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THE PRESS AND THE RIGHT TO FREEDOM OF EXPRESSION; ANY LIMITATIONS?

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Abstract: *The Media is regarded as the ears and mouthpiece of the citizenry in any Nation. Saddled with the moral and official task of information gathering and dissemination, and the enlightenment of the citizenry about public affairs, it (the Media) must constantly update the entire populace about the happenings in the country. In this regard the Media is expected to have unfettered ability to inform, disclose and analyze matters of and on national discourse. The right to do this is predicated on the fundamental right to freedom of expression as enshrined in the Universal Declaration of Human Rights and the 1999 Constitution of the Federal Republic of Nigeria. This article looks at the Press as an integral component of the Media and their right to freedom of expression, juxtaposed with the three legal principles of right to privacy, Defamation, and Sedition as impediments to the full exercise of this right. The paper concludes that there are indeed limitations to the exercise of the right to freedom of expression and the Press.*

Kew words: Media, Press, Sedition, Defamation, freedom of expression, right to privacy.

INTRODUCTION

The underlying moral postulate of governance is that the governed should know and be aware of what the government is up to at all time. This is made more evident in a democratic dispensation since it is said to be a government of the people, by the people and for the people. It is the fundamental principle enshrined in Chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria that the government must cater for the welfare of the people and in this regard the people must know what the government does and is doing at all times. The knowledge of Government's action is by information disseminated through the Media. In this regard the Media is then taken in two parts: an entity unto itself, and a means of information transmission.

The word Media connotes all the means of communication that provide the public with news, entertainment etc. It simply represents the plural of the word "medium", which means ways to communicate information. Media is also along the same lines defined as the main means of mass communication such as broadcasting, publishing and internet, regarded collectively, hence the appellation "mass media". The modern media exists in many formats including the Print Media, which covers Newspapers, Books, Magazines and Billboards; the Electronic Media, which covers Television, Radio, Movies and Music; the New Age Media, which covers such means of communication such as Mobile Phones, Computers, the Internet, and other means such as E-books. In this context the Print Media is also known as the Press; the Electronic Media is known as the Broadcast Media; and the New Age Media is known as the Social Media (though the term may be expanded to cover all the other types). Each of these types of Media involves the contents of the other and also a device or object through which that content is delivered, therefore publications come under the Press.

The Media by nature is said to perform the following basic roles:

- Educates the people in all fields of their life cycle
- Enlightens the people as to their rights

- Informs the citizenry as to matters of national interest
- Helps in social interaction
- It is the voice of justice, equality and liberty.

The Press

The Press, which is the focus of this article, is regarded as the Fourth Estate of the realm. This is against the backdrop of the fact that though not statutorily recognized in the separation of powers principle, it wields such considerable power in shaping political discourse and outcomes that it is recognized as a force. Thomas Carlyle (1840) in his book “On Heroes and Hero Worship” explained “...(Edmund) Burke said there were three estates in Parliament; but in the Reporters’ Gallery yonder, there sat a Fourth Estate more important than they all”. Again it was said, “the gallery in which the Reporters sit has become a fourth estate of the realm” (Macaulay, 1828). The derivation of the term fourth estate is a consequence of the belief in the traditional European concept of the three estates of the realm; the Clergy, the Nobility, and the Commoners i.e the Lords Spiritual, the Lords Temporal, and the Commons. It is this concept that led to the democratic adaptation of the Executive, the Legislature, the Judiciary; and of course the ever prowling Press, the watcher of them all, as the fourth estate. The significance of this term in the context of the considerable influence of this part of the Media was restated by Carlyle (1837) “a fourth estate of able Editors spring up; increases and multiplies, irrepressible, incalculable”. The Print Media i.e, the Press represents the earliest form of mass media, being one of the most vital channels through which the provisions made for...access to information...are guaranteed (Amodu et al, 2014). In this regard, it is often seen as fulfilling the vitally important role of a fourth estate, the guardians of democracy and defenders of public interest.

The Press derives its power from its tight control over information, to withhold or to give out (McQuail, 2010). The existence of an independent Press is integral to the strengthening of the responsiveness and accountability of Governments to all citizens, bringing about good governance and human development (Amodu et al, 2014). It is worthy to note that the Press is most times taken as synonymous with the Media in totality because in medieval times, the Press was the only prevalent form of media prior to the advent of Television and Radio.

Methodology

This article is a review of the workings of the Media as represented by the Press with regards to their fundamental duty to inform the citizenry. The article then juxtaposes this duty and its inherent right to be able to divulge and disseminate information at all times with the legal principles that constitute a variation or hindrance to the exercise of the right to freedom of expression by the Press in order to see whether there are indeed limitations to this right or not.

The Right to Freedom of Expression

The right to freedom of expression is recognized as a fundamental human right; one of the rights deemed to be vested in each individual by virtue of his existence as a human, for his benefit or for the benefit of others, as the case may be, which cannot be assigned like a movable asset, nor alienated from the individual (Dawodu, 2018). It is perhaps the most common and commonly claimed right. It is very prevalent in contemporary times to find a person insisting on the right to

freedom of expression, and never is this insistence more vociferous than as proclaimed by the Press. The right confers a power on the citizen, and the Press, not only to hold, but to have an avenue for the dissemination of views.

Known as the right to freedom of expression and the Press, Section 39 of the 1999 Constitution of the Federal Republic of Nigeria provides:

- (1) “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
- (2) Without prejudice to the generality of sub section 1 of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorized by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a Television or wireless broadcasting station for any purpose whatsoever...”.

The right to freedom of expression and the Press is a universal human right, and a writer observes “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive or impart information and ideas through any media and regardless of frontiers” (Salmon, 2008). The right to freedom of expression and the Press is significant and a sine qua non for guaranteeing good governance, democracy and the rule of Law. Violations of human rights, arbitrary use of power and contraventions of constitutional provisions may be, and remain hidden if there is the absence of the right to freedom of expression and the Press.

It is due to its symbolic nature that democracy cannot thrive without it and Nations all over have imbibed it as a key element of good governance. The provisions as to this right, espoused in Section 39 (1999 Constitution FRN), is replicated in international conventions and Charters: in Article 9 of the African Charter on Human and Peoples Rights, Article 13 of the American Convention on Human Rights, and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Right to Private and Family Life

It is aptly presumed by the Law that an individual enjoys some quietude in the course of living his life. This right, also known as the right of privacy, is a fundamental right under the Universal Declaration of Human Rights, and all other conventions on the rights of Man. Section 37 of the 1999 Constitution of the Federal Republic of Nigeria provides:

“the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications, is hereby guaranteed and protected.”

The right to private and family life is an innovation in the Nigerian Constitution. It is an adaptation of global developments in Tort and tortious liability arising from the proliferation of cases on the tort of Invasion of Privacy in the United States and Great Britain. It (the tort of invasion of privacy) did not form part of the original set of Torts commonly recognized. It came to fore as an American contribution to Torts in order to curb the free Press who were already at the point of overstepping the bounds of propriety (Dawodu; 2009, 97). In 1890, a series of articles were written by legal practitioners wherein they argued for the need to formulate a Tort as a remedy to and for individuals whom suffered as a result of an invasion into their private lives.

The Tort occurs in the following ways:

- Where a person uses another person's name or identity for commercial purposes without such person's consent
- Where a person wrongfully and unreasonably intrudes upon another person's solitude
- Where a person makes public, disclosures of private information in an offensive manner about another person.

In *Hirsch V S.C Johnson & Sons Inc. (1979)*, the Plaintiff was a famous football player known as 'crazylegs'. The Defendant used the name on a shaving gel for women, and the Court held that the Plaintiff's privacy had been invaded.

In *Motschenbacher V R. J Reynolds Tobacco Co (1974)*, the Court held that the unauthorized use of a race car which was distinctly synonymous with a well-known professional race car driver, violated his right and invaded his privacy.

It is submitted that the guarantee of the right of privacy, or private and family life, is as a result of the recognized ability of the Press to interfere dramatically in an individual's private life, sometimes altering it negatively (Idachaba, 2018). The Parliamentary Assembly of the Council of Europe states per the right to privacy; it *"consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honor and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection against unjustifiable or unreasonable spying and prying, protection from disclosure of information given or received by the individual confidentially."*

The Tort of Defamation

One of the integral functions of the Law is to protect a person from wrongs committed by another which may cause physical, mental or psychological hurt (Dawodu, 2009). The wrong complained of may affect the person's ego or personality thereby causing loss of stature, self-esteem and personal pride. Defamation therefore covers those instances where utterances in any form, oral or written, injure a person's reputation and causes a loss of self-esteem in the community.

In *Bryne V Deane (1937)*, the Court stated, "Defamation is a statement which tends to lower a person in the estimation of right thinking members of the Society and which causes him to be shunned and avoided or which is calculated to injure him, his office, profession or trade". Defamation is therefore the transmission to a third party, either orally (i.e Slander) or in writing (i.e Libel) of information or speech that could damage the reputation of another person (Idachaba, 2018).

A Plaintiff in a suit for Defamation must prove the following:

- The making of a statement
- The statement must have been of, and concerning the Plaintiff
- The statement must have been published.

The Law is that a bad, negative or derogatory statement must have been made against the Plaintiff by the Defendant for an action to succeed in Defamation. The offensive statement may be made directly, or through an Innuendo, which connotes an indirect and subtle implication in words and expressions. In *Mutual Aid Society V Akerele (1966)*, an Auctioneer in order to offset the mortgage debt of a person placed an advertisement of the imminent action in the newspaper. The advertisement was couched and placed in such a manner that suggested the Plaintiff was a

Debtor. The claim by the Plaintiff that the advert was an innuendo leading to Defamation was upheld by the Court.

The Tort of Defamation at all times specifically defends a person in particular, therefore the second element to be proved in its action is that the statement has harmed the particular Plaintiff's reputation (Dawodu, 2009). In *Barger V Playboy Enterprises Inc.* (1983), the Court held that a member of a defamed group cannot recover for damage to his personal reputation unless the group is so small that the statement or publication could be ascertained as referring to specific members of such a group.

The element of publication is essential to the success of an action in Defamation. It signifies the communication or transmission of the offensive speech to a third party(ies) which may not even be widespread.

Defamation as a Tort is concerned with safe-guarding the Plaintiff's interest in the good opinion which other persons hold of him. It is also reflected not only in Tortious liability, but also in the Criminal Code and Penal Codes, therefore Defamation could be a civil or criminal act (Idachaba, 2018). Section 375 of the Criminal Code stipulates that any person who publishes any defamatory matter is guilty of a misdemeanor and is liable on conviction to imprisonment; foreknowledge that the offending matter is false attracts imprisonment for two years. This is consequent upon Section 373, which defines defamatory matter as matters likely to injure the reputation of any person in his profession or trade. Section 391 of the Penal Code states as follows... "*whoever by words either spoken or reproduced by mechanical means or intended to be read or signs or by representations, makes or publishes any imputation concerning any person, intending to harm the reputation of such person, is said...to defame that person*".

It is expedient at this juncture to include a mention a means of passing a message in print which most times can be both entertaining and insulting at the same time, but which in majority of cases is not treated as Defamation i.e Caricature. Derived from the Italian word '*caricare*' meaning to charge or load, it connotes a rendered image showing the features of its subject in a simplified or exaggerated way through sketching, pencil strokes, or other artistic drawings. It is the description of a person using exaggeration of some characteristics or oversimplification of others. Though often times serving a political purpose or passing a message or view on a contemporary issue, it hardly passes as Defamation per se given the non-specificity of the posts or publication most of the time. In recent times, Caricature is used mainly to depict politicians in certain light, given the situation of the Nation.

The Offence of Sedition

The word Sedition, literally defined signifies "*incitement against a Government*". The issue with this loose definition is that rebellion could be of a physical nature and thus nullifies the integral part of the offence, that which is our concern i.e speech. It is then acceptable to adopt a modified definition to state that Sedition, is any action, especially in speech or writing, promoting a discontent or rebellion against a government. In the United Kingdom, Sedition is committed by conduct or speech inciting people to rebel against the authority of a State or Monarch (Sedition Act, 1661). It is any act committed with a seditious intention. Stephen in his book "Digest of the Criminal Law" states of a seditious intention.. "*(is) an intention to bring into hatred or contempt, or to incite disaffection against the person of His Majesty, his heirs or successors or the government and Constitution of the United Kingdom, as by Law established, or either House of Parliament, or the administration of justice, or to incite His Majesty's subjects to attempt*

otherwise than by lawful means, the alteration of any matter in Church or State by Law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."

In the United States of America, Sedition is the crime of inciting a revolt, or actual revolt against the government in power (Dawodu, 2018). This could be done by teaching, instigating or advocating the overthrow of the government by force, or to organize persons to overthrow the government by force. As a result of this connotation, a person may be punished under the offence of Sedition if he makes statements that constitute or create a clear and present danger to rights and safety of citizens, the protection of which are the duties of the Federal Government (Shenck V United States, 1919) (Debs V United States, 1919) (FRN V Nnamdi Kanu & Ors, 2015).

In Nigeria, the offence of Sedition is provided for by Section 50 of the Criminal Code. The offence is committed when any person or group of persons does any act, makes a speech or produces a publication with a sedition intention. Section 50(2) of the Criminal Code states that "sedition intention"

"is an intention..."

- a. *To bring into hatred or contempt or incite disaffection against the person of the President or of the Governor of a State or the government of the federation; or*
- b. *To incite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means of any matter in Nigeria as by Law established; or*
- c. *To raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or*
- d. *To promote feelings of ill-will and hostility between different classes of the population in Nigeria."*

Analysis

Historically, the dangers of giving the Press unfettered powers of print and publication has always been a thorny issue. From time beginning there has been attempts to tame the Press starting with the Defamation Laws formulated circa 1500 CE. In the Elizabethan era, the Press in England were required to be licensed and to give a bond to the government. This policy of licensing was instituted because *"the printed word was believed to be a significant threat to political stability"* (FindLaw). In fact, Libel i.e written defamation, was taken to include any criticism of the English government, and any person who committed Libel, committed not a Tort but a crime.

Freedom of Expression and Information of the Press constitutes one of the essential principles of a democratic society (Idachaba, 2018), and it is important for democratic societies to have a wide range of independent and autonomous means of communication. In other words, a free and vibrant Press (Salmon, 2008). The extent of the powers of the Press to express itself if unchecked however becomes highly dangerous given their ability to shape society. Oscar Wilde (1891) stated whilst commenting on the influence of the Press over Society; *"In the old days Men had the Rack. Now they have the Press. That is an improvement certainly. But still it is very bad, and wrong, and demoralizing. Somebody...was it (Edmund) Burke?...called journalism the Fourth Estate. That was true at that time, no doubt. But at the present moment it is the only estate. It has eaten up the other three. The Lords Temporal say nothing. The Lords Spiritual have*

nothing to say, and the House of Commons has nothing to say, and says it. We are dominated by Journalism.”

It is in this regard that Society through government has perpetually tried to limit the powers of the Press in expression. History abounds with cases of suppression, fines and more severe punishment for making seemingly false and or derogatory statements. In the landmark *Zenger’s Case* (1735), John Zenger published a weekly Newspaper which was scathingly critical of the Governor of New York appointed by the Crown. The Governor promptly had Zenger thrown into Jail for seditious Libel.

Totalitarian States generally make it an offence to publish or broadcast stuff that are critical of government, thereby limiting the right to freedom of expression and the Press. In the civilized world, the limitations to the exercise of the right has been embedded in the Statutes. Section 39(3) of the 1999 Constitution of the Federal Republic of Nigeria provides *“Nothing in this Section shall invalidate any Law that is reasonably justifiable in a democratic society:*

(a) For the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of Courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films, ...”

The purport and clear intent of this provision is that the right to privacy or private and family life is a credible limitation to the right to freedom of expression. In the famous case of *New York Times V Sullivan* (1964), the Court upheld the right to privacy as a limitation to free speech by balancing the individual’s right to his reputation as against the interests of free speech in the Society.

The European Convention on Human Rights is clear on the idea that there exists a right to receive and impart information and ideas without interference by public authority and regardless of frontiers, but that these freedoms (including freedom of expression) may be subject to such conditions and restrictions as are prescribed by Law and necessary in a democratic society. These exclusions, and as the case is, limitations to freedom of expression and the Press, covers; the prevention of disorder or crime, the protection of health and morals, the protection of the reputation of others (defamation) and rights of others to quietude (right to privacy), preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the Judiciary (Idachaba, 2018). The purport of the foregoing is that though the right to freedom of expression and the Press is guaranteed, the exercise of the right is to the exclusion of speech or utterances which may result in a crime, intrude upon another person’s quietude, or injure another person’s reputation, profession or trade.

A balance must be sought by the society through its government or agents which on one hand allows or upholds the right to freedom of expression and the Press, but does not extend to incitement to crime or criminal conduct, including political insurgence (e.g Seditious). In this regard, to refer to a public office holder as being a patient in a mental hospital may be deemed to be a matter of national concern, but the same statement directed at his wife or members of his immediate family constitutes a clear and actionable invasion of privacy. It is also in this regard that certain utterances may be regarded as intended to bring the government to opprobrium, or a statement calling a particular ethnic group to an uprising against the Federal Government was deemed seditious (FRN V Nnamdi Kanu & Ors. 2015).

Conclusion

There is no controversy in the fact that the backbone of any democracy must have an independent, professional and responsible Media embedded in it. The sacred duty here is to inform accurately, criticize constructively, and stimulate meaningful debates on or about national discourse in order to contribute immensely to good governance and national development. In this duty the Press must be accurate, succinct and impartial in order not to fall into Mark Twain's tirade "*stupid people...who constitute the overwhelming majority of this and all other Nations...believe and are convinced by what they get out of a Newspaper, and there is where the harm lies.*" (Millett, 2012).

The risk is then to believe in total freedom of and for the Press, without recourse to the underlying dangers of an unfettered freedom to express their thoughts regardless of bias, either social, political, or economic, the crucial point here being the issue of credibility. As a result, freedom of expression is known and accepted as a fundamental human right, and expressly guaranteed in most modern societies. It's exercise is not however, absolute. The Law of Libel in Defamation, the Tort of invasion of privacy (which protects the right of privacy), and the offence of Sedition are limitations to unfettered freedom of expression. In fact, the first recorded measure to limit Press freedom in the then Nigeria was The Newspapers Ordinance No 10 of 1903 which required that the Newspaper itself be registered, along with the real names (not any pseudonyms) and addresses of the Editor, the Proprietors, Printers and Publishers to be listed (Okonkwo, 1999).

The revelations of the "News of the World" scandals involving phone tapping, hacking etc leading to the closure of the media outfit in 2011 is an affirmation that the Press must be bonded or guided into avoiding exaggeration, scare-mongering, and sensationalism in order to gain more market share and undue advantage. Hence the necessity for limitations on the exercise of the right to freedom of expression in the form of Sedition, Defamation and or invasion of privacy, in order to seek a balance between the right itself, and the bounds of propriety in the Society.

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