

THE PRESS AND COURT PROCEEDINGS IN NIGERIA¹

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The importance of the press for any democratic society or society aspiring to be democratic is no longer debatable. In our recent history as a people we can easily point to the patriotic role played by the press in scuttling the inglorious agenda at self-perpetuation in office and in power by certain military and civilian Presidents. The judiciary occupies a high pedestal in the scheme of liberal democracy. Thus, court proceedings on important constitutional issues that impact the building of that democracy are crucial. This explains why generally the constitution provides that cases shall be heard in public.² However, as everybody cannot possibly attend all court sessions hearing cases, the public relies on the press to record and publish accurately the proceedings. But the obligation carries with it enormous responsibilities. It is therefore apt that Judicial Correspondents have chosen for discussion the relationship between press laws and court proceedings. I feel delighted and honoured to have been requested, though at a brutally short notice, to lead the discussion on this important issue. However, as whatever laws exist on the press have a relationship to the larger issue of press freedom, I have taken the liberty to discuss the duties of the press in covering court proceedings within the context of a general treatment or discussion of press freedom.

¹ This paper is based largely on the one delivered at the annual conference of the Nigeria Bar Association on the 26th of August, 2010

² Section 36(3) of the Constitution of the Federal Republic of Nigeria, 1999

Freedom of the press and freedom of speech are related components or subsets of the wider freedom of expression which is one of the fundamental ingredients of liberal democracy³. Indeed, scholars like Henrik Berglund rightly see liberal rights as integral part of liberal democracy⁴. It is therefore useful to examine freedom of the press in the context of the promise and problems of liberal democracy. But this discussion would be unhelpful without posing the practical question ultimately whether countries like Nigeria are moving towards liberal democracy in spite of the problems of the latter. My central argument here is that although freedom of the press may not necessarily lead to equality and indeed may exacerbate inequality in society, equality and social justice would be impossible without it.

Overcoming the Contradictions of Liberal Democracy?

Liberal democracy essentially promises equality of citizenship and civil or individual freedoms. These promises are supposed to be realised through the mediation of the state and its institutions or agencies by organising periodic elections and affording mechanisms for the enjoyment of civil freedoms. Over time direct participation, in the Athenian sense, has come to be replaced with indirect representation with the result that citizens become less equal or lose their autonomy. The tendency is for the majority of the citizens who are represented in decision making or law making institutions of state by a tiny fraction of the

³ Abrahamsen has eloquently argued that democracy can only be meaningfully discussed as a contested category or concept. Thus we are reminded that there are different types of democracy or democracies. See Rita Abrahamsen, *Democracy in the age of Security, The Constitution*, Vol. 9, No. 1, pp1-17

⁴ *Civil Society and Democracy in Gavin Williams (ed) : Democracy, Labour and Politics in Africa and Asia: Essays in Honour of Bjoorn Beckman*, 2004, centre for research and documentation, kano, pp27-41

population to be reduced to periodic voters. But that also leads to the problem of marginalisation and poverty in prebendal societies such as Nigeria where representation is reduced to personalization of state resources. We see therefore that liberal democracy which promises equality can create and has actually been creating conditions for inequality. As observed, again by Berglund, 'the main problem is not that the citizen's activity is limited to voting but that opportunities for further engagement in politics are decided by access to resources, which are unevenly distributed. In a democratic society, the impact of these inequalities must be moderated, both by limiting the resources of the powerful and by improving access to them for the less powerful. The second constraint is the limited state, which gives too much room for unrestrained capitalism, leading to inequality and the lack of real democracy'

Liberal democracy is therefore at a crossroads, in spite of the misplaced triumphalism of the Fukuyamas that it is the end of history. While its leading proponents insist that the best way to guarantee democracy is by limiting the role of the state, particularly by privatising public corporations, the result has been that the untrammelled dominance of those who have access to the unevenly distributed resources of society lead to greater inequality which makes civil and political freedoms illusory. Can liberal democracy be redeemed? Are the freedoms, such as freedom of the press, which form an integral part of it useful and relevant?

Of course there are alternatives to liberal democracy⁵. One obvious way to overcome the limitations of liberal democracy is to do away with the artificial dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other. As has been argued extensively elsewhere without the economic, social and cultural rights which ensure access to societal resources, civil and political rights lack any real content⁶. However, this distinction will not be abolished by merely wishing or decreeing it. There has to be a fundamental change in the way liberal societies are ordered. That fundamental change cannot take place without the full exercise of the civil and political rights such as freedom of the press which is one of the promises of liberal democracy. These freedoms are necessary handmaidens in transforming liberal democracy. We can only argue for the deepening and not the rejection of those rights regardless of the fundamental problems or contradictions of liberal democracy.

Freedom of the Press without Freedom of Information: Freedom without content

Dissemination of information is the universally acknowledged principal function of the press. It is therefore not difficult to see that without civilized access to information which a Freedom of Information Act facilitates, it really does not make sense to talk of freedom of the press in any country or polity (even though freedom of information is not meant for the journalists alone). The first draft of the Freedom of Information Bill entered our political

⁵ Radical democracy or socialoist democracy...

⁶ See...

discourse 16 years ago⁷. Since then and in spite of the clamour for its passing by the people, members of the National Assembly and the ruling elite have remained implacably hostile to the Bill⁸. Many reasons and justifications have been proffered for the hostility of the ruling elite to the FOI Bill. The main argument against the Bill is that granting access to public information to citizens would jeopardise national security. The unacceptable paternalism of this self-serving argument has been poignantly pointed out⁹. The point that has to be made is that the issue of whether it is desirable to pass the Bill or not is not a moral issue but a serious political and economic issue. Unequal access to information generates political and economic inequality which in turn leads to the domination of one class of people over another. One can cite several examples to show how a tiny proportion of our population benefits from the opaqueness and corruption that lack of access to public information engenders. Every now and then government officials award lucrative oil blocks to their cronies who immediately happen on stupendous and easy wealth. Citizens cannot request the relevant ministry to make available the names of beneficiaries of this easy largesse since 1956 when oil was found at Oloibiri. How much money these middlemen and women have made from these immoral parcelling of collective resources of our people to themselves would never be known without FOI. What about contracts awarded by various ministries and government departments or even professional jobs such as briefs given out by government

⁷ Chidi Odinkalu, Freedom of Information in Nigeria: Perspectives, Problems and Prospects, Paper delivered at the Law and Development Lecture organised by Bamidele Aturu and Co in Lagos on 27 October 2008

⁸ By Chidi Odinkalu's account in FOI Bill, *ibid*, this is the Bill's eleventh year in the National Assembly

⁹ *Ibid*, p. 22

departments? It is necessary to know who got these jobs and at what costs to the taxpayers. Furthermore, it would be useful to know how much some of these funny jobbers who make it look like they are the most brilliant professionals in the world pay as taxes. The opaque system facilitates corruption and cronyism in such a way that development is impossible. The enemies of FOI are therefore enemies of peace, progress and development of Nigeria and they must be fought as such.

Thus the FOI issue is also and very clearly an issue of power. This is why some of the people opposing the passing of the Bill today would rather die than see it passed. The immediate implication of this is that the proponents of the Bill, and every decent citizen should number among them, should work out a sustained political strategy against the opponents of the Bill. Until and unless we stop moralising the debate the Bill stands no chance. In other words, if any issue or matter should be a matter of life and death it is the issue of the need for Freedom of Information. I really do not see why citizens cannot protest and seize the National Assembly until the Bill becomes law willy-nilly. I am ready to take part in, and if need be lead, such an action. The struggle for FOI requires a combination of actions, from legal actions to civil disobedience to any action necessary. The trade unions which need information for proper and effective bargaining, ought to organise strikes to force members of the National Assembly to pass the Bill. I cannot agree more with Chidi Odinkalu when he said that 'advocacy for freedom of information is the struggle for our republic and to return

ownership of both our government and our information to where they belong-our people¹⁰

Freedom of the Press: A brief theoretical Note

There is an undying debate as to whether the press ought to enjoy a special right different from that enjoyed by other citizens or members of the society¹¹. For some, freedom of expression guaranteed by section 39 of the Constitution is sufficient for the press to carry out its assumed traditional functions of informing, educating and entertaining the public. Section 39 of the Constitution provides that, 'every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'. In subsection 2 it is provided that every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions'. However, the proviso to subsection 2 states that persons other than the state cannot operate a television or wireless broadcasting station for any purpose without the permission of the President upon fulfilment of conditions stipulated in an Act of the National Assembly.

The question then is, is section 22 of the Constitution which provides that

The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives

¹⁰ Ibid, p.21

¹¹ Adigun Agbaje, Freedom of the Press and Party Politics in Nigeria: Precepts, Retrospect and Prospects, African Affairs, Vol 89, Number 355, 205-226.

contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

superfluous? Those who take the view, which is predominant in Nigerian legal circles, that rights and obligations contained in Chapter II of the Constitution are absolutely enforceable not being justiciable by virtue of section 6(6)(c), can argue that section 22 is superfluous as section 39 which is justiciable covers impartation of ideas and information, the main functions of journalists and the press. However, it has always been my position that the fact that the whole of Chapter II of the Constitution are not justiciable or amenable to judicial enforcement does not imply that they cannot be enforced by other means. Indeed as I posited in an earlier article, section 13 creates an obligation for all Nigerians to enforce the whole of the Chapter. It is therefore possible for citizens to ensure compliance with the provisions contained in the Chapter by non-judicial means.

It is arguable that section 22 fortifies the power of the press in ways that section 39 does not. Although the section is not justiciable, I am of the view that it can be a defence to illegal criminal libel prosecutions¹². This point has never been raised in any such prosecution. My position is based on the creative use to which the Supreme Court¹³ put section 15 of the Constitution in upholding the legality of the passing of the law by the National Assembly, although corruption is not one of the matters in respect of which it can legislate. The argument is that if the Supreme

¹² See *Nwankwo v The State*

¹³ *AG Ondo State v AG Federation NWLR* pt 772

Court can rely on a non-justiciable section to validate a law, there is no reason why a journalist or the press cannot rely on another non-justiciable section contained in the Constitution as a defence to criminal libel prosecutions by the state when it can be established that the subject matter of the report relates to holding the government accountable. But the question really is why section 22 is not placed under the justiciable Chapter 4 of the Constitution if its drafters are sincere about freedom of the press? We shall return to this question subsequently. It suffices however to state that even section 39 which is in Chapter 4 of the Constitution is not an absolute right as section 45 of the Constitution permits its derogation by laws reasonably justifiable in a democracy in defence of public morality etc. The point is that even if section 22 had been placed under Chapter 4, that would not be the end of the matter. But the derogation from section 39 compels an examination of judicial attitude to Press freedom.

Press Laws and Press freedom

The question of what law is or is not remains a matter of serious controversy among jurists and philosophers. Yet its understanding is crucial to our present purpose. Law has been defined as ‘the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society’¹⁴ It appears that this and many of the other well-known definitions of law bear the imprints of either positivism or natural

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Black’s Law Dictionary, 7th Edition, West Group, Minnesota, p.689.

law. Austin, the leading positivist of all times, regarded law as a body of command laid down by a sovereign with an obligation for obedience on the part of those to whom the command was issued¹⁵. Positivists tend to exclude the Sovereign from the obligation to obey the command and also invariably separate the issue of legality from that of morality. For them once a law can be traced to any of the accepted sources it is law whether or not it is a bad law.

On the other hand, natural law adherents believe that it is impossible to understand what the law is unless one understands what the law ought to be. The question of morality is inseparable from the search for what the law is. Law according to naturalists must be aimed at the common good. A notable variant of this is that natural law is the law of God that must be obeyed by all persons and authority.

For me, I conceive of Law as no more than the domination of an inferior class by a superior class in a given society. That the superior class also controls the economic power in such a society is an inescapable conclusion supported by a cursory study of the history of all legal systems, advanced or primitive. We see therefore that law is at once an instrument of domination and 'legitimation'. When serving its role of domination it is necessarily coercive; but in its legitimating or ideological role it justifies the existence of the existing social order by conceding what I choose to call certain 'order-preserving rights' and this has often led some analysts to commit the error of celebrating

¹⁵ N.E. Simmonds, *Central Issues in Jurisprudence*, Sweet & Maxwell, 1986, p.78.

certain mainstream jurists or laws as friendly to the poor or the dominated class. Failure to elaborate on the interests of the Sovereign or the dominating class and its motive force for law making leads to gross obfuscation which is the eternal failing of both positivism and natural law.

The argument here basically is that the dominating class cannot make its law to serve the interest of the dominated. Put differently, it is wishful thinking to expect the dominating class to make laws that would confer benefits on the dominated except to the extent that the collateral benefits and law are to keep the oil of domination functioning and effective.

It should be obvious now that this paper is not concerned with analyzing specific laws inhibiting press freedom in Nigeria. All the laws, whether it was the colonial Seditious Offences Ordinance of 1909, the precursor of the notorious Public Officers (Protection Against False Accusation) Decree No 4 of 1984 or even the Nigerian Press Council Act recently nullified by the Federal High Court, these laws were enacted to repress the press and prevent criticism of the government in power¹⁶. That is the connecting thread. While one must commend some of our judges who have handed down courageous judgments in favour of press freedom, such as **Nwankwo v The State** (which held that sections 50 and 51 of the Criminal Code are unconstitutional), it must never be forgotten that the repressive laws are still being used by the state to harass and intimidate journalists. Under our so

¹⁶ Chris Ogbondah and Emmanuel U. Onyedike, *Origins and Interpretation of Nigerian Press Laws*, *Africa Media Review*, Vol 5, No 2, 1991. These authors, though non-lawyers, did a thorough review of anti-press laws and judicial attitudes to the laws in the periods during and after independence.

called democracy in the fourth republic journalists were charged with criminal sedition for publishing story indicating that presidential jets were not new but refurbished. Media houses have been shut down by our democratic governments on account of publishing news that embarrassed governments. The closure of Channels Television and Insider Magazine recently demonstrated the fact that qualitatively there is little difference between the so called democratic governments and the undemocratic regimes.

One can go on and on. The point is that the project for the abolition of press repression is not simply a legal project but a political project as well. It is not reformism but revolutionary reconstitution of society. In societies such as ours, that political project will include changing the electoral system to ensure that votes count and of course de-monetising the electoral process in such a way that to win votes one does not have to steal public funds to capture power.

Ownership of the Press, Self-censorship and hegemony

When we argue for freedom of the press we need to be careful that we are not merely asking for freedom of the owners of the press, for if we examine the matter more carefully we shall see that freedom of the press does not necessarily translate into freedom for journalists to practice their profession. This is not a matter on which I can claim any expertise, but it appears that there are enough hues and cries even among the journalists themselves that the payers of the pipers are the ones dictating the tunes. In our polity where owning a newspaper is often more in furtherance of political ends than of business, the hands of the

journalists more often than not are tied. Some may argue that if politicians own media outfits that in itself may help to deepen democracy as opposition may blossom on that account. But that argument would seem to gloss over the fact that divisions among the politicians are really never on issues concerning the common welfare of the people but on how one faction of the ruling elite may gain the upper hand in the control and sharing of offices and booties of those offices. That sort of fight can never deepen but destroy democracy. The challenge then is to ensure that we would be able to ensure in our laws that the journalists are free to practice their profession freely and that their employments would be protected against unfair dismissals.

Conclusion

For there to be true press freedom in Nigeria groups Nigerian journalists would have to be proactive. They should come out with suggestions on law reforms aimed at guaranteeing access to information and freedom of the press. But it must be recognised that freedom of the press cannot exist in isolation of other rights. In a situation where other rights are trampled upon needlessly, we cannot expect press freedom to be enjoyed without the traditional hostility from the powers that be.