The Nigeria Constitution apart from imposing a duty on the media to hold government accountable to the people has made provision for the freedom and right of the press to carry out this onerous task as required in Section 39(1) of the 1999 Constitution.

Also Chapter II, Section 22 of the 1999 Constitution of Nigeria defines the role and obligation of the mass media: *“The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people”*.

The media enjoys veneration in society that is hardly accorded other profession. This affirms that the media are trustee for the public by communicating government programmes, successes, failures and flaws and, where necessary, proffer solutions and set agenda. This scope is further enhanced by the Freedom of Information Act, which

¹. Eburn-Olu Adegboruwa, *Press Freedom in the New Social Media Age (1)*. Nigerian Tribune, 22 October, 2019.

gives the journalist right to demand, and access information considered of public interest from the relevant public institutions.² (emphasis added).

2.1 *Press Freedom: Background*

The struggle for press freedom may have started with the martyrdom of Socrates (470-399 BC) who was killed for allegedly corrupting the youth of Athens with his “strange” idea about their freedom: Galilio Galilie (1564-1642); who was killed for his scientific discoveries, contrary to what the authorities of his days knew as the “truth”, and the scholarly writing during the rise of Liberalism in Europe.³ Clyde (1934) traced the travails of the press to the reign of the Tudors and Stuarts in the United Kingdom when the press freedom was curtailed through the practice of licensing and placing a limitation on the number of printers that were allowed to operate.⁴

John Milton in his publication *Areopagitica* (1644) attacked the licensing law amongst others. This eventually became a cornerstone of press freedom, leading in 1695 to the abolition of censorship laws in England.⁵ The struggle continued, with the First Amendment (1791) to the U.S. Constitution which declared that “Congress shall make no law ... abridging the freedom of speech or of the Press”.⁶

2.2 *Constitutional Provisions for Mass Media in Nigeria*

Mass media has often been described as the Fourth Estate of the Realm. This description can be traced to 1787 when a British Statesman and Orator, Edmund Burke categorized the media as the Fourth Estate in a parliamentary debate. He described the Lords

². Michael Owoko, *Rescuing and Safeguarding the Future of Journalism in Nigeria*. The Guardian, Monday April 27, 2020 p. 10.

³. Rotimi W. Olatunji; *Media Freedom for a Better Future: Shaping the post-2015 Development Agenda*. The Guardian, Monday May 26, 2014 p. 76.

⁴. Ibid. p. 76.

⁵. Ibid. p. 76.

⁶. The *Columbia Electronic Encyclopedia*, 6th ed. (2012).

spiritual as the First Estate; the Lords temporal as the second Estate while the House of Commons was the third Estate.⁷

Nigeria, like other democracies recognizes the role of the mass media and has gone to the extent of giving constitutional backing to it. Section 39(1) of the 1999 Constitution of Nigeria states: “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference”. Also, Section 39(2) provides that: “Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions”.

Section 22 of the Constitution states: “The press, radio, television and other agencies of mass media shall at all times be free to uphold the fundamental objectives contained in this chapter (i.e. chapter 2 of the constitution) and uphold the responsibility and accountability of the government to the people”.

According to Professor Ralph Akinfeleye, “mass media practitioners are gate-keepers who open and close the gate according to their constitutional, professional integrity, ethics, social responsibilities, as well as their sense of news judgments in the context of national interest”.⁸ Each Nigerian Constitution since 1979 has assigned a constitutional obligation to the press. Section 22 of the 1999 Constitution provides:

“The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the government to the people”.

Section 14 of the Constitution lays sovereignty squarely in the hands of “the people”. Section 38, 39, and 42 further support the adoption of a FoIA as a political and developmental right. Section 38, grants every Nigerian citizens, freedom of thought, and as a

7. Mack Ogbamosa; *Mass Media: Constitutional responsibility without empowerment*. The Guardian, Tuesday, August 27, 2019 p. 43.

8. *Media and Protection of National Security Interest*. This Day June 12, 2011, p. 19.

compliment, Section 39 grants freedom of expression and the press. If these rights are to be taken seriously in a democratic society, the free flow of information must exist. Without this foundation, the rights of Section 38 and 39 are virtually meaningless.⁹

2.3 *The International Legal Instruments for Press Freedom*

- a. Article 19 of the ICCPR¹⁰ declares:¹¹
 1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 3. The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –
 - a. for respect of the rights or reputations of others;
 - b. for the protection of national security or of public order, or of public health or morals.
- b. The Universal Declaration of Human Rights G. A. res 217A (iii), U. N. Doc. A/810 at 71(1948) provides that:

*“Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.”*¹²

⁹. Communiqué issued by the Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria, *“Roundtable on Press Freedom and National Security”*. The Nation, Tuesday, July 12 2011, p. 33.

¹⁰. International Covenant on Civil and Political Rights.

¹¹. R. Wacks. *Privacy and Press Freedom*. Blackstone Press Limited (1995), p. 18.

¹². First Amendment to the United States Constitution.

- c. Also, in Article 9 of the African Charter of Human and People's Right (Ratification and Enforcement Act) cap A9, Laws of the Federation of Nigeria, 2004 provides inter alia: "Every person shall have the right to express and disseminate his opinion within the law".

3. MEANING OF FREEDOM OF INFORMATION

Freedom of information means having access to files, or to information in any form, in order to know what government is up to. It also involves access by individuals to files containing information about themselves – and an assurance that the information is not being used for improper or unauthorized purposes. It covers individual access to information and the protection of information upon individuals from unjustified use.¹³

3.1 *The Importance of Information:* Our capacity as human beings to acquire, use and store information is essential to our survival. Through information, disasters are avoided, accidents prevented and sustenance provided by our use of information. Our ability to discern the degree of the reliability of the information provided is essential in the exploitation of resources or relationships, or in the exposure of sham. Information is necessary to make sensible choice or wise judgment. Information in the form of facts constitutes the basis of order in our lives, of community, regularity and knowledge.¹⁴

3.2 *Public Access to Information:* The freedom of information enables citizens to have right to access public records such as contracts, budgets provision, legislators votes, rules and regulations, and other government decisions. Freedom of information law presumes that an informed citizen is a necessary condition for social progress.¹⁵ It presumes that the people should, quite logically, have the right to know how their business is being conducted, how their

¹³. Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal. Third edition.* Cambridge University Press, 2001. p. 1.

¹⁴. Ibid. pp 17, 18.

¹⁵. The Nation, Tuesday, August 5, 2007. P. A7 2007.

employees, otherwise known as public officials are performing their duties. In essence, freedom of information in conformity with the constitution makes the political leaders accountable to the public.¹⁶

The public rights to know exempts information that has a direct bearing on national security. It also precludes disclosure of certain law enforcements information, and aspect of the conduct of foreign affairs. It also protects individual privacy – for example, a private citizen’s tax information, except as specified by law.¹⁷

Freedom of information ensures accountability in government through monitoring of government programmes, strengthens transparency, ensures good governance and strengthens public confidence in government for better service delivery.

To facilitate access to information from public institutions, the freedom of Information Act¹⁸ has imposed a duty on all public officers to make information available upon demand. Access to information is a fundamental right by virtue of Section 38 of the Constitution which stipulates that “every citizen shall have the right to freedom of expression including the right to obtain information and impact ideas”.¹⁹

Access to information is equally protected by Article 9(2) of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act which provides that “Every individual shall have the right to receive information”.²⁰

The 1999 Constitution of Nigeria and the African Charter have recognized the right of citizens to information. The right has been strengthened by the Freedom of Information Act (FoI Act). The FoI Act has enhanced the legally enforceable rights of Nigerian citizens to have access to official records, documents and information held by the federal government, public institutions and private bodies performing public functions subject to certain limitations. By virtue of FoI Act, there is no more secrecy in the affairs of the federal government as information can be requested for on any aspect of the

¹⁶. Ibid. p. A7.

¹⁷. Ibid. p. A7.

¹⁸. FOI Act was enacted on May 28, 2011.

¹⁹. Femi Falana. *Access to Information in Nigeria*. Vanguard, Wednesday, February 13, 2019, p. 21.

²⁰. *Ibid.* p. 21.

management and operation of public institutions including the award of contracts, disbursement of funds, recruitment of staff etc.²¹

4. THE FREEDOM OF INFORMATION IN OTHER JURISDICTION

4.1 *Freedom of Information in USA:* In 1966, Congress of U.S. enacted the Freedom of Information Act (FoIA).²² The purpose of FoIA is to provide the public with access to information in federal agency records. FoIA requires that agencies make information available for public inspection and release information to “any person” making appropriate request, section 552(a) (3). Once a proper request has been made to an agency, it must make the requested records available unless the agency establishes that the information sought comes within one of the Acts nine exemptions.²³ Every state has its own access to information statute. Many of these are patterned after FoIA, but some follow a quite different model.²⁴

In U.S., a federal district court expressed well and simply the broad principle of FOIA: *Freedom of Information is now the rule and secrecy the exception.*²⁵ FOIA was a major blow to the developing doctrine of “executive privilege”, a doctrine brought to maturity by burgeoning theories and laws of privacy. In US, Federal government agencies are no longer able to withhold information on the capricious ground that its release would be contrary to the public interest.

The Freedom of Information Act has opened up federal files to investigate reporters, scholars, public interest groups, and others. It has put a spotlight on government wrongdoing, unsafe working

²¹. Ibid. p. 21.

²². 5 U.S.C. Section 552 (1988).

²³. Richard, C. Turkington ... (et al). *Privacy Cases and Materials*. The John Marshall Publishing Company, Houston, Texas, 1992. P. 353.

²⁴. Franklin, M. A., Anderson, D. A., *Mass Media Law Cases and Materials – 4th ed.* (1989) University Casebook Series p. 644.

²⁵. Wellford v. Hardin, 315 F. supp. 768 (DD.C 1970).

conditions, noncompliance with antidiscrimination laws, FBI and CIA shading of the law, and myriad public matters.²⁶

For instance, in the case of *Kerr v. Koch*,²⁷ a reporter for the Daily News demanded appointment calendars identifying Mayor Koch's luncheon and dinner guests, whether official or private, under New York's Freedom of Information Law. The Mayor invoked an exemption for material that if disclosed would constitute an unwarranted invasion of personal privacy. The court ordered disclosure and held that "in an administration that has been solely afflicted by scandals of one sort or another, it seems quite proper to know the friends of the City's Chief Magistrate and his association with them especially where a diary of those associations is represented by an appointments calendar kept on the premises of the agency of the Mayor".

4.2 Freedom of Information in the United Kingdom:

Unnecessary secrecy in government leads to arrogance in governance and defective decision making so starts the White Paper²⁸ presented to Parliament in December 1997 entitled 'Your Right to Know – The Government Proposals for a Freedom of Information Act'. The White Paper proposed radical changes in the approach of public authorities to questions of disclosing or withholding information. In the Prime Minister's words "The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know".²⁹

In the United Kingdom, neither statute nor common law developed an overall concept of freedom of information prior to the 2000 Act. The Freedom of Information Act 2000 establishes a statutory right of access to information held by public authorities. In essence, the public have a right to know about the work of

²⁶. Donald M. Gilmore ... (et al.) 0 5th ed. *Mass Communication Law Cases and Comment*, (1990) West Publishing Company, p. 460.

²⁷. 15 Med. L. Rpts. 1579 (N. Y. Sup. 1988).

²⁸. John MacDonald QC, Olive H. John., "*The Law of Freedom of Information*" (Oxford University Press, 2003), p. 3.

²⁹. *Ibid.*, preface.

government and all other public authorities. The statutory right of any person making a request is entitled:³⁰

- i. to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- ii. if that is the case, to have that information communicated to him.

There are three types of exemption to Freedom of Information Act 2000.³¹ First, there are provisions which confer absolute exemption which falls within the class; there is no duty to disclose the information instances of this are: information supplied by, or relating to, bodies dealing with security matters, court records, parliamentary privilege, personal data, information provided in confidence, statutory prohibitions on disclosure. There are over 300 legislative provisions which contain restrictions on disclosure.

The second type of exemption relates to information intended for future publication, national security, investigations and proceedings, communications with the Royal family, environmental information, the formulation of government policy and ministerial communications, and legal professional privilege.

The third type of exemption applies where disclosure can be shown to prejudice interests which are singled out in the Act, namely defence, international relations, relations within the United Kingdom, the economy, law enforcement,³² audit functions, the conduct of public affairs, health and safety, commercial interests, if prejudice *cannot* be shown, the information must be disclosed. If prejudice *is* established, the information will still have to be disclosed under the public interest test set out in *Section 2*,³³ if the balance of public interest favours disclosure.

³⁰. Ibid, p. 34.

³¹. Ibid. p. 35

³². The law enforcement exception is wide: It includes the detection of crime, the prosecution of offenders, the administration of justice, the collection of taxes, immigration controls and security in prisons.

³³. The law of freedom of information 2000.

5. THE MEDIA, FREEDOM OF INFORMATION AND NATIONAL SECURITY

National security concerned matters related to the survival or wellbeing of the nation as a whole. There are different worldview and discourses and opinions about the meaning of security. According to Booth,³⁴ “security means the absence of threats. Emancipation is the freeing of people (as individuals and groups) from those physical and human constraints which stop them carrying out what they would freely choose to do. War and the threat of war is one of those constraints, together with poverty, poor education, political oppression and so on. Security and emancipation are two sides of the same coin. “Emancipation, not power or order produces true security”.

It is pertinent therefore to examine who should know of the activities of the security agents in order to vouchsafe to the public that those activities are conducted according to the proper mandates and the law? Likewise, the question about their general operations and techniques for dealing with information, what safeguards exist, and should exist to prevent abuse against the media practitioners.

National security in Nigeria is maintained by security agencies that are saddled with the responsibility of maintaining law and order, internal and external security of Nigeria. Security agencies in Nigeria are the Nigerian Police Force, the Military, State Security Services, Nigerian Customs Service and the Nigerian Civil Defence and Security Corps.

In the needs for journalists to be given free access to information, it is lamented that journalists have become targets of repression and assault by *the Government security* forces which trample on the rights of journalists. There are growing number of attacks and the culture of impunity against the media as a result of their watchdog functions.

The memories of military regimes often evoked the era of the promulgation of obnoxious decrees and draconian laws made by the junta at the helms of the country’s affairs. One of such repressive

³⁴. Paul D. Williams (ed.) “*Security Studies: An Introduction*” 2nd ed (2013) Routledge Publisher, p. 104.

enactments was *Decree No. 4 of 1984 (Protection Against False Accusation) Decree* of former Head of State, General Muhammadu Buhari administration under which two Guardian journalists, Tunde Thompson and Nduka Iraboh were tried, convicted and jailed on July 4, 1984.³⁵ The worst in Nigeria of media brutality was also exemplified by the murder of Dele Giwa, a frontline media practitioner in 1985.³⁶

The press is fettered and free flow of information for sustainable government is hindered through various decrees and acts.³⁷ Among these are Defamation Act, 1961; Official Secret Act, 1962; Seditious Act, 1961; Public Officers (Protection Against False Accusation) Decree No. 11, 1976; Newspaper (Prohibition of Circulation) Decree No. 12, 1978; Nigerian Press Council Decree No. 31, 1987; News Watch (Proscription and Prohibition from Circulation) Decree No. 6 of 1987 and The News (Proscription and Prohibition from Circulation) Decree of 1993. All these decrees and promulgations did not permit press freedom in Nigeria.³⁸

Media practitioners in Nigeria are an endangered species living through harrowing experiences in the hands of security agencies. The horrifying trends and worrisome instances are state inflicted violence, oppression, harassment, brutalization, humiliation, thump up charges, police applied violence, gagging the media, crackdown and legislation to stifling the media in the course of media carrying out their legitimate duties.

State security has often been a way of legitimating oppressive structures of surveillance and control formulation and implementation of security, policies of the state. Security therefore is a label which sets the limit to other labels like freedom, mobility and privacy. Through government justificatory claim, what is a national security justification therefore is the result of legitimacy struggles, between state actors (media inclusive) and government represented by security agents.

³⁵. National Mirror, Monday, July 4, 2011.

³⁶. The Guardian, Monday May 26, 2014, p. 77.

³⁷. The Nation, Tuesday July 12, 2011 p. 33.

³⁸. Ibid p. 33.

Media practitioners in Nigeria have since become a metaphor of suppression of freedom of information and access to information in Nigeria though the process of gathering information with the instrumentality of Freedom of Information Act (FoIA).

6. CONCLUSION AND RECOMMENDATIONS

Security thrives on robust plurality of ideas and opinions, and the availability of information. Freedom of speech offers that platform for the exchange of those ideas and should not be unnecessarily clogged in the name of state security by anti-democratic forces, who are very uncomfortable with the media freedom. Constitutional democracy cannot work, without freedom of expression and/or media freedom.

The following recommendations are proposed:

1. Creating a forum for media practitioners and the security agencies to exchange ideas on how to protect the national security of the country. Security of life and property is the business of every Nigerian and it begins with consciousness and intelligence.³⁹
2. The need for security agencies to brief the media and the general public on security threats and the measures to take to avoid such threats.
3. The need for workshops, conference and seminar to be anchored by the media and security agencies to sensitize people on security awareness.⁴⁰
4. Citizens should get all the information they need to make informed analysis of issues and to be effective partakers in the political governance of the country.
5. The media should adopt a holistic view of national security over and above reporting of news to catch attention of readers and by extension view security agencies as partners in progress, that is, as professionals who have been charged with the mandate of securing the lives and properties of every Nigerian.⁴¹

³⁹. This Day Sunday, June 12, 2011 p. 19.

⁴⁰. Ibid p. 19.

⁴¹. Ibid. p. 19.

6. The law should only protect government information where a risk of a breach of national security is clearly established or where a clear and present danger would exist to an identifiable public interest by disclosure.
7. The media must not prevaricate, hedge, nor quibble over what is wrong, but it should stand always and uncompromisingly on the side of transparency, openness, accountability and good governance.
8. The media must ensure accuracy by knowing and telling the truth always.
9. The media must be courageous to tell the truth, and criticize government constructively and offer solutions to pressing issues.
10. The media practitioner(s) must be well educated, trained, knowledgeable and enlightened to be able to perform the role of informing the public.
11. The right of the people to know should override any perceived national security concerns.
12. The right of Nigerians to report cases of crime and criminality to the security agents without fear of indictment nor incarceration or false accusations by the police and security agents.
13. The need for reform of the security operatives eccentric and highly questionable security agents should be accountable for their misdeed through the Court of Justice.