THE LEGAL BASIS OF FREEDOM OF EXPRESSION IN NIGERIA

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This article's purpose is to examine the legal framework within which freedom of expression is practiced in Nigeria. Because concepts such as freedom of expression are subject to various philosophical interpretations, one needs to succinctly delineate the scope of any discussion surrounding such concepts. Therefore, it is necessary to point out some basic assumptions before embarking on the substantive discussion of freedom of expression in Nigeria.

The first assumption arises out of the fact that the military government presently in power in Nigeria[1] is regarded as transient. This is so because the mere existence of that type of government constitutes a state of emergency which negates any constitutional or legal tenets in the country.[2] As a corrollary to this state of affairs, it is assumed that Nigeria believes in a democratic form of government. The second assumption occurs because Nigeria has consistently included provisions guaranteeing freedom of expression in her constitutions since the constitution of 1958, up to and including the draft of 1976.[3] Thus, it is reasonable to assume that Nigeria believes in preserving this fundamental right.

The last assumption concerns the legitimacy and supremacy of the constitution. Recently, Nigerians have been engaged in the constitution making process. The Constitutional Drafting Committee[4] drafted a new set of constitutional proposals, and the media pro-

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1. The civilian government of Nigeria was overthrown in a *coup d'etat* by 25 Army officers on January 15, 1966. 2 ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, CONSTITUTIONS OF AFRICAN STATES 1150 (1972) [hereinafter cited as 2 AFRICAN CONSTITUTIONS].

2. *See* The Constitution (Suspension and Modification) Decree 1966: Decree No. 1 (Jan. 17, 1966), *reprinted in* 2 AFRICAN CONSTITUTIONS, *supra* note 1, at 1274 [hereinafter cited as Decree No. 1].

3. The draft constitution has yet to be adopted.

4. The Constitutional Drafting Committee is often referred to as the "forty-nine wisemen."

vided information regarding these proposals to Nigerians who, because of this process, were given a chance to identify with the constitution. The proposals, in effect, were put through a process of popularization. A specially elected constituent assembly will meet in Lagos to ratify and/or amend these proposals; when this occurs, Nigeria will be deviating sharply from the conventional methods employed by former colonies when adopting a constitution. She will, in fact, be conforming to stipulations espoused by Professor Nwabueze for determining the legitimacy of a constitution. These include the formulation by the people, or their representatives, of a document which has the force of supreme law, and which creates and defines the organs of government, and assigns specific powers to the government which limit their legal operations.[5] Therefore, the final assumption is that the constitution is the highest legal document to which Nigerians look for guidance when questions concerning fundamental rights are raised. The 1963 Nigerian Republican Constitution, whose essential provisions are still in force despite the military presence,[6] declares that:

> [T]his Constitution shall have the force of law throughout Nigeria and . . . if any other law (including the constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.[7]

The constitution also provides for the alteration of any of the provisions by Parliament that are supported by a resolution and passed by a vote of not less than two-thirds of all the members, and by each legislative house of at least three out of the four regions in the country.[8]

Fortunately, the draft constitution retains, as its section one, chapter one, the provision regarding the supremacy of the constitution and states that "its provisions shall have binding force on all persons and authorities throughout the Federal Republic of Nigeria."[9] Such provisions provide evidence that Nigeria is aware that a constitution needs enough power to enable it to limit the arbitrariness and high handedness that is inherent in all governments. Dec-

5. B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 25-26 (1973).

6. Decree No. 1, *supra* note 2.

7. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA ch. 1, § 1, *reprinted in* 2 AFRICAN CONSTITUTIONS, *supra* note 1, at 1156. The official language in Nigeria is English.

8. *Id.* § 4(1) & (2).

9. 1 Constitution Drafting Committee, Report of the Constitution Drafting Committee Containing the Draft Constitution 9 (1976).

larations of good intentions usually are not enough when one considers those who gain from limitations on governmental powers. If the modern concept of democracy continues to mean government of the people, by the people, and for the people, constitutions must limit governments by constitutionally guaranteeing individual civil liberties which are enforceable by an independent judiciary. In addition to civil liberties guarantees, Professor McIwain maintains that "full responsibility of government to the whole mass of the governed"[10] is imperative.

Many governments, particularly those of the developing countries, frown upon restraints that favor the individual. For this reason, there is often a substantial gap between constitutional guarantees and their actual practice. Holding the government accountable to the people presupposes that individuals are always free to question and criticize governmental actions. From that supposition, the duty of the government to explain and justify its conduct follows. Finally, sanctions must be available to remedy unconstitutional governmental conduct. In an ideal situation, then, freedom of expression is of vital importance to the smooth working of a democratic society. This is so because such freedom bears on politics and matters of public interest. By this same reasoning, it becomes apparent that the right of the individual to criticize the government carries great potential of bringing the interests of the individual into conflict with those government functionaries whose conduct he criticizes. This result becomes even more apparent if one bears in mind the resentment of the governing elite within developing countries. It should be noted, however, that those in government have equal rights to be protected from unwarranted and scurrilous attacks from individuals and the mass media.

Having accepted the constitution as the legal foundation regarding fundamental rights, and bearing in mind that the problems surrounding freedom of expression essentially can be reduced to reconciling the individual's legitimate interests with those of public officials, this article will examine the extent to which the Nigerian Constitution has set up guidelines for the enjoyment of the right of freedom of expression. This shall be accomplished by first discussing the constitution's historical background, followed by a discussion of specific constitutional guarantees and certain constraints that have been placed upon freedom of expression.

10. C. MCILLWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 141-146 (1947).

I. HISTORICAL BACKGROUND

The provisions regarding fundamental rights in the Nigerian Constitution are based on the report of the Minorities Commission which was set up by the British government in 1957 "to ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears whether well or ill-founded."[11] Prior to independence, the heterogeneous nature of the peoples and regions of Nigeria, and the federal system which the British attempted to introduce, engendered in the minds of minority ethnic groups the fear of being perpetually deprived and dominated by the three major ethnic groups of Igbo, Yoruba, and Hausa. Following recommendations by the Commission that constitutional safeguards for minorities be written into the 1958 constitution, a Nigerian "Bill of Rights" surfaced for the first time in the constitution,[12] which included a guarantee of rights and centralization of the federal police. This Bill of Rights served not only to secure the unity of the country, but also acted as a buffer against any abuse of power by majorities.

The Commission's recommendations, however, did not solve the minorities' problems in Nigeria.[13] One of the major causes of the 1967 Civil War can be traced to the primordial antagonisms that existed among the various ethnic groups in the country. In spite of the rights enshrined in the 1958 constitution, the government did not hesitate to encroach upon individual freedoms, and particularly upon freedom of expression. Nwabueze states that "the law of sedition . . . had to be made harsher and be more rigorously enforced than in Britain in order to guard against the possibility that the relatively small politically articulate section of the population might exploit the natural resentment against colonialism to incite the populace to disaffection."[14]

The Minorities Commission anticipated the vulnerability of the individual rights provisions in the constitution, but, nevertheless, reported:

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11. Minorities Commission, Command Paper No. 8934, at 13 (1957) [hereinafter referred to as the Commission]. The Commission was headed by Sir Henry Willinck and is sometimes referred to as the Willinck's Commission.

12. 2 AFRICAN CONSTITUTIONS, *supra* note 1, at 1149. The so called "Bill of Rights" was contained in ch. 3, §§ 17-32.

13. A civil war over the secession of Biafra broke out on July 7, 1967 and lasted until January of 1970. *Id.* at 1150.

14. NWABUEZE, *supra* note 5, at 40.

> Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed.[15]

Realizing that constitutional safeguards, alone, do not provide complete and unchallengeable security, the Commission warned that "a government determined to abandon democratic courses will find ways of avoiding them."[16] Yet, the Commission hoped that the constitutional safeguards would prevent a steady deterioration in standards of freedom and the government's ability to unobstrusively encroach upon individual rights. Essentially the Commission thought that such safeguards would constitute the outer bulwarks of defense against the might of governmental power.

II. CONSTITUTIONAL GUARANTEES

Among the democratic countries of the West, and in those developing countries within Africa, Asia, and Latin America who are striving towards democracy, the traditional focal point for discussing specific constitutional provisions regarding freedom of expression has been the first amendment to the United States Constitution. The guarantee is stated as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for a redress of grievances.[17]

This seemingly all-encompassing constitutional guarantee did not apply to the state governments within the United States for fifty-seven years. Finally, the Supreme Court of the United States, in dicta, made freedom of speech as safe from state governments, under the fourteenth amendment, as well as from the federal government when it stated that:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due pro-

15. Minorities Commission, Command Paper No. 505, at 97 (1958).
16. *Id.*
17. U.S. CONST. amend. I.

cess clause of the Fourteenth Amendment from impairment by the States.[18]

The first and fourteenth amendments both provide protection for freedom of expression and have experienced numerous interpretations. Almost two centuries after the adoption of the first amendment, the full scope of protection afforded the press is still evolving through both state and federal court decisions. The United States Supreme Court has delineated the boundaries of constitutional protection regarding such matters as critical expression,[19] and has ruled on the question of the time, place, and manner of expression.[20] Moreover, the Court has dealt with such issues as personal attacks through the broadcast media,[21] personal privacy,[22] and petitioning the government for a redress of grievances.[23] The point to be gleaned from this discussion is that, even in the United States, the first and fourteenth amendment protections are not absolute, for the Supreme Court has been called upon continuously to define limits and parameters surrounding the guarantees.

The relevant constitutional provisions governing freedom of speech in the Nigerian Constitution are as follows:

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. Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society.
   a. - in the interest of defense, public safety, public order, public morality or public health;
   b. - for the purpose of protecting rights, reputation and freedom of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Courts or regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph film;
   c. - for imposing restriction upon persons holding office under the state, members of the armed forces of the Fed-

18. Gitlow v. New York, 268 U.S. 652, 666 (1925).

19. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

20. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

21. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

22. See Time, Inc. v. Hill, 385 U.S. 374 (1967).

23. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

eration or members of the police force.[24]

In Nigeria, individual rights are divided into two groups. The first group includes rights that are relatively absolute. These rights cannot be limited by Parliament or any legislative body except in time of war or national emergency, and include the rights to life, to protection against inhuman treatment, to protection against slavery or servitude, to personal liberty, and to the fair judicial determination of civil and criminal rights.[25] The second group consists of those rights that are regarded as "qualified." Such rights may be limited by any law that is "reasonably justifiable in a democratic society"[26] if the law's purpose is permitted by the constitution. The right to private life, freedom of conscience, freedom of expression, freedom of assembly, and freedom of movement are examples of these "qualified" rights.[27] Thus, a delicate balancing between individual interests and societal interests becomes necessary with this group of rights.

More important than the range of the rights guaranteed is the way in which the provisions are formulated, because the scope and sweep of the provisos attached to the guarantees are heavily influential when determining the effectiveness of the guarantees. In Nigeria, the question of effectiveness is inextricably connected with the formulation of the guarantees in the constitution. The "qualified" rights are subject to certain exceptions, and have provisos attached that state that the guarantee is not to invalidate any law that is reasonably justifiable in a democratic society in the interest of defense, public safety, public order, public morality, or public health.[28] Unquestionably, a guarantee needs to be balanced against society's demands, but the question remains as to whether the formulation of the exceptions strikes a proper balance, or whether there is a tilt in favor of one over the other.

Consider the power given to the legislature to enact laws abridging the freedom of expression, and examine the implications of the words "reasonably justifiable in a democratic society" and "nothing in this section shall invalidate any law . . . ." Such words are manifestly vague and flexible, and raise vital questions. For example, how is the degree of freedom compatible with democracy to

24. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA ch. 3, § 25(1),(2)(a)-(b)-(c), *reprinted in* 2 AFRICAN CONSTITUTIONS, *supra* note 1, at 1156.

25. *See id.* ch. 3, §§ 18-22.

26. *Id.* §§ 23-27.

27. *Id.*

28. *See, e.g., id.* § 25(a).

be determined? There is no agreed lowest common denominator of democratic behavior applicable to all societies, yet, such a common yardstick is imperative if we are to ascertain whether "reasonably justifiable" does not leave too much scope for the subjective manipulations of legislators and administrators. One Nigerian court attempted to define "reasonably justifiable." Justice Bates ruled that in order to be reasonably justifiable "a restriction upon a fundamental human right must be necessary . . . [and must] not be excessive or out of proportion to the object which it is sought to achieve."[29] Considering the Justice's definition, it seems that the Nigerian courts can benefit from the United States concept of due process. This concept has enabled the United States Supreme Court to strike down any law that has unreasonably or arbitrarily interfered with liberty. One such case is *Cox v. Louisiana* in which the State of Louisiana convicted Reverend B. Elton Cox, leader of a civil rights demonstration, for disturbing the peace and obstructing public passages. In reversing the judgment, the United States Supreme Court held that Louisiana could not constitutionally punish appellant under its "disturbing the peace" statute, and that the statute as interpreted by the Louisiana Supreme Court is unconstitutionally vague.[30]

Another objection to the framing of the Nigerian Bill of Rights concerns the words: "Nothing in this section shall invalidate any law . . . ."[31] These words seem to be tilted in favor of the derogatory law, which thereby shifts the onus to the challenging person to prove that the law is not reasonably justifiable. This is akin to the United States Supreme Court's doctrine of judicial review of statutes whereby acts of the legislature are presumed to be constitutional, even if infringing upon first amendment freedoms, unless arbitrary or unreasonable.[32] It is submitted that the onus of proving the reasonable justifiability of a law should be on the authorities, thereby enhancing the value of the guaranteed right. When considering the question of the presumption of constitutionality, it should be remembered that fundamental rights in Nigeria were designed by the federal government to allay the fears of minorities. It is, therefore, necessary to deviate from the normal and typical ap-

29. Cheranci v. Cheranci, N.R.N.L.R. 24, 29 (1960). The citation N.R.N.L.R. refers to the Northern Region of Nigerian Law Reports.

30. Cox v. Louisiana, 379 U.S. 536, 551 (1965).

31. These words are found in sections 23-28.

32. Gitlow v. New York, 268 U.S. 652, 668-69 (1925), *citing* Great Northern Ry. v. Clara City, 246 U.S. 434, 439 (1918).

proaches employed by judges in England, where the judgment of Parliament regarding the necessity for any legislation cannot be properly questioned by the courts. The Nigerian courts should always bear in mind that the primary purpose of guaranteeing individual rights is to protect the minority from the tyranny and arbitrariness of the majority, which here is represented by the government.

We come now to the question of interpreting and enforcing the Nigerian Bill of Rights. Original jurisdiction to enforce the fundamental rights is vested in the high courts of the states, from whence appeals can be taken to the Federal Supreme Court. There is a constitutional provision which states that "any person who alleges that any of the fundamental rights provisions have been contravened in relation to him may apply to the High Court . . . ."[33] The Nigerian courts will find no guidance from the constitution regarding the form to take when enforcing fundamental rights, other than reference to writs, orders, and direction. The court, therefore, may issue prerogative orders, mandatory or prohibitory injunctions, or, in appropriate cases, it may employ normal remedies, such as the transfer of judicial proceedings and ordering retrials. When interpreting constitutional provisions, much depends upon the judicial orientation adopted by the Federal Supreme Court. Nigeria, like most Commonwealth countries, operates under the common law. In common law jurisdictions, the choice lies between strict adherence to the ordinary rules of statutory construction, or judicial restraint and judicial activism, which espouses a more beneficial interpretation of the constitution than the normal rules of statutory construction allow.

The Federal Supreme Court of Nigeria is the final court for deciding constitutional issues, and is also the final domestic appeallate court. Therefore, the principle of judicial restraint might be expected. However, some provisions in the Bill of Rights are so worded that the supreme court will find it difficult to avoid the assumption of a policy-making role on important public questions. Take, for example, the issue of evidence. How will evidence of what is "reasonable and justifiable" in a "democratic society" be adduced, and who will adduce such evidence—the government or the aggrieved party? Will the practice in other countries alleged to have democratic forms of government have to be taken into account? If

33. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA ch. 3, § 32(1), *reprinted in* 2 AFRICAN CONSTITUTIONS, *supra* note 1, at 1156.

so, will evidence on the question of whether such countries are truly democratic have to be introduced? What is true democracy? These are some of the fascinating questions with which the supreme court will have to grapple.

The Nigerian Bill of Rights differs essentially from the rest of the constitution because it is a statement of principles that involves the application of nonlegal criteria. When interpreting the provisions, the courts will have to consider the reasonableness and justifiability of legislative and executive acts. This compels a subjective, rather than a purely objective, approach that adheres to strict statutory construction. The subjective approach involves the measurement of reasonableness and justifiability in terms of the historical setting; the local, political, and social conditions; and local standards of acceptability. The task of developing a jurisprudence relating to the constitution must be discharged primarily by the supreme court. This should have the effect of keeping the charter of government current and in tune with the needs of the day. A liberal and effective interpretation of the freedom of expression provisions is highly desirable, and should not be unduly confined by restrictive technicalities and interpretation. Otherwise, the clear danger exists that the enforcement procedure will cease to be a special remedy. An action brought to protect freedom of expression would become just another kind of litigation, with the inherent potentialities of procrastination and evasion of issues by the pursuit of technical points. If this happens, the rights will fall into disregard.

III. CONSTRAINTS UPON FREEDOM OF EXPRESSION

Colonialism is intrinsically inimical to the fostering of democracy. This inherent conflict can be felt even more strongly in the field of freedom of expression where a different viewpoint invariably is regarded as a ploy to unseat an imperial power. Colonial administrators thought that a press of any type was dangerous in the hands of "barbaric" Africans, and, therefore, a critical nationalist press was doubly dangerous. Lord Lugard, one of the early British administrators in Nigeria, deprecatingly regarded the Nigerian journalists as "mission-educated young men who live in villages, interferring with the native councils, and acting as correspondents for the mendacious native press." He stated that the Nigerian newspapers "represent the scurrillous local press, pouring out their col-

umns of venomous abuse, often bordering on sedition or libel."[34]

These attitudes were reflected in various types of controls which were easily established because of the caveats contained in the Nigerian Constitution.[35] These caveats provided the loopholes enabling the government to enact laws relating specifically to the press. The controls ranged from regulations allowing direct censorship, to sedition and other laws that colonial governors interpreted broadly.

An intriguing question asks why, after independence, do many African countries leave in their books those laws the colonial administrators created to safeguard their own selfish and imperial objectives? The answer is closely linked with the willingness of the leaders of independent African countries to continue the legacies of their colonial past. Many of the leaders began their careers as editors or publishers. Jomo Kenyatta of Kenya was editor of *Muiguithania* in the late 1920's, and Julius Nyerere of Tanzania began his public career as editor of *Sauti ye TANU.* Nigeria's Nnamdi Azikiwe started the *West African Pilot* for nationalist purposes, while Kwame Nkrumah started a daily, the *Accra Evening News*, for mobilizing political support.[36] Many of these leaders, especially those who used the press to garner and ascend to political power, fear the media. This is so because they are all too familiar with the potential of the media for displacing ruling elites. Those rulers who were also leaders of the nationalist movements regard themselves as founders of the states, and would do anything to remain in power, even to the point of prostituting constitutionalism. Any opposition or divergent opinions are regarded as attempts to destroy the revolution for which the leaders endured so much to build. One method of maintaining power was to force the press into a groove of conformity, and leave those very laws they had attacked in the statute books. Through this process, a new definition of freedom of expression evolved.

The above discussion should answer the question of why there are Nigerian laws designed to regulate specifically the establishment of newspapers. The 1917 Newspapers Ordinance[37] has a deposit requirement of 750 dollars, which presupposes the guilt of

34. R. JULY, THE ORIGINS OF MODERN AFRICAN THOUGHT 360 (1968).

35. *See* text accompanying note 24 *supra.*

36. D. WILCOX, MASS MEDIA IN BLACK AFRICA PHILOSOPHY AND CONTROL 10 (1975). A similar development occurred in the French controlled territories.

37. Newspapers Ordinance of 1917, ch. 129, 4 The Laws of the Federation of Nigeria and Lagos (revised 1958).

publishers in libel cases.[38] T.O. Elias, the former Chief Justice of the Nigerian Supreme Court, said:

> The minister may pay out of it [the deposit] such penalty as may from time to time be imposed by any court in Nigeria on the proprietor, printer, or publisher, whether in respect of libel published in the newspaper or otherwise. Whatever amount is thus paid out . . . must be made good on the same day, so that the deposit held by the Minister in respect of the particular newspaper stands at [250, $750] . . . . Failure to make good the deposit will result in the newspaper being suspended until due reparation is made.[39]

In 1964, a Nigerian press law was enacted.[40] It seeks to make it an offense to publish any confidential information about members of parliament, high civil servants, and other high government functionaries. Moreover, any journalist who makes comments injurious to the good repute of these government officials is subject to punishment. The pertinent provisions of the law are as follows:

> [W]here a person, to whom this section applies publishes or reproduces or circulates in a newspaper any false statement or false report which he knows or reasonably ought to know to be false or where such person published or reproduces or circulates in a newspaper such statement or report without due regard being first had as to its truth or falsity, he shall be guilty of an offence and liable upon conviction . . . to imprisonment for a term of not less than 12 months or more than 3 years. . . .
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> A prosecution for an offence under this section shall not be instituted except with the consent of the Attorney-General:
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> Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued or executed, and any such person may be remanded in custody or on bail notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained but no further proceedings shall be taken until the consent has been obtained.[41]

The above provisions are akin to the United States Supreme Court ruling in *New York Times Co. v. Sullivan*[42] as far as criticism of public officials in their official capacity is concerned, but the similarity stops there. The *Times* case was considered upon the philoso-

38. *Id.* § 3.
39. T. ELIAS, NIGERIAN PRESS LAW 2 (1969).
40. Nigerian Amendment Act, Federal Republic of Nigeria Laws (1964).
41. *Id.* § 27a(1)(2).
42. 376 U.S. 254, 279-80 (1964).

phy "that debate on public issues should be uninhibited, robust, and wide open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[43] On the other hand, the Nigerian Newspaper Act presumes that the publisher had knowledge of the statement's falsity unless he proves that, prior to publication, he took reasonable measures to verify its accuracy.[44]

It is submitted that this law imposes very serious limitations on newspaper reporting in Nigeria. The perishable nature of news, as well as the elusive nature of government news sources, must be kept in mind. These factors, coupled with the fact that no newspaper in Nigeria can afford to send reporters to every part of the country to check the veracity of every report, make it unreasonable to expect reporters to conduct a thorough investigation of all their news items before publication. How can the press possibly secure governmental accountability to the people if government officials and their policies are never subject to criticism? What is to stop government officials from declaring that unfavorable statements are false, particularly when the press's access to sources is limited? These questions are yet to be answered because, as Chief Justice Elias has said, "It is interesting to record that this particular piece of legislation has not so far been the subject of prosecution, nor has the Federal Military Government seen fit to repeal it up to now."[45]

A few cases in the areas of defamation, national security, and seditious publication will illuminate the views of the Nigerian Supreme Court. This case study will also reflect the state of freedom of expression in Nigeria.

The publication of a defamatory matter, whether it be libel or slander, is a criminal offense.[46] It is unnecessary that the defamatory matter be calculated to provoke violence, as is the case in England. The Nigerian Supreme Court has drawn a distinction between spoken words that can be construed as vulgar by those who hear them, which are not necessarily actionable as a tort, and spoken words later reduced to writing, which are not protected. In *Benson v. West African Pilot, Ltd.*,[47] Chief Justice Ikpeazu held that certain words spoken against the plaintiff at a press conference

43. *Id.* at 270.

44. Nigerian Amendment Act, Federal Republic of Nigeria Laws § 4(1)(2) (1964).

45. ELIAS, *supra* note 39, at 135.

46. 2 NIGERIAN CRIMINAL CODE §§ 60, 373 & 375 (1958).

47. N.M.L.R. 3 (1966). The citation N.M.L.R. refers to the Nigerian Monthly Law Reports.

were mere vulgar abuse because there was a squabble between them. When the words were published later in the defendant's newspaper, however, the judge held the written version actionable[48] and purported to follow Lord Mansfield's dictum in the old English case of *Thorley v. Kerry*.[49] That case held that abusive words published later by the person who spoke them cannot claim any protection.[50] The Chief Justice stated that "for mere general abuse spoken, no action lies."[51] He further stated that "had those same words been written down by the person who spoke them, then they would not be mere vulgar abuse any longer."[52] The evidence before the court indicated that the words were not written by the person who uttered them, but by a reporter who was present at the press conference. Because this was the case in *Benson*, the written version published by the reporter ought to have been protected as a vulgar abuse.

The issues in the areas of national security and seditious publication seem to overlap. The government often uses methods, such as the declaration of an emergency in the whole or parts of the country, to punish those newspapers it does not like. The Seditions Act[53] forbids, among other things, publications that intend to induce hatred or contempt for the Sovereign or the government, or the laws or constitution of the Realm. The Act also forbids publications that intend to excite discontent and dissatisfaction among the citizens of Nigeria, or to promote feelings of ill-will and public disorder.[54] The problem is that the offense of sedition can arise from criticizing matters of general public concern where very little restraint is exercised in the choice of words. Hence, even where no revolt is intended by the author of such words, if narrowly construed and without due consideration to the fact that in political matters greater latitude should be accorded, the inference of a seditious intention is easy. For example, in *Director of Public Prosecution v. Obi*,[55] the following statement was construed as expressing a seditious intent:

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48. *Id.* at 9.
49. 128 Eng. Rep. 367 (C.P. 1812).
50. *Id.* at 371.
51. Benson v. West African Pilot, Ltd., N.M.L.R. 3, 9 (1966).
52. *Id.*
53. 2 NIGERIAN CRIMINAL CODE §§ 50-52(c), (d) (1958).
54. *Id.*
55. ALL N.L.R. 184 (1961). The citation ALL N.L.R. refers to the All Nigeria Law Reports.

> Down with the enemies of the people, the exploiters of the weak and oppressors of the poor . . . ! The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians.[56]

Obi's apparent intention in the above attack was to dissuade the people from voting for the incumbents in the upcoming election. For this he was convicted, and his appeal to the supreme court was dismissed. The crucial point is that seditious convictions normally punish the intention supposedly lurking behind a statement. Clarence Darrow's statement that "there is no such crime as a crime of thought; there are only crimes of action" seems to be pertinent in these matters. Yet, surprisingly, "publications intended to promote feelings of ill-will and hositility" or "to raise discontent and disaffection" can be termed seditious, according to the Act.[57] In this regard the United States Supreme Court's holding in *Terminiello v. Chicago*[58] points up the sharp contrast between the two countries. The Court, through Justice Douglas, said:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[59]

The above cases provide but a mere glimpse into the state of freedom of expression in Nigeria. They also expose the loopholes any authoritarian-inclined government can exploit in order to render the constitutional guarantee of freedom of expression meaningless. Fortunately, Nigeria still has the opportunity to reformulate the provisions of section twenty-five of the constitution for the purpose of enhancing the protection provided for freedom of expression.

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56. *Id.* at 186.
57. 2 NIGERIAN CRIMINAL CODE §§ 50-52(c), (d) (1958).
58. 337 U.S. 1 (1949).
59. *Id.* at 4.

IV. CONCLUSION

When suggesting what can be done to enhance the guarantees pertaining to freedom of expression, it is necessary to examine the rationale of the Constitutional Drafting Committee's action of virtually transplanting section twenty-five of the 1963 constitution, with all of its inadequacies, directly to draft section thirty-five. The Committee acknowledged that many members had pressed for the inclusion of a special provision in the constitution enabling the press to publish and circulate matters of public interest. Yet, the Committee stated "that there are no grounds for giving any Nigerian citizen a lesser right to freedom of expression than any other person or citizen who happens to be a newspaper editor or reporter."[60] Thus, the Committee equated freedom of the press with that of an individual.

This argument, equating the press with the individual, fails to recognize the dynamic nature of the world in which we live. Because of this dynamism, the individual must grapple with and interpret complex phenomena if he is ever to understand his immediate environment. Therefore, there is need for an informed citizenry. Most people rarely have the time, money, and knowledge necessary to exercise their personal right of access to information; even if they were able and committed enough to unearth relevant facts, they may find them so complex, conflicting, and unintelligible that interpretation would become imperative. It follows that, functionally, the press is in a better position to vindicate the peoples' right to know by monitoring the activities of legislators and administrators. The press is equipped to collect, analyze, and disseminate this information to the public as a benefit to society generally. Governments in developing countries, in fact, utilize the press to promote various developmental projects. This practice merely recognizes that it is far more convenient to furnish information to the press than to feed the same information in installments to many and varied individuals. Moreover, the press may achieve a far wider exposure than could possibly be achieved through an individual.

The Constitutional Drafting Committee, recognizing the potentials of the press, spelled out what is regarded as obligations of the mass media in the draft constitution. Section sixteen, chapter

60. Constitutional Drafting Committee, Report of the Constitutional Drafting Committee Containing the Draft Constitution 14 (1976) [hereinafter cited as Drafting Committee Report].

two, of the draft deals with Fundamental Objectives and Directive Principles of State Policy. The Committee states:

> The [p]ress, [r]adio, [t]elevision and other agencies of the mass media shall at all times be free to uphold the [f]undamental [o]bjectives . . . of this Constitution and uphold the responsibility and accountability of the government to the people.[61]

Obviously, an institution that is responsible for bridging the gap between the government and the people needs some specific constitutional guarantees as a safeguard to its effectiveness. This need was recognized by Justice Powell, in a dissenting opinion in *Saxbe v. Washington Port Co.*,[62] when he stated:

> The court did not hold that the government is wholly free to restrict press access to newsworthy information. To the contrary, we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful.[63]

It will be interesting, however, to test the scope of the term "freedom" in the provision that states, "the mass media *shall at all times be free* to uphold the [f]undamental [o]bjectives"[64] of the draft constitution in the courts. It is imperative that the new constitution provide the judiciary with the power of judicial review over legislative and executive action. The power of the Nigerian judiciary to carry out such duties was eroded by the abolition of the Judicial Service Commission in 1963.[65] The abolition allows the Prime Minister or the Premier of a Region to advise the President or the Governor on the appointment of judges, and the removal of judges came to depend upon the vote of politicians in both houses of Parliament. This may not be sufficient evidence to conclude that the Nigerian judiciary has lost its independence; nevertheless, it is hardly reassuring to know that the judiciary is subordinated to the executive. Unfortunately, the Commission was abolished just as it was beginning to serve as an example to other countries. Commenting on the power of appointing, promoting, and removing judges,

61. *Id.*
62. 417 U.S. 843 (1974).
63. *Id.* at 859 (Powell, J., dissenting).
64. Drafting Committee Report, *supra* note 60 (emphasis added).
65. The commission was abolished in 1977 by the Federal Government of Nigeria. Decree No. 66 (Oct. 24, 1977). The decree also provided for the establishment, in each state of the federation, of an Interim Judicial Committee charged with the responsibility of appointing all grades of Magistrates except that of Magistrate Grade III, who would be appointed by the Chief Judge of the State concerned. In reality, however, judges are appointed by the Executive.

the International Commission of Jurists, in 1961, had recommended

> that these powers should not be put into the hands of the Executive, or the Legislative, but should be entrusted exclusively to an independent organ, such as the Judicial Service Commission of Nigeria so that in exceptional circumstances, removal of a judge should be before a body of judicial character, assuring at least, the same safeguards to the judge as would be accorded to an accused person in a criminal trial.[66]

The foregoing discussion of freedom of expression, as guaranteed in the Nigerian Bill of Rights, has indicated a very uncertain legal premise upon which to base such a critical and fundamental right. The Constituent Assembly, which met late in 1977, had the opportunity of ensuring not only a freedom of the press guarantee free of provisos and exceptions, but also the opportunity to reinstate the Judicial Service Commission for the purpose of reversing the subordination of the judiciary to the executive. Unfortunately, no action was taken to further either of these attractive proposals. Hopefully, the Committee will persevere until they can provide the courts with the assurances necessary to enable them to adopt the dynamic role of providing guidelines for the enjoyment of all fundamental rights, including freedom of expression.

66. International Commission of Jurists, Report of the African Conference on the Rule of Law 20-21 (Jan. 3-7, 1961). The conference was held in Lagos, Nigeria.