



DIFFUSING THE TENSION AMONG JOURNALISTS, CITIZENS' SPEECH AND NATIONAL SECURITY IN THE DIGITAL ERA IN NIGERIA

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ABSTRACT: *Aside from being one of the journalistic codes of ethics, journalistic privilege is a right accorded to journalists to maintain the anonymity of a source of information. The paper evaluated the relationship between journalists' claim to privileged communications and the government's right to every man's evidence. The paper sought to define who a journalist is and the duty of the court to ensure permitted derogations are reasonably justifiable in a democratic society. It examined the impact of emergent digital technologies and the internet, which have empowered the average person to perform the functions of a journalist – should such people be accorded journalistic privilege? In democratic settings, free speech is not the only interest demanding recognition, they may be subject to some restrictions of which national security actions are most profound. The paper recommends that journalists' advocacy for legal guarantees should be matched by increased social responsibility and professional ethics as a panacea to national security excesses.*

KEYWORDS: Journalistic privilege, national security, digital era.



INTRODUCTION

Journalist's privilege¹ is the protection afforded a reporter under constitutional or statutory law, which prevents the reporter from being compelled to testify about confidential information or sources. The importance of a source to a journalist is part of the reasoning behind the need to protect and ensure their anonymity. As Aidan White noted, "Journalists may take pride in the eloquence of their storytelling, but even the best reporters know they are only as good as their sources. Good sources are the lifeblood of journalism. If there were no people willing to talk to us or answer our questions, journalism could not survive."² Throughout the history of journalism, from the big stories of the past such as the Watergate Scandal to today's headlines over FIFA and revelations of global snooping by prying governments, it has been all about news stories shaped by courageous voices inside the structures of power.³

Very often sources can be vulnerable people, the victims of human trafficking for instance, and in reports that border and touch on national security, sources that may double as whistle-blowers need to retain anonymity. Journalists need to reassure sources that their identity will be protected. But often this is easier said than done as protection of sources is well recognised in international law as a key principle underpinning press freedom. Article 19 of the Universal Declaration of Human Rights (UDHR)⁴ recognises the right to free expression⁵ while article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁶ under the same broad terms as in the UDHR includes the right not only to express opinions and ideas but also to receive information:

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 (order public), or of public health or morals.

The ICCPR though ratified by Nigeria in 1993 is not domesticated in Nigeria in accordance with Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

¹ Also known as reporter's privilege, newsman's privilege and press privilege

² Aidan, W. (2015). *Protecting the people behind the stories that keep journalism alive*.

³ Ibid

⁴ Hereinafter UDHR

⁵ U.N. Doc. E/CN.4/1996/39 (1996)

⁶ Hereinafter ICCPR



However, the provisions of the Covenant form a major part of the country's domestic laws. The press in Nigeria draws its power to source for information from Section 39 of the Federal Republic of Nigeria Constitution 1999 (as amended) which guarantees freedom of expression for all citizens⁷, and 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 contained in this chapter and uphold the responsibility and accountability of the government to the people". It must however be noted that Section 22 of the Constitution does not contain the required legal framework for the journalism profession, and by extension, freedom of information and journalistic privilege.

Interestingly, Chapter II of the 1999 Federal Republic of Nigeria Constitution (as amended), wherein, Section 22 is contained is not justiciable⁸ and it is important to point out here that Section 39 of the Constitution of the Federal Republic of Nigeria Constitution 1999 (as amended) which guarantees freedom of expression makes the right enjoyable by all citizens. The reality is that these rights are available to all members of the public but these rights are exercised through the medium of the press

After all, 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:" National security is the protection of the lives and property of people from various forms of threat, be it internal or external.

It is the decision-making process concerned with the identification of potential and actual threats, and the mobilisation of resources that promptly ensures the safety and stability of the nation-state, while simultaneously enhancing the promotion of national development.⁹ What obtains in most African states, which attained perfection during the dark days of military rule, is a distorted version of the traditional model, whereby those in power substitute their individual security for national security and consider any challenge to their tenacious grip on power as a "threat" to national security. Since national security should occupy the "highest priority"¹⁰, it is "non-negotiable and does not permit undue compromise"¹¹. Any individual or group which poses the slightest threat to the selfish interest of those in power is visited with the full might of state coercion.

Incidentally, it is the media and those who use them to vent dissenting views that are always at the receiving end of this coercion¹². The history of Nigeria from the dawn of colonialism to date is replete with instances of such rifts between the media and government over national

⁷ CFRN 1999, Section 39(1)

⁸ Section 6 (6) (c) CFRN 1999 (as amended)

⁹ Mohammed, G. (1988). *Mass Media and National Security* (Unimedia Publications Ltd 1988). In Akinfeleye, I. (2003). *The Nigerian Press and June 12: Pressure and performance during a political crisis. Journalism Communication Monographs*, (4) (4) 5, 102

¹⁰ Ibid

¹¹ Ibid

¹² Nwokegi, S. N. (2009). *The effect of Media Laws on Nigerian Print Media: A study of three newspapers in Port Harcourt, Rivers State*.



security.¹³ At the epicentre of any discourse on national security is the issue of classified information. Classified information is sensitive information to which access is restricted by law or regulation to groups of persons¹⁴. Every government operates a hierarchical system of secrecy that engenders the classification of documents based on their level of sensitivity - top secret, state secret, confidential, restricted etc. The inference however to Okon¹⁵ is that “the unwarranted disclosure of such information may create bedlam, cause damage and endanger national security”.

The foregoing forms a hotbed of manifold tension between the role of the press to inform and the responsibility of the government to ensure the well-being and security of its citizenry. With press freedom facing an unprecedented threat in Nigeria and across the world¹⁶, the need to uphold Journalistic Privilege has never been more important. The European Court of Human Rights has ruled¹⁷ in the case of a British journalist, Bill Goodwin that protection of confidential sources is an essential means of enabling the press and indeed the citizenry to perform its important function of public watchdog and should not be interfered with unless in exceptional circumstances where vital public or individual interests are at stake. In Nigeria, a Lagos State High Court held in the case of *Oyegbemi v. Attorney General of the Federation and Others*¹⁸ that:

When a newspaper has investigated a matter of general public interest or concern (such as it ought to the public), the publication of an article upon the matter is so much in the public interest that the newspaper ought not to be restrained or “interfered” with by any person or authority, solely on the ground that the information in the article originated in confidence...nor should a newspaper be compelled (except in grave and exceptional circumstances...) to disclose the source of the information.

Journalists have tended to view the above type of rulings as vindication of source protection, usually forgetting the qualifying clauses in such judgment, “unless in exceptional circumstances where vital public or individual interests are at stake”, and “except in grave and exceptional circumstances”. Presumably, governments view it as a “vital public or individual interest” or “exceptional circumstances” when it asks a journalist to reveal a source. An informed citizenry with the support of the press can hold the state accountable through the power of information gathering and dissemination. Sections 22 and 39 of the FRN constitution 1999 (as amended) charge the agencies of mass media and citizens with the freedom of expression in order to uphold the responsibility and accountability of government to the people.

¹³ Ibid

¹⁴ Godwin B. O. (2013). National Security and Journalism Practice-Emerging Considerations for Nigerian Journalists. *Global Journal of Arts Humanities and Social Sciences*, (1) (4) 1

¹⁵ Ibid

¹⁶ In February 2017, US President Donald Trump took aim at journalists for using anonymous sources after a series of leaks from within his administration. In the United Kingdom, in March 2017 police were granted permission to raid the home of a Scottish journalist after he took pictures of an argument. Saxon Norgard ‘Protecting Journalists’ Sources is Vital for Press Freedom: Goodwin v UK’ [2017] accessed 8 October 2019.

¹⁷ Godwin v. United Kingdom, (1996) 22 HER 123

¹⁸ (1982) FNLR, 192



At the regional level, Article 9(1) of the African Charter on Human and Peoples Rights which is part of Nigeria's domestic law¹⁹ guarantees the right of every individual to receive information.

The 2002 Declaration of Principles on Freedom of Expression in Africa released by the African Commission on Human and People's Rights provides detailed guidelines for member states of the AU on the protection of sources. Principle XV on the Protection of Sources and other journalistic material provides this:

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- i. identity of source is necessary for the investigation or prosecution of a serious crime, or defence of a person accused of a criminal offence.
- ii. information or similar information leading to the same result cannot be obtained elsewhere.
- iii. public interest in disclosure outweighs the harm to freedom of expression; and
- iv. disclosure has been ordered by a court, after a full hearing.²⁰

The Problem

Exceptions to Journalist's Privilege are not new. However, the boundaries to these exceptions are unsettled, particularly in connection with National Security and the social responsibility of the press. The legal contours in this field are more crucial than ever considering the recurrent standoffs between the executive branch and the press, the escalating war against terrorism, and the advent of citizen or mobile journalists occasioned by the introduction of new digital technologies. Though much of the debate surrounding a potential journalist's privilege revolves around the conception of "freedom of the press" and "freedom of speech", both phrases simply ensure the protection of all types of expression, both written and oral. Ordinary citizens are required to give testimony, and journalists cannot hide behind their profession to shirk this responsibility. But, if "freedom of the press" means freedom of newspapers and broadcasters, then journalists should arguably be afforded at least some protection in court proceedings and the question of who a journalist is would become pertinent.

Because of the secret nature of information gathered by national security agencies, it can be difficult to establish a trusting relationship between citizens about whom information is gathered and the agencies doing the gathering. The mass media themselves have severally appropriated the citizen's right to know in the concept of journalist's privilege, thereby creating another line of tension. These are a major source of tension between law enforcement, journalists and citizens. The law enforcement's infringements of privacy in the name of public

¹⁹ African Charter on Human and People's Right (Ratification and Enforcement) Act, 2004

²⁰ African Union, Declaration of Principles on Free Expression. Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.



safety, the journalist's abuse and misuse of privacy in the name of privileged communication and source confidentiality, and the usurpation of citizens' right to know have put the citizens in the middle of this tension. In this scenario, the citizens or politically marginal groups of people, such as journalists, are at the receiving end, at least in the short term. In these circumstances, it is easier for the law and the press alike to dismiss or minimise privacy concerns that their actions might raise.

Objectives of Study

The following objectives guided the study:

1. Evaluate the tenuous relationship between the claim to privileged communications by journalists and the government's right to everyman's evidence.
2. Define who a journalist is.
3. Examine the duty of the court to ensure that permitted derogations are reasonably justifiable in a democratic society.
4. Examine the impact of emergent digital technologies and the internet on the ability of an average person to perform the functions of a journalist – should such people be accorded journalistic privilege?

Scope and Significance

This author explored how National Security actions have been encouraged by abuses and misuse of media power, extant legal guarantees of privilege, and the convergence of mass media tools such as social media, television and the Internet. It interrogated the extent to which social responsibility, self-restraint and high professional standards, established through the Code of Ethics and Professional Conduct, can empower journalists to operate as trustees of the public, seek the truth, report it fairly and with integrity and independence, and stand accountable for their actions. As the tension between journalists, national security and citizens continues to escalate, the author seeks to contribute to resolving or at least mitigating this rivalry and assuring and creating an enabling environment for the attainment of citizens' aspirations in Nigeria. This article may form the basis for further academic research, assist legislatures in amending or enacting laws that will strengthen press freedoms, and clarify national security priorities without undue compromise by any individual or group. This should curb the instances of such rifts among the media, the government and the citizens.

Clarification of Terminologies

Freedom of the Press and Freedom of the Media

In Nigeria, Section 39(1) which guarantees the freedom of expression guarantees it for "every person" which means that the right is accruable to a person, a citizen, not a journalist. Free speech serves the individual's right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator. To drive home this point, it is necessary to consider Harold Laswell's model of communication regarded as "one of the



earliest and most influential communication models" espoused in "The Structure and Function of Communication in Society"²¹:

New Media

A lot of media is the digital upgrade version of traditional media, such as digital broadcasting and digital television.²² The import of the above is that new media is just a relative concept, because of this, we also often hear some associated media concepts, such as digital media, mobile media, network media, all media, and so on.²³ Flowing from the preceding, this study also suggests that while you have digital media, there is nothing like a digital message or digital content, therefore nomenclatures such as digital advertising, digital political science or digital history are misnomers.

Freedom of Speech and Expression

Freedom of speech and expression are not recognised as being absolute and common limitations or boundaries to freedom of speech relate to libel, slander, obscenity, pornography, sedition, incitement, fighting words, classified information, copyright violation, trade secrets, non-disclosure agreements, the right to privacy, dignity, right to be forgotten, public security, and perjury. Justifications for such include the "harm principle", proposed by John Stuart Mill in *On Liberty*²⁴, which suggests that: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."²⁵ The idea of the "offence principle" is also used in the justification of speech limitations, describing the restriction on forms of expression deemed offensive to society, considering factors such as extent, duration, motives of speaker, and ease with which it could be avoided.

However, freedom of the press does not necessarily enable freedom of speech. Judith Lichtenberg²⁶ has outlined conditions in which freedom of the press may constrain freedom of speech, for example where the media suppresses information or stifles the diversity of voices inherent in freedom of speech. Lichtenberg argues that freedom of the press is simply a form

²¹ Banisar, D. (2007). *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources*

²² *Oyegbemi v. Attorney General of the Federation and Others* (1982) FNLR, 192

²³ *Momoh v Senate of the National Assembly*, [1981]1 N.C.L.R. 105. In February 1980 Daily Times editor Prince Tony Momoh was asked by the Senate to disclose his sources after an article he wrote implying the Senate was grossly under-performing. Momoh's appeal to the High Court that his fundamental rights were being violated was upheld by Justice Candido Ademola Johnston, but overturned by the Appeal Court which ruled: "The press or any other medium of information cannot claim any right to confidentiality of the source of their information in a proper investigation by a House of Assembly or the Police".

²⁴ Godwin B. O. (2013). National Security and Journalism Practice-Emerging Considerations for Nigerian Journalists. *Global Journal of Arts Humanities and Social Sciences*, (1) (4) 1

²⁵ Romm, J. (1993). *Defining national security: The non-military aspects*. Council on Foreign Relations Press

²⁶ Michael, P.; Seng, G.; & Hunt, T. (1986). The Press and Politics in Nigeria: A Case Study of Developmental Journalism. *Boston College Third World Law Journal*; (6)(2) 85



of property right summed up by the principle "no money, no voice"²⁷. The Internet is a far more speech-enhancing medium than print and the village green. Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, unconventional, even emotionally charged, sexually explicit, and vulgar – in a word, "indecent" in many communities. But such is to be expected in a medium in which citizens from all walks of life have a voice and as such we should all join hands to protect the autonomy that such a medium confers to ordinary people as well as media magnates.

Who is a Journalist?

Any common issue in the protection of source cases is defining who is a journalist and is thereby protected. Many legal definitions of 'journalist' have been evaluated as overly narrow, as they tend to emphasise official contractual ties to legacy media organisations. This leaves confidential sources relied upon by bloggers and citizen journalists largely unprotected because these producers of "journalism" are not recognised as 'proper' journalists. Such definitions also exclude the growing group of academic writers and journalism students, lawyers, human rights workers and others, who produce journalism online, including investigative journalism. In the US, several federal Courts of Appeals have set out a three-part test to determine who should be covered as a journalist - the person must be engaged in investigative reporting, is gathering news, and possesses the intent at the inception to disseminate the news.²⁸

United States media lawyer Charles Tobin is also in favour of a broad definition of journalism as a response to the rise of citizen journalists and bloggers.²⁹ Some countries are broadening the legal definition of 'journalist' to ensure adequate protection for citizen reporters (working on and offline). This opens debates about classifying journalists and even about licensing and registering those who do journalism³⁰. These debates are particularly potent where there is a history of controls over press freedom.

National Security

Instruments of power exist along a spectrum, from using force on one end to diplomatic means of persuasion on the other. Such instruments include the armed forces; law enforcement and intelligence agencies; and various governmental agencies dedicated to bilateral and public diplomacy, foreign aid, and international financial controls. Variables of power include military strength, economic capacity, the will of government and people to use power, and the degree to which legitimacy either in the eyes of the people or in the eyes of other nations or international organisations affects how power is wielded. The measure of power depends not only on hard facts but also on perceptions of will and reputation. More importantly, if one uses the state as the referent, as the term national security suggests, he will then encounter the problem of who defines national interests or sets the national security agenda of the state.

²⁷ Ahmad, M. A. (2015). *News Media and Security in Nigeria: A Theoretical Analysis*.

²⁸ Ibid

²⁹ Godwin v. (1996). *United Kingdom*, 22 HER 123

³⁰ Costas, S. (2017). *The Right of Journalists Not to Disclose Their Sources and the New Media*



If one agrees that the regime is both a source of threats and a producer of insecurity, then the concept must not be defined only from this perspective. It has been put forward that this definition captures the essence of the “state” as composed of the people and regime³¹. It talks about two concerns: that of the people’s interest (well-being) and that of the regime (sovereignty).³² Maxwell and Ebenezer³³ posit that Nigeria provides a clear case scenario for these as public servants and government at large tend to label every piece of information within their purview ‘secret’ thereby shutting off enquiries pertaining to such documents. Ironically, the information they hoard is the same information journalists are trained to uncover. The implication is a cataclysmic relationship between the two³⁴.

Hate Speech

Hate speech is any expression that vilifies an identifiable group, a race, religious community, or sexual minority, and thus prompts harm to members³⁵. Such is the corrosive nature of hate speech, that even free speech advocates agree that hate speech requires special handling, especially when levelled against minorities too weak to counter it in the marketplace of ideas³⁶. To label something otherwise inoffensive as “hate speech” and use it as an excuse for silencing criticism of dominant values and institutions has understandably bred cynicism among many journalists. As a defensive reaction, they retreat behind their legal right to freedom of expression.

Journalist’s Source Protection

Technological developments and a change in operational methods of police and intelligence services are redefining the legal classification of privacy and journalistic privilege internationally. With rapid technological advancement, law enforcement and national security agencies have shifted from a process of detecting crimes already committed, to one of threat prevention in the post-September 11 environment. In the digital age, it is not the act of committing (or suspicion of committing) a crime that may result in a person being subject to surveillance, but the simple act of using certain modes of communication—such as mobile technology, email, social networks and the Internet. Journalists are now adapting their work to shield their sources from exposure, sometimes even seeking to avoid electronic devices and communications. The cost of the digital era source protection threat is significant in terms of

³¹ The terms ‘citizen journalism’ and ‘citizen journalists’ are commonly used by legal scholars discussing the problem of the journalist’s privilege

³² Susan L. Dolin, ‘Shield Laws: The Legislative Response to Journalistic Privilege’ (1977) (26) (453) *Cleveland State Law Review*; 1 33

³³ In *Plunkett v Hamilton*, 136 Ga. T2, 70 S.E. 781 (1911). A reporter was called to testify about information he had received from a police officer. The reporter asserted that if he were to respond to this line of inquiry, he would be ruined as a professional journalist since he had received the information under a promise of confidentiality. He claimed he would lose his position with the *Augusta Herald* and would be unable to find employment elsewhere as a reporter.

³⁴ 5 259 F.2d 545 (2d Cir.)

³⁵ Shrivastava, K. M. (2005). *Broadcast Journalism In The 21st Century* New Dawn Press Group

³⁶ *Ibid*



digital security tools, training, reversion to more labour-intensive analogue practices, and legal advice.

Legal Framework

In Nigeria today, strictly speaking, there are no shield legislations or any form of omnibus legislation expressly dealing with journalist's privilege, it must, however, be noted that press freedoms and its ideals are to an extent³⁷ guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (as amended). Therefore, the responsibility to safeguard and protect this right is owed to the common man and not exclusively to the journalists. Furthermore, press licenses are conditioned on a contractual promise to provide equal expression to all shades of citizen voices or lose the right to own the "medium". Whereas there is no express mention of "Journalist's Privilege" in the above sections, the courts have sometimes when interpreting these sections inputted it. To buttress this point is the case of *Innocent Adiukwu v. Federal House of Representatives*³⁸, where the court was called upon to resolve the conflicting claims of legislative power and of press freedom.

The House of Representatives through its Legislative Investigating Committee summoned the editor and three others to appear before it. The main question, in this case, was whether requiring newsmen to appear and testify before a legislative committee abridges the freedom of speech and press guaranteed under Section 36 of the 1979 Constitution of the Federal Republic of Nigeria, which contains similar provisions to Section 39 of the current Constitution. In his ruling, the Hon Justice Balogun said:

The purpose of S. 36 of the Constitution (1979) is not to erect the press into a privileged institution but it is to protect all persons (including the press) to write and to print as they will and to gather news for such publications without interference, but it does not authorise any person to publish false news.

Similarly, Hon. Justice Ademola-Johnson, acting Chief Judge of the High Court of Lagos, (as he then was) also delivered a very significant judgment on the freedom of speech under the 1979 Constitution in the case of *Tony Momoh v. Senate of National Assembly*³⁹. In his judgement, he declared the resolution of the Senate, inviting a journalist to appear before them, as unconstitutional on the ground that it was an interference with the fundamental rights of Mr Tony Momoh, conferred upon him by S. 36 (1) of the 1979 Constitution. The learned judge said on page 113:

It is a matter of common knowledge that those who express their opinions or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a

³⁷ Lasswell, H. (1948). 'The Structure and Function of Communication in Society' in Bryson, L (Ed.), *The Communication of Ideas*. New York: Institute for Religious and Social Studies, 117

³⁸ Peng Wenxiu (2015). 'Analysis of New Media Communication Based on Lasswell's "5W" Model', (5) (3) *Journal of Educational and Social Research*; 245

³⁹ Ibid



disseminator of information to operate if those who supply him with such information are not assured of protection from identification and disclosure?

The judge further held that

The 49 wise men who formulated the Constitution wanted to discourage any attempt “to deafen the public by preventing a hindering of the free flow of information, news and or ideas from them”. This would explain why the provisions of S. 36 (1) of the Constitution 1979 give freedom of expression, subject only to the laws of the country as libel, slander and injurious falsehood.

However, on appeal, the Court of Appeal, per Nnaemeka Agu, who read the lead judgment overturned the decision of Lagos High Court and said that:

Section 36 does not carry with it either expressly or by implication, the right not to disclose the source of information of pressmen nor does the section protect the disseminator of the information from legal disabilities or liabilities such as are imposed by the law of libel.

The attitude of the courts on this provision in the Constitution has not changed fundamentally, since the section was interpreted by the Supreme Court in *R v. Amalgamated Press of Nigeria Limited*⁴⁰ that Section 24 of the 1960 Constitution⁴¹ guarantees nothing but ordered freedom and it cannot be used as a license to spread false news likely to cause fear and alarm to the public. Despite their provisions and the interpretations that can be drawn from them, Sections 22 and 39 do not contain the required legal framework for the journalism profession, freedom of information and by extension Journalist’s Privilege. Section 39 has been described as amorphous⁴² and Chapter II of the Constitution of Federal Republic of Nigeria 1999 (as amended), wherein, Section 22 as contained is not justiciable. Non-justiciability of Chapter II means that the courts cannot adjudicate on any provisions of Chapter II, thus such provisions cannot be interpreted. This situation leads to limitations as such sections will not go through the fire of judicial interpretation which invariably leads to the development of the law and accountability of government.

⁴⁰ Mill, J. S. (2011). *On Liberty*. Cambridge University Press

⁴¹ Ibid

⁴² Karen S. (2003). *Ethics & Journalism* Sage; 68



LITERATURE REVIEW

Banisar in his work titled ‘Silencing Sources: An International Survey of Protections and Threats to Journalists’ Sources’⁴³ states that Nigeria which is home to what is arguably the most strident and vibrant news media on the continent of Africa, has no laws to protect confidentiality of sources. According to the author, what exists is Section 4 of the Nigerian Union of Journalists Code of Ethics, which urges journalists to protect their sources, is of course, non-binding. The author goes further to state that Jurisprudence over the last three decades has been mixed, while some cases have upheld the assumed right of journalists to protect their sources⁴⁴, one Appeal Court judgment ruled against such protection⁴⁵. On the consequences of lack of source protection, Banisar lists three effects that a lack of source protection could occasion for journalism.

Firstly, the author reiterates that in the absence of adequate legal protections, journalists must either disclose their sources or face legal sanctions. Journalists’ reputation will be changed from that of an independent gatherer of information to that of an arm of government which could, by itself, occasion significant changes to the practice of journalism. On the issue of emerging media and the rapidly evolving meaning of the term journalist, Banisar opined that any common issue in the protection of sources cases pertains to defining who is a journalist and thereby protected. Media is constantly changing and each technological change results in new forms of media being created. Laws are often slow in keeping up with new forms of media and journalists who publish using new technologies are often not as protected as their colleagues in more established media. He goes further to state that the internet and mobile phone technologies have challenged many of the definitions of who is a journalist and thus who should be protected.

Most major media organisations have created sites and have dedicated staff that provide content for the sites. Due to the rapidity of electronic publishing, stories often appear on these sites before they appear in printed versions. More intriguing are the more informal types of journalism that have emerged. Bloggers, podcasters, citizen journalists and other types of information dissemination have stepped in and now often provide information to more people than the old technologies. Okon in ‘National Security and Journalism Practice - Emerging Considerations for Nigerian Journalists’⁴⁶ in defining National Security, utilises the definition by Romm⁴⁷ who operationalised national security to mean “the continued ability of a country to pursue its internal life without serious interference”. The author also made recourse to the McMillan Dictionary which sees national security as bordering on the protection or the safety of a country’s secrets and its citizens.

⁴³ Ibid

⁴⁴ Re Grand Jury Subpoenas, No. 01-20745, n.4 (5th Cir. Aug. 17, 2001).

⁴⁵ Possetti, J. (2017). *Protecting journalism sources in the digital age*. UNESCO

⁴⁶ Banisar, D. (2007). *Silencing Sources: An International Survey of Protections and Threats to Journalists’ Sources*

⁴⁷ UK Essays (2018). *The meaning of National Security Politics Essay*.



The author also brings to the fore the argument that National Security interests continue to enable governments to withhold information or override the constitutional or legal protections that should be accorded journalists. Seng and Hunt in 'The Press and Politics in Nigeria: A Case Study of Developmental Journalism'⁴⁸ argued that Nigeria has been said to have one of the freest presses in the Third World. The focus of this was on the role of the press in a free society vis-a-vis a government-controlled or developmental press. Auwal in 'News Media and Security in Nigeria: A Theoretical Analysis'⁴⁹ stated that the mass media sensitise, enlighten and persuade members of the public to participate actively in developmental activities and that the information disseminated by the news media could be either harmful or useful.

Auwal suggested that the mass media has the power and ability to contribute enormously to National Security through observance of professional ethics and in accordance with provisions of the constitution.⁵⁰ Auwal's work provides current research with a perspective into the influence of the media on national security and therefore a reason why government may take particular interest in them. In considering popular cases like Goodwin's Case⁵¹ where courts have acted as defenders of the principle of protecting sources, the courts do not give reporters an absolute right to protect their sources. Many of these actions have been made easier by the widening war on terrorism and the cloak of security, which has raised concerns about the weakening of civil liberties.

Stratilatis in 'The Right of Journalists Not to Disclose Their Sources and the New Media'⁵² commented that the uncertainty occasioned by the absence of necessary shield laws to protect Journalistic Privilege is enhanced by the rise of New Media and new types of public communication which often labelled as 'citizen journalism'⁵³. Relevant examples of citizen journalism by the author were:

- i. Wiki-news which was created by persons not regularly engaged in journalism with the purpose of providing information on the evolution of specific events, crises or issues; bloggers who are not associated with a media organisation and who regularly post information, stories, comments etc. on topics of public interest.
- ii. Web platforms, such as Wikileaks, which host leaked governmental documents.
- iii. The social media pages of non-journalists who regularly post the fruits of their research and/or their opinion on public interest issues.

⁴⁸ Ibid

⁴⁹ Ngene, M.; Marxwell; and Onyike, I. E. *The State and Press Freedom in Nigeria: Concepts, Precepts, and Prospects*

⁵⁰ Ibid

⁵¹ Cherian, G. (2017). *Hate Speech: A dilemma for journalists the world over*

⁵² Ibid

⁵³ The expression "to an extent" is used because in Nigeria, there is no clear-cut or expressed constitutional framework for freedom of information and effective practice of journalism profession



- iv. Electronic newsletters by non-journalistic organisations; posts and comments under articles which are published on web news portals etc.

The work by Stratilatis considers the possibility of the new media to claim or to benefit from Journalistic Privilege. Dolin in her study, 'Shield Laws: The Legislative Response to Journalistic Privilege'⁵⁴, wrote that the Watergate break-in has cast journalists, particularly investigative reporters, into the public spotlight. Threatened with a contempt citation, the journalist in such situations must often face two equally unacceptable alternatives: divulge a confidential source or go to jail. According to the author, no privilege against source disclosure was recognised at common law and the ground most often asserted in support of such a privilege was an injury to the journalist's career⁵⁵, these arguments, however, were generally unsuccessful. The author also cites the case of *Garland v. Torre*⁵⁶, where a journalist for the New York Herald Tribune refused to divulge the source of an allegedly libellous story she had written about Judy Garland, claiming that to do so would violate the First Amendment by placing an impermissible burden on the flow of news to the public.

The Second Circuit considered this premise and rejected it. The court held that the First Amendment freedoms were not absolute and that whether they were to prevail depended upon the outcome of a balancing test. This balance was to be struck between the First Amendment claim and "a paramount public interest in the fair administration of justice." It held that the Constitution did not give the witness a right to refuse to answer. Shrivastava in his book, 'Broadcast Journalism In the 21st Century'⁵⁷, asserted that "The digital media has revolutionized the information society"⁵⁸. An increased number of people can gain access to the internet through personal computers, televisions, and mobile phones. Thus, any individual or powerful group of individuals who can speak can speak to the whole nation giving rise to the concept of the Fourth Estate, which becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority.

Regarding the emerging media, the author added that "Professional electronic journalists should operate as trustees of the public, seek the truth, report it fairly and with integrity and independence, and stand accountable for their actions."

⁵⁴ (1982) 3 NCLR, 94

⁵⁵ (1984) NCLR, 269

⁵⁶ (1961) ANLR 209

⁵⁷ It should be noted that the provisions of Section 24 of the 1960 Constitution became Section 25 of the 1963 Republican Constitution and later Section 36 of the 1979 Constitution and currently Section 39 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁵⁸ Obinna, J. C. (2018). The Press and Freedom of Information in Nigeria and the United States of America: An Analysis, *International Journal of Law and Society*, (1)(1) 24-33



CONCLUSION

Infringing upon journalists' privilege is tantamount to infringing upon other press freedoms. Inevitably, confusion abounds as to who can exercise the right, thus leading to the question of whether the common man can exercise Journalists' Privilege. Hence the question, 'Who is a journalist?'. At the root of this imbroglio is that freedom of expression and the right to disseminate information are not absolute rights.

The following recommendations are made:

- i. That is an Act to define a journalist and codify the social responsibility of journalists.
- ii. The federal government initiated a programme to sensitise the general public to their right to seek information and the duty owed to them by members of the press to present unbiased news.
- iii. The passing of a reporter's shield law which will protect the press freedoms as provided for under Section 22 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) will also provide a codified position of the various court decisions that have sought to protect Journalistic Privilege. A federal shield law will balance the freedom of speech and journalistic privilege with national security interests.

CONTRIBUTIONS TO KNOWLEDGE

- i. The study has revealed that the central purpose of the law is for citizens in general to be able to function as watchdogs over government activities.
- ii. The study revealed that there is a prevalent misconception as to the operation of the freedom of expression. The press has operated for years under the erroneous understanding that the right is first and foremost theirs whereas it belongs to the citizens who have entrusted the press with a responsibility that requires them to utilise that right responsibly.

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