

American Journal of
Law
(AJL)

LAW

**From Freedom of Expression to Freedom of Speech –
the Guarantees under the Nigerian Constitution and the
Real Challenges**

Ibrahim Sule



From Freedom of Expression to Freedom of Speech – the Guarantees under the Nigerian Constitution and the Real Challenges

Ibrahim Sule

Lecturer, Nigerian Law School, Kano Campus

Email: ibrahim.sule@nigerianlawschool.edu.ng

Abstract

Right to freedom of expression is one of the globally recognized fundamental rights guaranteed and protected in many international human rights conventions, charters and other international and regional treaties and instruments. In Nigeria, the right has always been given recognition and specifically provided for in all the Nigeria's constitutions, including the colonial and pre-independence. Even under the constitutional arrangements under the military governments, the said right is given recognition. Under the 1999 Constitution of Federal republic of Nigeria, the said right has also been prescribed for as one of the rights guaranteed for all Nigerians and anybody on the Nigerian soil. Nevertheless, it is one thing to recognize a right and it is completely another to practically implement the guarantees provided for. The Nigerian constitution is said to have given the said right with one hand and takes it away with another hand. This article critically analyses the right to freedom of expression under the Nigerian Constitution 1999 to discover whether or not the constitution as is being alleged, is really speaking from two sides of its mouth.

Introduction

Freedom of expression or freedom of speech or freedom of press is a notion that “every person has the natural right to freely express themselves through any media and frontier without outside interference, such as censorship, and without fear of reprisal, such as threats and persecutions”¹ This right, though restricted and controversial “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”². It existed since ancient times dating back to the Greek Athenian era and now recognized by all the international, regional as well as domestic human rights instruments. Unfortunately however, it took a long time for the right to be included in the Nigerian constitutions as a fully entrenched right. Throughout the colonial era, fundamental rights have not been incorporated in any of the colonial constitutions, let alone the controversial right to freedom of expression.³

Fundamental rights and freedom of expression in particular was for the first time incorporated in the 1960 constitution under section 24; and then all the other constitutions of 1963, 1979 and 1999 recognized, guaranteed and protected this right under sections 25, 36 and 39 respectively. Under the 1999 Constitution of Federal Republic of Nigeria, right to freedom of expression is provided under section 39(1) which states thus:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

This provision literally means that all persons, natural or artificial, Nigerians and foreigners do have a right to express themselves freely, to hold any opinion whatsoever, to receive and divulge any ideas and any information, without anybody’s interference in accordance with the provisions of the constitution. To complement the enjoyment of the right guaranteed under sub section (1) of section 39, sub section (2) provides for the right of every person to be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions. It is to be noted that the wording and language used under section 39 of the CFRN was greatly influenced by the provisions of Article 19 of the Universal Declaration of Human Rights also recognized this right in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19(2) of *International Covenant on Civil and Political Rights* (ICCPR), a formally binding legal treaty ratified by 165 States including Nigeria states:

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

¹ *Freedom of Expression Toolkit: A Guide for Students*, (UNESCO, 2013) available on www.unesco.org/new/communication-and-information, accessed on 15th April, 2013

² See *Handyside v. United Kingdom* Judgement of 7 December 1979, Series A, No. 24; (1979-80) 1 EHRR 737, para. 48

³ Williams-Ilemobola Bolanle Olajumoke, *An Examination of the Right to Freedom of Expression in Nigeria*, available on https://www.researchgate.net/publication/329014139_An_Examination_of_the_Right_to_Freedom_of_Expression_in_Nigeria, accessed on 12th August, 2022

of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

All the regional human rights instruments – i.e the European Convention on Human Rights (ECHR),⁴ the American Convention on Human Rights (ACHR)⁵ and the African Charter on Human and Peoples' Rights (ACHPR)⁶ – guarantee the right to freedom of expression, respectively at Article 10, Article 9 and Article 13. These guarantees are in all ramifications similar to those found in the ICCPR.

The whole purpose of the above stated guarantees is not to erect the press into “a privileged institution” but it is to protect all persons, including the press, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to write and to print, to gather news for such publication for and against any government policy or individual interest without interference of anybody or agency, as far as they are within the law.⁴

In the case of **Inspector General of Police v. All Nigeria Peoples Party**⁵ the Court of Appeal held:

"The police have no powers to stop or restrict the fundamental rights of Nigerians to freedom of expression and assembly once those rights are exercised within the ambit of the law. If the demonstrators or marchers breach any law in the course of exercising their freedom of expression and assembly the Criminal Code is there to take care of such infraction." Per ADEKEYE, J.C.A. (P.28, Paras.F-G)

And this in essence means that, no government, including the federal government or state can, by the provision of section 39(1) assume a guardianship of public mind. Undoubtedly, section 39 though not as generous as the First Amendment to the American constitution, guarantees right to freedom of expression subject only to the restrictions stipulated in the constitution and other laws made pursuant to the constitution. And even in the instances where some of such restrictions arise it is for the court to determine and for legislature or any other person.⁶ It may be interesting to note that effective exercise of the right to freedom of expression does not depend merely on government's non-interference, but in addition to this it requires the government to take positive steps and measures to ensure full protection of this right not only in its relationship with the citizens but also in the sphere of relations between individuals.

Is Right to Freedom of Expression Absolute?

Rights by their nature and in terms of their enforcement are categorized into absolute, limited and qualified rights. Absolute rights are those that can never be departed from because they are inherent in man and so fundamental to him. For instance right to freedom from torture, inhuman or

⁴ See *Adikwu v. Federal House of Representatives* [1982] 3 N.C.L.R 394 SCN

⁵ (2007) 18 NWLR (Pt.1066) 457 C.A

⁶ See *Momoh v. Senate of the National Assembly* [1981] 1 NCLR, 103 HC Lagos

degrading treatment or punishment; right to fair hearing; right to freedom from discrimination etc.. Limited rights are those that can be departed from in certain circumstances as provided by the law.⁷

For example under section 33 of the 1999 Constitution deprivation of life cannot be regarded as breach where it results from the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary for the defence of any person from unlawful violence or for the defence of property; or for the purpose of suppressing riot, insurrection or mutiny. Qualified rights are those that can be interfered with in certain circumstances and under certain conditions. For example right to private and family life, right to freedom of expression etc.⁸ As a result of the legal implication of its exercise, the right to freedom of expression carries along with it a duty or responsibility. Of course the right is for one to freely and liberally express oneself for or against any idea, policy or interest and to share with others what one holds, but that must be within the confines of law. Accordingly, one must not overstep the bounds set by law. As far back as 1770s a distinguished English jurist Sir William Blackstone stated thus:

“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must face the consequences of his temerity”⁹

It is to be noted that in almost all the international, regional and domestic human rights instruments guaranteeing freedom of expression, the right does not at all confer an absolute or unqualified right to “speak or publish without responsibility” every piece of information or to use any language chosen. It is a right carrying with it a duty to respect the rights and privacy of others, to help in maintenance of peace and order, etc. For example section 22 of the 1999 CFRN provides:

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

Article 19(3) of the ICCPR also provides:

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 scope of what constitutes interference is wide and subject to so many interpretations by international tribunals. One of such interpretations was given by the European Court of Human

⁷ See Raymond Owigho Ekpobodo, Protection of Human Rights in Nigeria, available on <https://www.researchgate.net/search.Search.html?query=human+rights+in+nigeria&type=publication>, accessed on 12th August 2022

⁸ See P. Ashcroft et al, Human Rights and the Courts: Bringing Justice Home (Winchester, Waterside, 1999)

⁹ Blackstone Commentaries, Vol. 4, 151-152

Rights as any “formalities, conditions, restrictions or penalties” imposed on the exercise of the right.

Nevertheless, in Nigeria restrictions to the right to freedom of expression and other rights are provided under sections 39(3) and 45 of the CFRN. Section 39(3) 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; or

(b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

Section 45 on the other hand states thus:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons

It is important to note all of the above stated restrictions must be made pursuant to a law which is reasonable justifiable in any democratic setting or society which are enacted for reasons of general interest and based on the exact purposes for which the restrictions have been established. The restrictions are never left to the discretion of any one single person but must be enacted into law and passed by the legislature. The restriction must also be for protection of legitimate aim and overriding interest taking into account its purpose and effect.

Certain legislations in Nigeria also criminalize some categories of publications and prescribe for them. For example section 51 of the Criminal Code prohibit the utterance of seditious words, publication, selling, reproduction, distribution or importation of seditious material. The section prescribes punishment of 2 years or a fine of N200 or both and for a subsequent offence imprisonment of 3 years and forfeiture of the seditious material or publication to the state. Section 373 -381 prohibits publication of any defamatory matter against and prescribes the punishment of 1 year; but if the publisher knows the publication to be false, a punishment of 2 years – unless the publication at the time it is made for public benefit and defamatory material is true. Sections 416-421 of the Penal Code also prohibit utterance of any words or publication of any material or false news with intent to cause offence against public peace, inciting hatred between classes etc. The punishment extended to 7 years imprisonment or fine or both. *Section 21 (1)* of the Newspapers Law of Lagos State Cap N2 Laws of Lagos State, 2003 states makes it an offence for any person who authorizes for publication, publishes, reproduces or circulates for sale in a Newspaper any

statement, rumour or report knowing or having reason to believe that such statement, rumour or report is false.¹⁰

As part of the restriction regime, certain legislations in Nigeria provide for the establishment of certain regulatory agencies like the National Broadcasting Commission under the National Broadcasting Commission Act. The Commission is empowered to enforce the National Broadcasting Code made pursuant to the Act. Many are criticizing the commission as lacking in independence and as being another hunting dog for the office of the Minister of Information and Communications and well as the President to unnecessarily silence some inconvenient voices. It is also being accused of unjustifiably muzzling privately owned broadcast stations but turning a blind eye when government owned stations violate the provisions of the Broadcasting Code.

The Real Challenges and the Way Forward

Although these restrictions, if objectively enforced are meant to protect the rights of others and to bring peace and to maintain order in the society, some states particularly in Africa are using them as swords “of stifling freedom of expression and creating a faux legal justification to silence “inconvenient voices”.”¹¹ Some of these restrictions are manipulated and vaguely into sedition laws, national security laws, public order laws, official secret Acts, etc with overly broad extent that any objective criticism of government can be regarded as punishable offence. This attitude breeds secrecy, corruption, abuse of power and office in many countries, including Nigeria because these unnecessary laws prevent the public from scrutinizing the government.¹²

Few months ago Sahara Reporters posted on their website that “Liberty Radio FM was slammed with a hefty N2 million fine over a phone-in discussion programme” because the station “aired a live comment by a caller who objected to the planned visit of the Minister of Information” to the state. And just 4 days back Premium Times reported that the National Film and Video Censors Board, NFVCB, “has banned the airing and distribution of the documentary, Fuelling Poverty, a 30-minute film which documents the massive poverty in Nigeria and advocates against corruption and greed in the country”.

Conclusion and Recommendation

Of recent is the ban of Twitter by Nigerian government for many months after which some stringent stipulations were made by the government if Twitter should continue its operations in Nigeria. There has also been reports that the government while fighting Boko Haram has consistently been accusing the private media of undermining national security when reporting the military operations against Boko Haram. The National Broadcasting Commission has also been accused of unnecessarily sanctioning some media houses supportive of opposition parties or politicians and other pressure groups. A number of journalists have also been intimidated by

¹⁰ See Imo Udofa, Right to Freedom of Expression and the Law of Defamation in Nigeria, available on https://www.researchgate.net/publication/266341565_Right_to_Freedom_of_Expression_and_the_Law_of_Defamation_in_Nigeria/citations, accessed on 20th August, 2022

¹¹ See No. 1 above

¹² Bethel Uzoma Ihugba and Shuaibu A Danwanka, Derogation From Fundamental Rights For National Security Consideration In Nigeria, available at <https://ir.nilds.gov.ng/bitstream/handle/123456789/404/DEROGATION%20FROM%20FUNDAMENTAL%20RIGHTS%20FOR%20NATIONAL.pdf?sequence=1&isAllowed=y> accessed on 29th September 2022

security agencies, some were publicly harassed or even arrested for covering corruption cases involving the ruling party's officials and for reporting human rights abuses by government security agencies.¹³

It should be noted however, for any democracy to flourish, uplifting freedom of expression and speech is always key. The restrictions prescribed under section 45 should always be interpreted purposefully and be invoked in situations where they can be necessarily invoked in any similar democratic society as Nigeria. Without free speech, there is no freedom and where there is no freedom there is no life.

Bibliography

Bethel Uzoma Ihugba and Shuaibu A Danwanka, Derogation From Fundamental Rights For National

Security Consideration In Nigeria, available at <https://ir.nilds.gov.ng/bitstream/handle/123456789/404/DEROGATION%20FROM%20FUNDAMENTAL%20RIGHTS%20FOR%20NATIONAL.pdf?sequence=1&isAllowed=y> Blackstone Commentaries, Vol. 4, 151-152

Freedom of Expression Toolkit: A Guide for Students, (UNASCO, 2013) available on www.unasco.org/new/communication-and-information,

Global Freedom Statuses 2021 – Nigeria, available on <https://freedomhouse.org/country/nigeria/freedom-world/2022>

Imo Udofa, Right to Freedom of Expression and the Law of Defamation in Nigeria, available on https://www.researchgate.net/publication/266341565_Right_to_Freedom_of_Expression_and_the_Law_of_Defamation_in_Nigeria/citations,

P. Ashcroft et al, *Human Rights and the Courts: Bringing Justice Home* (Winchester, Waterside, 1999)

Premium Times - EXCLUSIVE: FG bans film on Nigerian poverty, places producer under security watch, available on <http://premiumtimesng.com/news/129349-exclusive-fg-bans-film-on-nigerian-poverty-places-producer-under-security-watch.html>

Raymond Ovwigho Ekpobodo, Protection of Human Rights in Nigeria, available on <https://www.researchgate.net/search.Search.html?query=human+rights+in+nigeria&type=publication>,

Williams-Ilemobola Bolanle Olajumoke, An Examination of the Right to Freedom of Expression in Nigeria, available on https://www.researchgate.net/publication/329014139_An_Examination_of_the_Right_to_Freedom_of_Expression_in_Nigeria,

¹³ Global Freedom Statuses 2021 – Nigeria, available on <https://freedomhouse.org/country/nigeria/freedom-world/2022> accessed 12th May, 2022

Cases

Adikwu v. Federal House of Representatives [1982] 3 N.C.L.R 394 SCN

Handyside v. United Kingdom Judgement of 7 December 1979, Series A, No. 24; (1979-80) 1 EHR 737, para. 48

Momoh v. Senate of the National Assembly [1981] 1 NCLR, 103 HC Lagos