

THE OFFICIAL SECRETS LAW AND THE PRESS IN NIGERIA

Introduction

Much has been written on sedition, libel and other laws relating to state security. However, for some inexplicable reasons, the Official Secrets Law has received insufficient attention, especially when compared to the other laws. This paper therefore, is mainly on an explication of the law and its application. Its main purpose is to correct the tendency to refer to laws relating to state security as one and the same. Efforts are made to highlight the ingredients of the law, the method of proceedings adopted and the defence.

Initial attempt is made at giving the history of the Nigerian Criminal Code. Emphasis is placed on its origin and progress. Of course, the creation of the Official Secrets law in Nigeria would never have been possible without the independence status of Nigeria. The colonial government had been known to arrest subjects for publishing items believed to be embarrassing to the government or capable of causing public disorder.

The author assumes that the reader may be ignorant of some terminologies or concepts which inevitably appear in the course of discussion. Therefore, brief explanations of such terms are given. Given the nature of government in Nigeria for the better part of its independence, the relationship between the press and government with regard to laws relating to state security has been nebulous.

Arriving at a clear-cut identification of offences which a particular journalist may be charged for in the course of carrying out his duty is difficult. The author could discuss only one obvious case where the government in power invoked the official secrets law against the press. No doubt, there is hope for the Nigerian Press under the democratic dispensation. In as much as the Press are called upon to exhibit a high level of social responsibility in their reportage, the government is also expected to protect its sovereignty if need be, not only by force but also by showing some concern for truth.

History of Nigerian Criminal Law

Although the Nigerian Criminal Law is largely a British creation, its primary source is the "Nigerian Legislature Enactment". According to Okonkwo (1980:3):

For several centuries, the basis of English criminal law has been the common law-considerably supplemented by statutes... In Nigeria, the reverse is the position. For the primary source of all Nigerian criminal law is Nigerian legislative enactment.

Further elucidating his position, Okonkwo (1980) identifies two categories of statutes, both Federal and State, defining what, according to him, may be described as 'technical offences'. These acts were intended to regulate, by the threats of penalties, the conduct of people in all works of life. They also tend to expand as the various governments in Nigeria extend their spheres of influence.

The second category is of two distinct groups or codes. They are the Penal Code and the Criminal Code. The Criminal Code is of paramount interest to us in this discussion as the major State Security enshrined in it.

Prior to the arrival of the British, what may be described as a system of criminal law existed in what is now known as Nigeria. In the South were many systems of social norm based on the family unit, village or village groups. The North was more sophisticated, with Moslem Criminal Law firmly systematized. Okonkwo (1980:4) observed that there were several "schools" of jurists. Foremost among these was the 'Maliki' school.

There were also pockets of "pagan" communities in the North which, to a certain degree, had their customary law blended with the Moslem law. However, the common feature of all customary laws, apart from the Moslem law, was that it was unwritten.

The English common law which included the common law of crime was introduced into the colony of Lagos. However, outside Lagos, the customary law was still operated. Occasionally, an ordinance was passed against certain kinds of conduct such as slave-dealing and witchcraft.

With the development of a more centralized government, the British administration began to feel a need for a clearly worded set of criminal principles in the British Courts. So, in 1904, Lugard's administration in Northern Nigeria introduced, by proclamation, a criminal code whose purpose was to amend the existing criminal law. Following the amalgamation of the Northern and the Southern protectorate in 1914, the law was extended to the whole country in 1916. Thus, the Code Statutes were formally instituted in the country's legal system.

The Code was modeled closely on the Code introduced into the State of Queensland, Australia, in 1899. The Queensland Code was in turn partially modelled on a Criminal Code drafted by one of the eminent English criminal lawyers, Sir James Fitz Stephen.

Even though the code was extended to the whole country, following the unification of the country, in some areas two or more systems of criminal law existed. Okonkwo (1980:5) describes the situation thus:

This situation, in which there were two or more systems of criminal law existing side by side in the geographical area became increasingly an unhappy one. The British administration were in a dilemma especially with regard to Northern Nigeria where Moslem law, as interpreted by the Maliki school was firmly entrenched.

A process of gradual change was therefore recommended in many circles as the solution to the anomaly. Meanwhile, the British hoped that the North would assimilate the Criminal Code. This was, however, not actualized as the Criminal Code was not drafted with the Moslem community in mind and had incurred some level of distaste from the Moslem community. However, some form of compromise emerged with the emergence of the 1959 Penal Code law. This code was known to have been applied successfully in a Moslem community, namely, the Code of Sudan. The Customary Criminal Law was finally abolished in Nigeria, following a decision taken in the 1958 Constitutional Conference. Today, the Official Secrets Law is defined in the Criminal and Penal Code of each state in Nigeria.

Following the independence of Nigeria in 1960, public order and safety became highly prioritized. According to Akande (1982:11), "public order and public security is nowhere defined. But the constitution drafting committee attempted to provide some guidance in its interpretation when it stated that public order and public safety entail the provision, maintenance and security of such supplies and services as may be designated by the National Assembly by order as essential services". What this statement implies is that the National Assembly, with the general legislative power at its disposal, can make laws at any time on any subject matter so long as it considers it essential for securing and maintaining public safety and public order.

In fact, T.O. Elias (1969:36) posits that it was "in pursuance of this power that parliament enacted the Emergency Powers Act of 1961 under which the President, who was clothed with full emergency powers, made thirteen emergency regulations during the period of emergency declared in the then Western Region".

It was also against this background that the Official Secrets Act was born. It contained more elaborate provisions for securing public safety and applied to all Nigerian citizens throughout the federation and outside.

Brief Explanation of Related Concepts

The Official Secrets Law is just one aspect of a wide array of sections under the Nigerian Criminal Code and Constitution dealing with State Security. It would therefore, be ill-advised to discuss the topic without first examining the concepts of Crime, State Security, National Security and Publication.

A *crime* can generally be said to be an indictable wrong-doing or offence against the community or public and punishable by the State. However, many scholars find it difficult to give a legal definition of crime. Many rather resort to making references to the characteristics of crime as a means of identifying what does or does not constitute crime. To such scholars, a crime is characterized by two features, namely: the public nature of wrong and immorality of the act (Okonkwo, 1980:198).

However, this notion is faulty because there are acts such as homosexuality, lesbianism, adultery or alcoholism which may be considered immoral but not public in nature and vice-versa. According to Okonkwo (1980:19), the words 'crime' and 'offence' would appear to mean the same thing because they are used interchangeably by the court. He also observed that the essence of what constitutes crime stems mainly from procedure rather than from substance. The procedure could either be civil or criminal in nature, namely:

- (1) The criminal procedure distinguishes crime from civil wrong.
- (2) Usually, criminal proceedings are instituted and controlled by the state and cannot be stopped by the victim. This differs from civil cases which are instituted by an individual and can be withdrawn at will.
- (3) Usually, there is always a possibility of passing of sentence or punishment by the court in a criminal trial unlike in civil cases where the main objective is to compensate the plaintiff.

In fact, the inherent difficulties in providing an acceptable definition of crime cannot be adequately discussed here. But it is pertinent to note that criminal law is variable in content; what constitutes crime varies from community to community; country to country and even within the same country. Okonkwo is of the opinion that this variance is especially manifest in countries (such as Nigeria) "which have been newly created by the amalgamation of separate communities which believe in different social values".

Tobi (1988:14) notes that the term *State Security* is very loaded. According to him, "it lacks both legal and factual precision". However, he posits that, "state security comes into play where government in power uses all the apparatus at its disposal to protect the territorial and national integrity from complete annihilation, from external or internal forces". Ohunbamu (1968:35) largely shares Tobi's definition, asserting that State Security is "All the means at a government's disposal for securing or protecting the nation or state from the danger of subjugation either by an external power or internal insurrection".

From the forgoing, it is clear that security is not a matter to trifle with by any government. Tobi (1988) agrees with this view, stating that,

...even in the most articulate democracies, security of the nations is paramount and never a subject of compromise. Accordingly, where there is a conflict between the freedom of individual, including the press, to express himself and the security of the state, the latter will prevail and the former will abate or become dormant to the extent of the conflict.

The learned judge further observes that in matters affecting the security of the state, the most democratic governments may temporarily take a totalitarian, fascist and authoritarian posture and may even rule by oligarchy.

According to the World Report on Information Freedom and Censorship (1999:412), a distinction can be made between 'State Security' and *National Security*. National Security extends to other spheres of government than defence, for instance, safety of the nation from threats by other nations to its political and economic independence, its territorial sovereignty, its cultural heritage and its way of life. National Security has been cited in some countries to prevent or delay publications unrelated to national defence but which are considered potentially embarrassing to government. It also has been used as a reason to deport or deny entry to non-nationals because of their political opinions or affiliations.

Publication is a word that features mostly in laws affecting the journalism profession. The publication of a defamatory matter is considered both a civil injury and a criminal offence; that is the publication of a statement calculated to incite the public to effect changes in the constitution by means other than constitutional. It can also mean scurrilous attacks upon a sovereign and the sovereign's family, which in technical language is termed "seditious libel" (Daramola, 287).

Seditious publication may lead to conviction, and the disclosure of official secrets contained in document, or other sources, equally brings along with it heavy sanctions. By publication of a defamatory matter is meant publication of a statement which tends

to lower a person's reputation in the estimation of right-thinking members of society generally, or which tends to make other people shun or avoid such a publication amounts to either libelous or slanderous defamation.

So we may then ask, what does 'publication' mean?

Section 374 of the Criminal Code defines publication thus:

- (1) in the case of spoken words or audible sounds, the speaking of such words or the making of such sounds to the hearing of the person defamed or any other person.
- (2) in other cases, the exhibiting of the material, or causing it to be read or seen, or causing it to be shown or delivered, with intent that it may be read or seen by the person defamed or by any other person.

From the above, it is clear that mere exhibition in public of a defamatory matter is regarded as publication.

The Official Secrets Law

Under Section 1(1) of the Official Secrets Act 1962, a person who transmits any classified matter to an unauthorized person on behalf of the Government to reproduce or retain, as the case may be is guilty of an offence. Furthermore, under subsection (2), a public officer who fails to comply with any instructions given to him on behalf of the Government as to the safe-guarding of any classified matter which by virtue of his office is obtained by him or is kept under his control is guilty of an offence, Okonkwo, 1980:347).

Again, section 2 of the Official Secrets Acts provides that, "any person who, for any purpose prejudicial to the security of Nigeria (a) enters or is in the vicinity of or inspects a protected place.

- (b) photographs/makes sketches of any situated in a protected place or
- (c) obstructs, misleads or otherwise interferes with a person engaged in guarding a protected place;
- (d) obtains, reproduces or retains any photograph, sketch, plan, model or document relating to a thing situated in a protected place, shall be guilty of an offence".

Ingredients of the Official Secrets Law

Okonkwo (1980:347) provides some guidelines to the content and interpretation of the offence of disclosure of Official Secrets. Section 97 (1) states as follows;

Any person who, being employed in the public service, publishes or communicates any fact which comes to his knowledge by virtue of his office and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which he is bound to publish or communicate is guilty of misdemeanor and is liable to imprisonment for two years.

Under Section 97 (2) of the Code "a person employed in the public service who, without proper authority, abstracts, or makes a copy of; any document which is the property of his employer, is guilty of misdemeanor and is liable for one year".

Consent of a Law Officer

Section 97(3) states that the prosecution for either offence cannot be commenced except by or with the consent of a law officer. This provision appears to have been amended. A report in the *Nigerian Law Times* (1985:3) has it that in some states, the provision above has been amended by including, "any person who, not being employed in the public service, without lawful authority, the proof whereof lies on him, has in his possession any official document marked "secret" or a copy, or an extract from such document before it is released for publication, is guilty of an offence and is liable to imprisonment for two years".

The above provision is also an indication that the law does not only apply to public officers but to "any person" who could per chance be a media practitioner. This also seems to imply that the wider government activities extend, the greater the number of ordinary citizens who may be put in peril of prosecution for disclosing Official Secrets.

Defence

It is a defence to prove that when the accused transmitted, obtained, reproduced or retained the matter, as the case may be, he

did not know that it was classified matter, he forthwith placed his knowledge of the case at the disposal of the Nigerian Police Force.

Nigerian Journalists and the Official Secret Law

The relationship between the Press and the law in Nigeria has not been a harmonious one. The reason for this does not emanate from any manner of inconsistency in the Press as a body or from the law but from the legislative authority and law enforcement agents in the country.

The susceptibility of the Press to offences such as defamation, sedition, disclosure of official secrets and others relating to state security is heightened by the type of government in power. Okonkwo (1980:23) states that "Crimes are created by the legislative authority in a community, be it despotic, oligarchic or democratic in nature, in response to certain needs for protection felt by governors, or governed, or both".

The Nigerian society is somewhat peculiar for obvious reasons. Due to the long stretch of military rule, the various laws made have catered more for the needs of undemocratic rulership than for the ruled. The laws enacted by these regimes were in many cases purposely intended to muzzle the Press. This resulted in bogus charges being brought against journalists with opposing views. Often, the tendency is for laymen to present such offences as sedition, defamation, State Security and disclosure of Official Secrets as one and the same thing.

However, there are basic distinctions among the various laws restraining freedom of speech, and of the Press. Prior to the advent of the current democratic dispensation in Nigeria, journalists were more prone to being prosecuted under one law (decree) or the other. Concerning the Official Secrets law, the World Report on Information Freedom and Censorship (1991:33) has this to say on the frequency of prosecution with regard to the Nigerian Press: "The Official Secrets Acts, 1962, though rarely invoked, greatly limit the extent of investigation concerning government activities".

There is one clear-cut case where a Federal Military Government invoked the provisions of the Official Secrets Act against the press. In 1987, a political bureau was set up by Major

Gen. Babangida's military government "to organize discussions, deliberate and make recommendations on the future political organization of Nigeria" (Tobi, 1988:17). The Nigeria media saw the report as a major scoop. However, the federal military government saw it differently. According to Tobi, the bureau, on completion of its assignment, submitted a copy of the Report to the *Newswatch* Weekly magazine which published it on its April 13, 1987 issue.

Tobi (1988) describes the situation of the country following the publication of the 'Scoop' thus:

The publications were controversial. There were pockets of political gimmicks all over the country. Tension rose. The Government was in a predicament. It was in these circumstances that it promulgated the *Newswatch* (Proscription and Prohibition from Circulation) Decree 1987.

On this matter, Tobi further states that the decree prohibiting the circulation of *Newswatch* magazine a preamble and 5 sections. The preamble referred to section 36 (1) and (3) of the 1979 Constitution on the freedom of expression. It also referred to sections 34, 35, 38 and 41 of the same Constitution dealing with the exemptions to freedom and rights.

The proscription generated heated debate in the country. However, we shall not go into that in this article. Suffice it to state that section 4 of the Decree provided that the proscription would last for a period of six months.

The Future of the Nigerian Press Under the Law

So far, it does appear as if the press is gagged from all angles by laws restricting its freedom of expression. The situation is worsened by the fact that not even 'truth' (as in the case of sedition and libel) is considered as a defence. Another worrisome aspect is that where freedom of the press has been acknowledged, there is still ample room left for doubt and uncertainty. Below is an extract from the famous Blackstone Commentaries (Book IV, :152):

Every freeman 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 take the consequences of his own temerity.

The question then arises: What constitutes the 'improper', the 'mischievous' or the 'illegal'? How can the press predict that what may have appeared as a harmless piece of information would excite so much passion as to destabilize the polity? The answers to these questions could be provided only by the judge sitting over such cases.

Sometimes the press are even rebuked from unexpected quarters for what is perceived as the undermining of state security. Below is the reaction of the learned Judge Nike Tobi to the 1987 proscription of *NewsWatch* (Weekly News Magazine):

On my own part, the proscription was most justified. The *NewsWatch* magazine was rather in some self inflicted injury... I expected a highly respected and most educative magazine of *NewsWatch* standard and status to realize the consequences of its action as it related to law.

T.O. Elias (1969:34) differed with N. Tobi on the position of the Press *vis-a-vis* state security when he stated that, "there are two characteristic hallmarks of a democratic society: the freedom of the press and the recognition of the fundamental human rights of the individual. Of these two, the freedom of the press is far and away the more important, because it is a basic freedom. Once one can print the truth of what goes on in a given society, then it would be impossible for the government to trample the otherwise impotent individual under its feet".

Now with journalists faced with such contradictory criticisms and views from even learned jurists, how can they reconcile their constitutional rights to publish and the needs of government? Any attempt to answer the above questions must first take into cognisance the need for a democratic platform. The Information and Censorship World Report (1991:409) on freedom of expression states that "any restrictions on free expression must be authorized

by *duly enacted* laws and must be necessary to preserve public order or other enumerated interests in a *democratic society*" (Emphases are mine).

The Report (1991:310) describes the overall picture of the Nigerian Press as one of high quality, despite the watchful eye of the military government. In 1986, the daily newspapers in circulation in the country stood at 19; radio sets were 16,600,000 in 1987; TV sets 5,600,000 in 1989 and there was one indigenous press-agency, the News Agency of Nigeria. Radio and television, however, were still wholly owned and controlled by the government in 1991. The situation changed in the mid-'90s when private individuals were permitted to establish radio and TV stations.

Since the press did not crumble during the turbulent period of military government, they are expected to perform even better in the present democracy. The press may be charged to court and can now also in turn seek redress at the court of law instead of press practitioners fleeing the country as happened during the military era. Given the democratic leadership in the country, a more objective and vibrant press is expected.

Conclusion

There is a thin line between freedom of the press and press responsibility. Inasmuch as the press is accorded freedom to publish by the Constitution, it is pertinent to remark that that freedom goes with responsibility. As watchdog of a nation the press must always match freedom to publish with responsibility of not publishing those materials that could endanger the security of the nation. In other words, the press should not equate freedom to license. Of course, there is no part of the earth where freedom is absolute. From available records, the Nigerian Press has performed creditably. It only needs to be given some measure of encouragement by government to operate more freely and responsibly.

References

- Akande, J.O. (1982). *The Constitution of the Federal Republic of Nigeria*, London: Sweet and Maxwell.
- Black, Stone: *Commentaries*, Book IV, p.152 in Niki Tobi (1982).
- Daramola, I. (1999). *Law & Ethics of Media Practice*, Lagos: Tothan Press Ltd.
- Elias, T.O. (1969). *Nigerian Press Law*, Lagos: UNILAG and Evans Brother Ltd.
- Ohonbamu, O. (1969). "State Security and the Press in Nigeria" in Tobi (ed.) *Second Anambra State Law Conference*, Dec., 1988.
- Tobi, N. (1988). "Responsibility of the Press" *Second Anambra State Law Conference*, 7-8 December.
- "The Nigerian Law and Mass Media - Official Secrets" (6) in *The Nigerian Law Times*, July 13, 1986, p.35.
- Information Freedom and Censorship World Report*, (1991). London: Library Association, pp. 31, 413.
- Okonkwo, C. (1980). *Introduction to Nigerian Criminal Law*, London: Sweet and Maxwell.