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Deconstructing Right To Freedom Of Expression Of Media, Journalistic Privilege And National Security In Digital Era

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Abstract

For over a century, the press asserted the existence of a reporter's privilege derivable from the constitution without which the reporters' ability to maintain confidential relationship with sources critical to their right to freedom of expression is impaired. Their argument, consistently rebuffed by courts, weighs against the public need to ensure the integrity and authority of legislative, judicial, and administrative bodies. If freedom of the press means nothing more than freedom of speech, then the constitutional argument for special privileges, the right to remain silent, for journalists in court proceedings is weak. Chapter 11, Section 22 of the 1999 Federal Republic of Nigeria Constitution commands that the media shall be free to uphold the responsibility and accountability of the government to the people, journalists and lawyers cannot cite provisions as defence, nor prescribed penalties, in litigations. Similarly, in the United States of America, the constitution expressly provides protection for the freedom of the press, without the right to refuse disclosing confidential sources. The Supreme Court held it could not entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. By the end of 2021, 6.4 billion smartphones are projected to get in the hands of citizens, compounding the struggle to precisely define "journalist". This author, a journalist, lawyer and media law scholar, examined the concepts embedded in the right to freedom of the media versus the government's right to ensure safety of the citizens and concludes that national security questions prevail over journalistic concerns, and good faith derogations are appropriate and do not impugn the right to freedom of expression of the press and speech. Using doctrinal and non-doctrinal methods of case law, books, journal articles and other secondary sources, the author concludes and recommends that the extant laws, though far from perfect, legislators should strike an effective balance between these three tensions by accurately defining terms like "national security", and "press", "journalist" and citizen to prevent government overreach.

Keywords: Freedom of Expression of Media and Speech, Journalistic Privilege, Citizen Journalism, National Security, Digital Era.

1. INTRODUCTION

Asides being one of the journalistic codes of ethics, Journalistic Privilege which is also referred to as the confidentiality of sources, is the right a journalist has to maintain the anonymity of a source of information in the exercise of their right to freedom of expression of the press.

The right to freedom of expression is expressed in Article 19 of the International Covenant on Civil and Political Rights[1] under the same broad terms as in the UDHR. Article 19 (3a and 3b) of the ICCPR includes the two important derogations:

1. Everyone shall have the right to hold opinions without interference.; 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Stating the problem, this article will evaluate the tenuous relationship between the claim to privileged communications by journalist and the government's right to confidential and non-confidential news source evidence. Though Privilege would provide significantly needed protection to journalists who need to be able to keep their promises to confidential sources in order to do their jobs, the difficulty, however is that it appears to provide protection for anyone who claims to have obtained confidential information as a Journalist especially in the digital era. Anyone who claims to be a journalist could be off the hook from testifying, so the research also sought to answer the question of who is a journalist attempts to answer questions such as:

[1] International Covenant on Civil and Political Rights (Hereinafter ICCPR}, The ICCPR though ratified by Nigeria in 1993 is not domesticated in Nigeria in accordance with Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). However, the provisions of the Covenant form a major part of the country's domestic laws. Examples include Chapter four of the Constitution which deals with the protection of civil and political rights. Other domestic laws which protect civil liberties and fundamental freedoms include Violence Against Persons (Prohibition) (VAP) Act, 2017; Administration of Criminal Justice Act, (ACJA) 2015; Anti Torture Act, 2017; Freedom of Information Act, (FOIA) 2011, Terrorism (Prevention) (TPA) Act, 2011 as amended; National Human Rights Commission (NHRC) Act, 1995 as amended; Legal Aid Council of Nigeria (Amendment) (LACN) Act, 2012; The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act CAP A9, Laws of the Federation of Nigeria (LFN)2004.
The National Human Rights Commission Act, (as amended), has direct reference to the ICCPR as one of the international human rights instruments to benchmark the mandate of the Commission in the promotion and protection of human rights in Nigeria

1. Whether freedom of the press and freedom of speech are coterminous especially in the digital era?
2. Whether existing constitutional rules have posed serious obstacles to the development of the right to freedom of the press and speech especially in the digital era?
3. Whether the press has flourished without constitutional protection for press informants especially in the digital era?
4. Whether the core tenets of right to freedom of the press and speech can be shielded from the operation of National Security especially in the digital era.?
5. Whether there should be such a thing as Journalist's Privilege especially in the digital era.?
6. But is the free flow of information in fact restricted by the absence of a privilege of secrecy in favour of newsmen and their informants?
7. What is the way forward to mitigating the tension between Journalists Privilege and National Security in Nigeria?

In Nigeria, the right to freedom of expression is enshrined in *Chapter 11, Section 22 of the 1999 Federal Republic of Nigeria Constitution under the heading Fundamental Objectives and Directive Principles of State Policy commands that the media shall* ***at all times be free to uphold the responsibility and accountability of the government*** to wit: "Every person shall be entitled to freedom of expression, But including freedom to hold opinion and to receive and impart ideas and information without interference."[2] But goes on in subsection three to state that "Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society" In effect, the freedom of expression purportedly granted in subsection one, is expressly revoked in subsection three. Clearly, acquiring a media licence is not a guarantee of the right to freely gather and disseminate information.

2. METHODOLOGY

Newspapers as Legal Sources: Newspapers are uniquely able to provide a contemporaneous historical account of unreported cases, and relying on newspapers as a source of legal knowledge is consistent with broader trends in scholarship. Judges and scholars have been more willing to look beyond the confines of law reports for legal authority.[3] And technological developments offer the legal historian a wealth of new possibilities: the digitization of millions of pages of historical

[2] The constitution of the Federal Republic of Nigeria, (as amended 1999), p.22-23) Section 39-(1)

[3]A number of scholars have tried to determine the extent to which the internet has opened the door for judges to rely on authority outside of published case reports. For example, Frederick Schauer and Virginia Wise argued in 1997 that " [a]s numerous technological, economic, and institutional developments make lawyers' use of so-called 'nonlegal' sources more and more prevalent, the informational line between law and nonlaw becomes increasingly tenuous." Frederick Schauer & Virginia J. Wise, Legal Positivism as Legal Information, 82 CORNELL L. REv. 1080, 1082 (1997). They noted that there was no significant increase in the Supreme Court's reliance on "nonlegal" sources, such as nonlegal journals and books, from 195o to 1990, but a substantial increase in the use of nonlegal sources from 1991 to 1997. Id. at 1108; see also Robert C. Berring, Legal Information and the Search for Cognitive Authority, 88 CALIF. L. REv. 1673, 1689-90 (2000) (describing the significant expansion of the number and type of legal authorities cited in Supreme Court decisions from 1899 to 1999).

newspapers has opened up new methods and avenues of legal research that were not available to scholars even prior to the digital era. [4]

Though contemporaneous secondary sources like newspapers, as well as reported cases in which a judge extended functional protection to a reporter without conferring an express privilege are relevant, the courts sidestepped surveys and opinions of reporters on this topic by concluding that they are chiefly opinions of predicted informant behaviours and must be viewed in light of the professional self-interest of the interviewees. Additionally, it is not certain how anyone could prove empirically the claimed adverse impact in an area where enshrined constitutional interests conflict with other interests.

Only a handful of reporter's privilege disputes are enshrined in the law reports but newspaper accounts of reporter's privilege disputes offer invaluable context to legal scholars.[5] Flowing from the above, the doctrinal and non-doctrinal methodology involving case law, books, journal articles and other secondary sources is supported in literature.

3. RIGHT TO FREEDOM OF EXPRESSION OF THE MEDIA

Journalist's privilege and all its ideals are hinged upon freedom of the press, in Nigeria, these freedoms are to an extent provided for under Section 22 of the Constitution of the Federal Republic of Nigeria Constitution 1999 (as amended), which provides that, "The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people." By virtue of this provision, the obligation of the press are to uphold the responsibility and accountability of the government to the people and help government realize the fundamental objectives and directive principles of state policy expressed and to that "The media or the press is also expected"

In addition to Section 22, the press in Nigeria draws its power to source for information ostensibly from Section 39 (1) of the Constitution of the Federal Republic of Nigeria Constitution 1999 (as amended), which guarantees freedom of expression for all citizens. The section provides that "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference". It is important to reiterate here that this freedom accrues to the common man on the street and also to the "press men" or "journalists". Arguably, this freedom as it accrues to the citizenry is greater than which accrues to the "press men" simply because the right was initially given to the citizenry who then chose to exercise in a different capacity as "press men" or "journalists" and the "press men" or "journalists" are individuals first before existing in any other capacity. This is why the responsibility to safeguard and protect this right is owed to the common man and not exclusively to the "pres men" or "journalists".

[4] For example, Google began digitizing microfilm from newspapers' archives in 2008. Miguel Helft, Google To Digitize NewspaperArchives, N.Y. TIMES (Sept. 8, 2008), http://www.nytimes .com/2o8/o9/o9/technology/o9google.html [http://perma.cc/K2NE-9RFP]

[5] See The History of Shield Legislation, 31 NEWS MEDIA & L. 8 (2007), http://www.rcfp.org /browse-media-law-resources/news-media-law/news-media-and-law-winter-2007/history -shield-legislation [http://perma.cc/2UFQ-EB2P] (noting that only two shield laws were proposed in Congress between 1979 and 2004).

Furthermore press licenses are conditioned on a contractual promise to provide equal expression to all shades of citizen voices or lose the right to own the "medium".

Whereas there is no express mention of "Journalist's Privilege" in the above sections, the courts have sometimes when interpreting these sections inputted it. To buttress this point is the case of Innocent Adiukwu v.Federal House of Representatives , where the court was called upon to resolve the conflicting claims of legislative power and of press freedom. The House of Representatives through its Legislative Investigating Committee summoned the editor and three others to appear before it. The main question in this case was whether requiring newsmen to appear and testify before a legislative committee abridges the freedom of speech and press guaranteed under Section 36 of the 1979 Constitution of the Federal Republic of Nigeria, which contains similar provisions with section 39 of the current Constitution. In his ruling, the Hon Justice Balogun said:

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

Further in the judgment, the learned judge said:

It must be remembered at all times that a free press is one of the pillars of freedom in this country as indeed in any other democratic society. A free press reports matters of general public importance, and cannot, in law, be under an obligation, save in exceptional circumstances, to disclose the identity of the persons who supply it with the information appearing in its reports. Section 36 of the Constitution, which guarantees freedom of speech and expression (and press freedom), does provide a constitutional protection of free flow of information. In respect of the press, the editor's reporter's constitutional right to his source stems from that constitutional guarantee.

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

It is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification and disclosure?

The judge further held that

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

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

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

It would appear that the attitude of the courts on this provision in the Constitution has not changed fundamentally, since the section was interpreted by the Supreme Court in R v. Amalgamated Press of Nigeria Limited that Section 24 of the 1960 Constitution guarantees nothing, but ordered freedom and it cannot be used as license to spread false news likely to cause fear and alarm to the public.

Despite their provisions and the interpretations that can be drawn from them, Sections 22 and 39 do not contain the required legal framework for the journalism profession, freedom of information and by extension Journalist's Privilege. Section 39 has been described as amorphous and Chapter II of the Constitution of Federal Republic of Nigeria 1999 (as amended), wherein, Section 22 is contained is not justiceable. Non-justiceability of Chapter II means that the courts cannot adjudicate on any provisions of Chapter II, thus such provisions cannot be interpreted. This Situation leads to limitation as such sections will not go through the fire of judicial interpretation which invariably leads to development of the law and accountability of the government.

A free press is the mouthpiece of the people and a veritable source of information for the people. Walter Lippmann observed in support of free press thus: "a free press is not a privilege, but an organic necessity in a great society'' . Indeed, as society has grown increasingly complex, people rely more and more on the press to keep abreast with world news, opinion and political ideas hence the need for an unhindered access to information and freedom of sources of information.

In Malawi, Section of the constitution provides that the media shall have right to report and publish freely, within Malawi and abroad and to be accorded the fullest possible facilities for access to public information. The situation in Malawi is probably the most apt as the country provided for freedom of expression in section of its constitution and moved just one step ahead to provide for Press freedom in section. Therefore, Malawi and other countries which have specific provisions for media freedom in their constitutions not withstanding that there is a general provision for freedom of speech have established beyond reasonable doubt that Press freedom and freedom of speech are not coterminous.

The American First Amendment states that Congress shall make no law abridging the freedom of speech, or of the press.[6] In 1972, the Supreme Court decided its only case interpreting the First Amendment in regards to the reporter's privilege in Branzburg v. Hayes when the Court denied the existence of a reporter's privilege.

Inevitably, much of the debate surrounding a potential journalist's privilege centers on the conception of "freedom of the press" as embodied in the First Amendment.12 The Expression "freedom of the press" and "freedom of speech" in most constitutions are thought by most commentators to be identical but literature affirms that both phrases are simply to ensure protection of all types of expression, both written and oral.

[6] U.S. CONST. amend. I.

4. JOURNALISTIC PRIVILEGE

It is important to point out here that Section 39 of the Constitution of the Federal Republic of Nigeria Constitution 1999 (as amended) which guarantees freedom of expression makes the right enjoyable for all citizens.

The American Supreme Court in Branzburg v. Hayes held that compelling journalists to disclose the identities of such sources before grand juries does not abridge the freedoms of speech and press. For, even if some informers would be unavailable because of a rejection of the privilege, the plurality was not persuaded that preservation of the confidentiality of the informant would override the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future. The question remained whether the newsgathering/dissemination function should take precedence over the grand jury function.

The courts have declined to create a constitution based testimonial privilege on grounds that fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

In Branzburg, Justice White explored the argument in detail: We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.[7]

The recent report of the Senate of Canada on the Mass Media[8] declines to recommend any modification of the common law position denying the claim by newsmen to maintain, before official bodies, secrecy of news source. In the United States, important news media have been confronted by governmental demands that they release, in the course of judicial proceedings, unpublished notes, files, films and other material relating to certain political organizations

Generally, there has been a lack of legislative and judicial response to the newsman's claim. It is clear that recognition of a privilege for newsmen must proceed from the legislature.[9] This was an

[7] 147. Branzburg v. Hayes, 408 U.S. 665, 698-99 (1972).

[8] Report of the Special Senate Committee on Mass Media "The Uncertain Mirror" (Ottawa: Queen's Printer, 1970) 105-06 [hereinafter the DAUEX Committee].

[9] Apart from the attorney-client relationship (see Wigmore on Evidence [McNaughton Revision] (Boston: Little, Brown, 1961) s.2282 at 541 [hereinafter Wigmore]) which has been privileged for centuries, and is now recognized by statute in many jurisdictions, some legislatures have extended privileged protection of other confidential relationships. These include physician-patient, priest-penitent, patient- psychologist, and other relationships (see Id. s.2286 at 536). Most of the moves to establish occupational privileges outside the attorney-client privilege have been in the United States. In Canada, Newfoundland recognizes a priest-penitent privilege by statute (Evidence Act R.S.N. 1952, c.120 s.6.). But in England, the trend against the granting of privilege is more pronounced: some old privileges were abolished by the Civil Evidence Act 1968 c.64, s.16 (U.K.). On the physician-patient and priest-penitent privileges, see Nokes, Professional Privilege (1950), 66 L.Q.R. 88 at 94. 0 Wigmore, A Student's Textbook on the Law of Evidence, (Chicago: F (Chicago: Foundation Press, 1935) s.386 at 391.

illustration of the principle, expressed by Wigmore, that there should be no general privilege of confidential communications because the investigation of facts, for reaching the truth in the administration of justice, would be intolerably obstructed by such a general privilege."[10]

In one case the writer who claimed the privilege wrote for a biweekly magazine, and the California statute only protects persons connected with newspapers, press associations or wire services. The claim to privilege was defeated.[11] Where statutes conferring a privilege do not exist, the interest most frequently invoked by the courts in disallowing claims to privilege is the public interest in the due administration of justice.[12]

It has not been reliably demonstrated that the absence of such a privilege hinders freedom of information; or, more to the point, that the creation of such a privilege increases the information gained by reporters. It has been suggested that the interference with the flow of information is imperceptible or non-existent. Reference has been made to the superiority of information found in the New York Times, although until 1970 the State of New York did not have a privilege statute. Again, it is said that better news reporting is not guaranteed by a statute for two reasons. First, the newsman will not refrain from publishing confidential information out of fear that he might later be cited for contempt for failing to reveal his informant.

. As has been noted, this interest in the administration of justice is that most frequently enlisted by courts to justify refusal to permit silence by newsmen. Another interest that might be weighed against this interest in the freedom of information is the maintenance of law and order. This is related to, but distinct from, the interest in the integrity of institutions.

The principal trends in the major common law countries in relation to the newsman's claim to secrecy of news source have been defined. It is considered that the matter should no longer be left entirely to judicial discretion as it is in the United Kingdom and Canada. If it is objected that, unlike the usual privileged relationship, the privilege in this case may be claimed by the newsman, a statute could provide in unequivocal terms that the privilege belongs to the informant and may be waived by him alone. It is not sufficient to dismiss the claim by pleading, as did the Canadian Senate Committee, that there is a problem of definition; who is, and who is not, entitled to the privilege.

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[10] Apart from the attorney-client relationship (see Wigmore on Evidence [McNaughton Revision] (Boston: Little, Brown, 1961) s.2282 at 541 [hereinafter Wigmore]) which has been privileged for centuries, and is now recognized by statute in many jurisdictions, some legislatures have extended privileged protection of other confidential relationships. These include physician-patient, priest-penitent, patient- psychologist, and other relationships (see Id. s.2286 at 536). Most of the moves to establish occupational privileges outside the attorney-client privilege have been in the United States. In Canada, Newfoundland recognizes a priest-penitent privilege by statute (Evidence Act R.S.N. 1952, c.120 s.6.). But in England, the trend against the granting of privilege is more pronounced: some old privileges were abolished by the Civil Evidence Act 1968 c.64, s.16 (U.K.). On the physician-patient and priest-penitent privileges, see Nokes, Professional Privilege (1950), 66 L.Q.R. 88 at 94.

[11] For a discussion of the Buchanan case, supra note 75, see J. E. Beaver, The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence (1969), Oregon L Rev. 243 at 258, the author concludes that the claim to privilege based on the First Amendment is rightly rejected for otherwise the courts would be faced with "the task of determining who was in fact a newsgatherer entitled to the privilege"

[12] Several states of the United States which have privilege statutes clearly grant the privilege to the newsman, e.g., New Jersey, supra note 51. It has been held that the Indiana statute grants the privilege to the reporter and can only be claimed by him. See Lipps v. State (1970), 258 N.E. 2d 622. Note also the Report of the Canadian Senate Committee, supra note 1 at 105-06.

Again, the necessity for precise definition of terms, discussed above, is apparent and would solve this alleged problem. The interests of the national security would, of course, be one criterion upon which to determine the availability of the privilege.

In a 1914 case, a Hawaii journalist posited a chilling effect claimed that if they break confidence with the source of news, they would lose all of their sources and would have no newspaper but the courts were unmoved and in 1930, a Pennsylvania judge told a reporter that "you must overlook your profession when you are called upon to answer testimony, like a good citizen."[13]We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist. that view received widespread attention in 2001 and 2002, when author Vanessa Leggett spent 168 days in jail for refusing to provide tapes of interviews she had conducted to a federal grand jury in Texas.[14]

1. CITIZEN JOURNALISM

If freedom of the press means nothing more than freedom of written speech, then the constitutional argument for special privileges for journalists in court proceedings is indeed weak. Ordinary citizens are required to give testimony, and journalists cannot hide behind their profession to shirk their responsibility.

The largest leak of classified U.S. military documents in U.S. history occurred on October 22, 2010. Approximately 400,000 U.S. Army reports documenting five years of the U.S. war in Iraq were released. The documents showed that U.S. authorities failed to investigate hundreds of reports of rape, torture, and murder committed by Iraqi police and soldiers. Despite U.S. and U.K. officials' claims that a record of civilian casualties did not exist, the documents revealed a log recording over 66,000 non-combatant deaths. The organization behind this leak was WikiLeaks.[15] U.S. government officials and political pundits condemned WikiLeaks and federal courts have not addressed whether bloggers and other new-media journalists may obtain the privilege.[16] Because the Medium in Which News Is Disseminated Is Not Determinative, WikiLeaks may claim the Privilege and the Branzburg Court noted in dicta that an individual does not have to be a member of the institutionalized press to invoke the privilege.

Today, journalistic activity is largely performed by "the modern 'lonely pamphleteer' with a smart phone and a Twitter feed but it may it may still claim the privilege.

Some scholars argue that freedom of the press should be conceptually separate from freedom of speech. In contrast to the view that press freedoms are greater than speech freedoms, some

[13] " Forfeiture of an estate": Plunkett v. Hamilton, 70 S.E. 781, 785 (Ga. 1911). "[I]f we break confidence": In re Wayne, 4 U.S.D.C. Hawaii 475, 475–76 (1914). "Overlook your profession": A. David Gordon, "Protection of News Sources: The History and Legal Status of the Newsman's Privilege," Ph.D. diss., University of Wisconsin (1971), 530.

[14] See, e.g., United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); In re Shain, 978 F.2d 850, 853-54 (4th Cir. 1992); Storer Commc'ns, Inc. v. Giovan, 810 F.2d 580, 584-85 (6th Cir. 1987); Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1049-50 (D.C. Cir. 1978).

[15] Henry Farrell & Martha Finnemore, End of Hypocrisy: American Foreign Policy in the Age of Leaks, 92 FOREIGN AFF. 22, 22 (2013).

[16] Glenn Greenwald, Joe Lieberman Emulates Chinese Dictators, SALON (Dec. 2, 2010), http://www.salon.com/2010/12/02/lieberman_55/.

commentators argue that "freedom of the press" does not provide the institutional press with any rights not available to ordinary citizens. The other camp, walking a more delicate interpretive line, argues for press protections but with added press responsibilities because if it is a "public agent," then the public can theoretically assert control over the press. And the most practicable means of the public asserting this control is through the government, which can more easily implement such mechanisms. Paradoxically, granting the press special rights under the First Amendment could actually lead to the press's loss of independence from the government.[17]

In re Pappas and Caldwell v. United States, state prosecutors subpoenaed two different reporters who were covering the Black Panther organization to testify before grand juries to reveal confidential information. Pappas and Caldwell refused to testify. Therefore, the central constitutional issue in Branzburg was whether requiring reporters to testify before grand juries abridges the First Amendment's freedom of speech and press guarantees. In a five-to-four decision written by Justice Byron White, the Supreme Court held that neither the First Amendment nor any other constitutional provision protects reporters from disclosing information. Rather, a journalist has the same duty as an ordinary citizen to testify. The Court also denied a reporter's privilege because it would present practical difficulties, such as creating a definition of "reporter" under the privilege.[18]

1. NATIONAL SECURITY

National security is the decision-making process concerned with the identification of potential and actual threats, and the mobilization of resources to promptly ensure the safety and stability of the state while simultaneously conducive to the promotion of national development. Since national security should occupy the "highest priority" it is "non- negotiable and does not permit undue compromise"

In the prologue to his book titled 'Trials and Triumphs: The Story of The News' , Adebanwi describes how on Saturday, 10th July 1993, Bayo Onanuga, the Editor-in Chief of The NEWS magazine and Seye Kehinde, one of the two executive editors, were supervising as well as taking part in the collation of the maiden edition of their new magazine, TEMPO at the Abiola Bookshop Press in Isolo, Lagos in a semi-clandestine operation because the parent organ, The NEWS, had been proscribed a few days earlier by the military regime of General Ibrahim Babangida which seized power in a palace coup on August 27, 1985.[19]

Adebanwi further narrates that The NEWS proscription in July 1993 was backdated by the unsigned proscription decree to 22 May, 1993, when the offices of the newsmagazine were sealed up by Babangida's security men and the editors of The NEWS magazine were declared wanted. As if the

[17] 6 Randall P. Bezanson, The Structural Attributes of Press Freedom: Private Ownership, Public Orientation, and Editorial Independence, in JOURNALISM AND THE DEBATE OVER PRIVACY 17, 18 (Craig L. LaMay ed., 2003). First, journalists exercise "editorial judgment" that is fundamentally different from how individuals form their beliefs and make expressive judgments. Id.; see also Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 NEB. L. REV. 754, 757-58 (1999) (describing the body of case law related to claims of editorial freedom). Second, the press comments on matters of public import, while individuals' speech "is, by its very nature, personal and therefore private."

[18] Markus E. Apelis, Fit To Print? Consequences of Implementing a Federal Reporter's Privilege, 58 CASE W. RES. L. REV. 1369, 1373 (2008).

[19] W. Adebanwi, *Trials and Triumphs: The Story of TheNews* (West African Book Publishers Limited 2008).

editors had a premonition of the state repression they had registered, alongside Independent Communications Network Limited, publishers of the NEWS, another company, Bookmate Nigeria Limited, to publish a magazine called TEMPO. Therefore, while The NEWS was rested, TEMPO magazine was founded to continue the battle in defiance of the ban.

Unknown to the editors, Babangida's goons had detected their plan and location and were waiting to pounce on them at the appropriate time. The State Security Service (SSS) operatives with a contingent of full-armed policemen forced their way into the premises of the Abiola Bookshop Press. As they entered the press hall, Onanuga, Kehinde and other staffers knew the more important task was to save themselves and not copies of the magazine. They loosened one button here, rolled one leg of the trouser up there, to appear no different from casual workers at the press. The security men asked who they were and the identified themselves as 'casual workers' Onanuga and his colleagues said in rotten English, 'we never resume (for night duty)'. With the copies of TEMPO all over the tables and on the floor.

After securing the premises of the Abiola Bookshop Press, the security men searched the press hall further, ordered everyone available, assuming them to be casual workers all, to load 50, 000 copies of the maiden edition of TEMPO magazine. "It was an act of excessive intolerance and wanton highhandedness on the independent press and a new outfit that has not done anything against the law of the land. But do remember our pledge: that even in the face of intimidation and harassment, we at TEMPO shall not falter in our resolve to reflect the pulse of the nation".

Because of the secret nature of the information gathered by national security agencies, it can be difficult to establish a trust relationship between the citizens about whom the information is gathered and the agencies doing the gathering. Conversely, the mass media have severally appropriated the citizen's right to know in the concept of journalist's privilege to scoop for newsworthy events in every nook and cranny. This is a major source of tension between law enforcement, the journalist and the citizens. The law enforcement's infringements of privacy in the name of public safety, the journalist's abuse and misuse of privacy in the name of privileged communication and source confidentiality, the usurpation of citizen's right to know has put the citizens in the middle of this tension.

In Nigeria, a Lagos State High Court held in the case of *Oyegbemi v. Attorney General of the Federation and Others*[20] that When a newspaper has investigated a matter of general public interest or concern, the publication of an article upon the matter is so much in the public interest that the newspaper ought not to be restrained or "interfered" with by any person or authority, solely on the ground that the information in the article originated in confidence nor should a newspaper be compelled, except in grave and exceptional circumstances to disclose the source of the information.

Journalists have tended to view the above type of rulings as vindication of source protection, usually forgetting the qualifying clauses in such judgment, "unless in exceptional circumstances where vital public or individual interests are at stake", and "except in grave and exceptional circumstances".

[20] (1982) FNLR, 192

Exceptions to Journalist's Privilege are not new. However, the boundaries to these exceptions are unsettled, particularly in connection with National Security and the social responsibility of the press. The legal contours in this field are more crucial than ever in light of the current standoff between the executive branch and the press, the escalating war against terrorism and the advent of citizen or mobile journalists occasioned by introduction of new digital technologies.

National security places the responsibility to protect the lives, property and rights of citizens from various forms of threat, be it internal of external on Government for the mobilization of resources to promptly ensure the safety and stability of the nation state. Both "freedom of the press" and "freedom of speech", simply ensure protection of all types of expression, both written and oral. All citizens are required to give testimony, and journalists cannot hide behind their profession to shirk their responsibility.

In Branzburg, the Court decided not to extend the reporter's privilege under the First Amendment because, among other reasons, the Court acknowledged that it is unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege.

Does the current federal law on reporter's privilege adequately address new media, such as WikiLeaks? And if not, how should the law evolve to sufficiently accommodate organizations like WikiLeaks? The changing nature of media further complicates the federal reporter's privilege because it is difficult to define who is considered a reporter under the privilege. The rise of online journalists such as bloggers, tweeters and operators of websites like WikiLeaks brings new challenges to the federal reporter's privilege.[21]

Adversarial Press, Adversarial Government: Earl Caldwell of the New York Times began covering the Panthers in late 1968, and soon began spending hours at their national headquarters in Berkeley. He kept tapes of his conversations as well as files with notes on personalities, off-the-record revelations, and his reactions to events. After writing in the Times about a cache of weapons in Panther headquarters, Caldwell was questioned by FBI agents, but "they left me alone when I assured them that all the information was available in the newspaper." Another of his articles quoted a Black Panther official as urging "the very direct overthrow of the government by way of force and violence." Agents tried to question him again, but he refused to talk. Finally, prosecutors served a grand jury subpoena demanding his tapes, notebooks, and other materials about the Panthers.[22] The

[21] Peters, supra note 15, at 670; see also Mary-Rose Papandrea, The Publication of National Security Information in the Digital Age, 5 J. NAT'L SEC. L. & POL'Y 119, 119 (2011) ("One dominant theme in the discussion of how to strike the balance between an informed public and the need to protect legitimate national security secrets is whether new media entities like WikiLeaks are part of 'the press' and whether Julian Assange and his cohorts are engaging in 'journalism.'").
[22] David Shaw, Journalism Today: A Changing Press for a Changing America (New York: Harper & Row, 1977), 59, 63. Others have also made this point. See, e.g., James Aronson, Deadline for the Media: Today's Challenges to Press, TV, and Radio (Indianapolis: Bobbs-Merrill, 1972), 21; Hillier Krieghbaum, Pressures on the Press (New York: Crowell, 1972), 30; Joseph C. Spear, Presidents and the Press: The Nixon Legacy (Cambridge: MIT Press, 1984), 163; Fred P. Graham, "Background Paper," in Press Freedoms under Pressure: Report of the Twentieth Century Fund Task Force on the Government and the Press (New York: Twentieth Century Fund, 1972), 67.

position of the media became untenable. Few judges had difficulty rejecting the media's position. **No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice.**

In Nigeria, the print media has remained adversarial in line with the original objective of its founding fathers to use the media to fight the colonial masters.

The Nigerian military promulgated Decrees, among them the following:

1. Newspapers (Prohibition of Circulation) Decree No. 17, 1967. This decree empowered the Head of the federal military government to prohibit the circulation of any newspaper which he considered detrimental to any part of the country
2. Public Officers (Protection against False Accusation) Decree No.11, 1976. This decree made it an offence for any person to publish any false allegation of corruption in relation to any public officer.
3. State Security (Detention of Persons) Decree No.2, 1984. This decree empowered the Chief of Staff, Supreme Headquarters to order the detention of any person he considered necessary to exercise control over. The decree was later amended to bar the courts from asking that anybody so detained be produced.

4. DIGITAL ERA

With the prospect of having an estimated 6.4 billion smartphones marking a 5.3 percent annual increase in the hands of citizens globally by the end of 2021,, the struggle to precisely define "journalist" and thus who should be protected gets more burdensome Could WikiLeaks claim a federal reporter's privilege if the U.S. government were to ask it to disclose the sources of its documents? Does the current federal law on reporter's privilege adequately address new media, such as WikiLeaks? And if not, how should the law evolve to sufficiently accommodate organizations like WikiLeaks?[23]

WikiLeaks, however, has affected the media landscape, creating a new genre of reporting and reinforcing the power of online media. Moreover, WikiLeaks has challenged the status quo in an area other than U.S. national security and journalism: law.

The internet has fundamentally altered the way society disseminates and receives information. In addition to online versions of traditional newspapers, millions of bloggers, tweeters, podcasts, websites, and social media users have supplemented the mainstream news media. While traditional journalists are generally subject to formal editorial oversight, citizen journalists generally lack such supervision, professional journalism training as well as experience in the field. Citizen journalists are more likely to express controversial views because they are not editorially supervised.

CONCLUSION AND RECOMMENDATIONS

From the analyses above, the rights of the press can never exceed the rights of a defendant to a fair and impartial tria1. Two competing interests can often be raised in this context. The first is the concern that there be a full and fair judicial proceeding at which all relevant evidence is presented. The other is the constitutional freedom of the press to freely gather and disseminate information. The

[23] How Many People Have Smartphones? [Jul 2021 Update] | Oberlo

resolutions we have seen have been neither wholly satisfactory nor complete, for the process requires a "delicate balance of interests."[24]

The rise of citizen journalism brings even more challenges to the privilege because it is more difficult to define who is a reporter in today's media landscape. The challenges that new media brings and the increased classification of government documents do not seem to be going away. Constitutional interventions to define the meaning of "any law that is reasonably justifiable in a democratic society" will bring much needed clarity, consistency and clear standards to claims of reporter's privilege. Clear standards would encourage organizations like WikiLeaks and freelancers to continue to "responsibly" disseminate leaked information to the public to expose government abuses, contributing to public discourse, enhancing democratic self-governance, and ultimately achieving the societal values that the reporter's privilege was meant to protect. any law that is reasonably justifiable in a democratic society.

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[24]See generally United States v. Nixon, 418 U.S. 683 (1974). "The need to develop all integrity of the judicial system ••. depends on full disclosure. ••• " Id. at 709.