



## How obligatory is the obligation of the mass media under the 1999 Nigerian constitution

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### Abstract

The mass media perform many important roles in the society. In addition to their traditional functions of information, education and entertainment, they also serve as a liaison between the government and the people, as well as a check on government excesses through their influence on public opinion. In appreciation of these functions, the 1999 Nigerian Constitution guarantees freedom of expression and the press. The scope of this freedom has been further widened by the Freedom of information Act, 2011, which grants the right of any person to access information in custody or possession of any public official. Consequently, the Constitution has also imposed obligation on the mass media as a mouth piece of the people. This paper examines the scope of this obligation contained in Chapter II of the Constitution and the constraints in its realization. These impediments include the non-justiciability of Chapter II of the Constitution, derogation clauses contained in the Constitution and restrictive media laws, among others. The paper argues that unless all these impediments are removed the realization of this obligation will be a mirage.

**Keywords:** Obligation, mass media, 1999 Nigerian constitution

### Introduction

According to the *Oxford Advanced Learner's Dictionary*, (2010), the word "obligation" means "the state of being forced to do something because it is your duty or because of a law etc". In his own view, Chaturvedi (2006) <sup>[4]</sup> sees the "mass media as ... methods of communication which can reach large number of people at the same time". McQuail (2010) <sup>[11]</sup> defines the "mass media" as "the organized means of communicating openly, at a distance, and to many in a short space of time". Haralambos, Holborn and Heald (2000) <sup>[7]</sup> opine that in mass media, message is from a point to many other points: The mass media include television, films, internet etc. According to Ikeke (2023) <sup>[10]</sup>, "the notion of mass media cannot be separated from communication". In order to fully appreciate the legislative intention behind the obligation of the mass media under the 1999 Nigerian Constitution it would not be out of place to have a brief discussion of the theoretical foundations of the obligation of the mass media.

### Theoretical foundations of the obligation of the mass media

A number of theories have been propounded on the role of the mass media. Some of them are discussed below.

#### Normative Theories of the Press

The normative theories of the press (2022) <sup>[23]</sup> generally express how the mass media might, or are expected to behave or operate under certain prevailing conditions as opposed to how they really operate as a matter of fact. There is no unanimity of opinions on the number of these theories. It ranges from two to six. According to Nordenstrend (1997) <sup>[13]</sup>, the normative theories were originally two from which additional two were developed. In contrast, Rantanen (2017) <sup>[17]</sup> and Urbanski (2018) <sup>[24]</sup> believe that they were originally four from which additional one or two were developed to

make a total of five or six. However, the original four theories of the press seem to be the dominant view following the publication in 1956 of a classical book entitled: *Four Theories of the Press* by Frederick S. Siebert, Theodore Peterson and Wilbur Schramm. The authors argue that the press always takes on the form and colouration of the social and political structures within which it operates. They, thereafter, propound four normative theories of the press. These are the authoritarian theory, the libertarian theory, the social responsibility theory and the Soviet Communist theory.

The authoritarian theory is traceable to the beginning of printing in the 16<sup>th</sup> and 17<sup>th</sup> centuries. Truth was believed to only reside in the state and those in position of authority. The press and other media of communication were highly censored through the provisions of Official Secrets Acts and declaration of emergency. (Tripti: 2002).

The Libertarian theory (2022), also called the free press theory, posits that an individual should be free to publish what he or she likes and to hold and express opinions freely. It dates back to the 17<sup>th</sup> century philosopher, John Milton who opined that human beings inevitably choose the best ideas and values. In contrast to the authoritarian theory, the libertarian theory encourages criticisms of government policies as the theory believes in the unfettered freedom of the individual to freely hold and express opinion without any government interference. According to Oluwasola (2022) <sup>[15]</sup> there is hardly any country in the world where this theory is fully operated as most countries in the world use both statutory and constitutional provisions "reasonably justifiable in a democratic society" to restrict the unfettered freedom of the libertarian theory in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons. (S. 45(1) CFRN 1999).

The third normative theory is the social responsibility theory, which is an offshoot of the libertarian theory. The social responsibility theory is associated with the Hutchings Commission on the Freedom of the Press in the United States in 1942. It is meant to check the excesses of the libertarian theory. According to Oluwasola (2022) <sup>[15]</sup> the social responsibility theory lies between both the authoritarian theory and the libertarian theory “because it gives total media freedom in one hand but with provisions for external controls in the other hand”- The theory, therefore, “balances the claims for freedom with the need for responsibility”. It posits that in public interest, in the interest of true representation both sides of a case or controversy should be clearly stated. The theory believes that the mass media owe a moral obligation to the society to keep them well informed and avoid any activity that can lead to social disorder or criminal tendencies.

The fourth normative theory is the Soviet Communist/Workers’ Theory. It is traceable to the 1917 Russian Revolution and is tied to the communist ideology of Carl Marx and tangle the theory postulates that the mass media should be owned and controlled by the government in order to serve the interest of the working class, and prohibits private ownership of the mass media. The theory is very similar to the authoritarian theory in that in both theories, the government has strong control over the mass media. The only difference is that while private ownership of the media is encouraged under the authoritarian theory, only the state is allowed to own the press and other media of communication under the Soviet Communist theory (2022) <sup>[20]</sup>.

The four theories of the press as propounded by Siebert *et al* in their classic book of the same title have been highly commended by many scholars like Vartanova (2009) <sup>[25]</sup>, and Curan (2011) <sup>[5]</sup>. They have also been strongly criticized by Rantanen (2017) <sup>[17]</sup>, Sparks (1998) <sup>[21]</sup> and Urbanski (2018) <sup>[24]</sup> who states that perhaps, the most description of *Four Theories of the Press* is that it does not in fact offer four different theories at all, “it offers one theory with four examples”. The criticisms against the four theories of the press have led to the birth of two new theories. These are the development media theory and the democratic participant theory.

The development media theory was propounded by Denis McQuail (1983) <sup>[11]</sup>. The doctrine sees the media as the tool for national development. The main thesis of the theory is that the media should be used at the tools for “the primacy of the national development task (economic, social, cultural and political); the pursuit of cultural and informational autonomy, support for democracy, and solidarity with other developing countries”. According to Folarin (2002) <sup>[6]</sup>, the development media theory was propounded because other normative theories of the press could not be easily applied to developing countries due to certain characteristics peculiar to them. These include absence or inadequate supply of communication infrastructure, relatively limited supply of requisite professional skills; relative lack of cultural production resources; limited availability of media literate audiences; and dependence on developed countries for technology, skill and cultural products. The Nigerian Freedom of Information Act, 2011, seems to have been based on this doctrine.

The latest addition to the list of the media theories is the democratic participant theory. According to McQuail, the

theory reflects “public reaction against the commercialization and monopolization of privately owned media and against the centralism and bureaucratization of privately owned media established according to the norms of social responsibility”. It emphasises communitarianism and encourages citizens’ participation in community affairs. The theory allows the people to express their views, freely exchange ideas without fear, and with absolute freedom with the aid of innovation in technology.

### **Obligation of the mass media under the Nigerian constitution**

Section 22 of the 1999 Nigerian Constitution, entitled “Obligation of the Mass Media” obliges the mass media to uphold the fundamental objectives in Chapter II of the Constitution and “uphold the responsibility and accountability of the Government to the people. The section provides.

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

According to Akande (1982) <sup>[1]</sup>, the Press has used this provision in their demand for a more specific provision for press freedom in the Constitution. It is their contention that in order to fulfil the specific obligation imposed or them by the Constitution, “they must have corresponding facilities to ensure effective performance”. Furthermore, this provision has foisted two great responsibilities on the mass media. The first is to uphold the fundamental objectives while the second is to uphold the responsibility and accountability of the Government to the people. These are very herculean tasks.

This is because, in the first place, the fundamental objectives contained in sections 13 to 24 of the 1999 Nigeria Constitution are legion. They include fundamental obligations of the government, the government and the people, political objectives, economic objectives, educational objectives, foreign objectives environmental objectives, directives on Nigerian cultures, national ethics and duties of the citizens among others. Alemika (2000) <sup>[2]</sup> argues that the symbolic significance of the provisions is that government is portrayed as a relationship of rights and duties, a social contract. This raises the issue of consent and legitimacy as basis of submission or loyalty to a government. According to Nwabueze (1993) <sup>[14]</sup>, the affirmation or declaration of common beliefs and objectives has more than a symbolic value. It is part of the process of creating a national acceptance of, and attachment to those beliefs and objectives, with a view to an eventual growth of habits and tradition of respect for them. Therefore, he further contends, “enshrining an affirmation or declaration of a nations common ideal and objectives in a Constitution” would make them “less of a political slogan”, and “invest them with the character of constitutional, if non justiciable norms, thereby making it easier for the rulers and the ruled alike to develop the desired identification with them”. However, by section 6(6) (c) of the same Constitution these provisions contained in Chapter II are generally non-justiciable. Therefore, how could the mass media conveniently fulfil their obligation to uphold the fundamental objectives contained in Chapter II of the Constitution in the event of any breach since the court cannot be approached for redress?

On the second responsibility of the mass media to uphold “the responsibility and accountability of the Government to the people”, it will not be out of place to briefly consider some of the responsibilities of government to the people. Section 13 of the Constitution obligates all authorities and persons exercising legislative, executive or judicial powers to “conform to and apply” the provisions of Chapter II of the Constitution. Section 14 is to the effect that “sovereignty belongs to the people of Nigeria from whom Government through the Constitution derives all its “powers and authority.” Subsection (2) (b) thereof further provides that the security and welfare of the people “shall be the primary purpose government”.

Commenting on the obligations of the government to the people Chief Folake Solanke, SAN (2004) <sup>[19]</sup>, in a well-researched paper stated that:

Having regard to the constitutional admission that the constitution, should on the basis of accountability, make it possible for the people who are the grantors of constitutional powers and authority to challenge a breach of any provision in court if the government becomes irresponsible and/or unaccountable to the grantors of its powers, I ask you the jury; what can the media practitioners do to uphold accountability if accountability does not exist?”

On the obligation of the government to provide security and welfare for the people, Folake Solanke is of the view that if the government fails to provide security and welfare for the people, the non-justiciability of this provision will allow the government to go free with this breach of the constitution thus rendering the provision as an empty promise. This leads us to the other impediments to the fulfilment of the obligation of the mass media.

### **Impediments to the obligation of the mass media**

In addition to non-justiciability of the fundamental objectives of state policy in Nigeria, other impediments on the obligation of the mass media include the derogation clauses in the Constitution, the Official Secrets Act, law of sedition, law of contempt, and law of defamation.

One of such derogation clauses is contained in section 39 of the 1999 Constitution which provides for freedom of expression and information. The section provides as follows:

39(1) “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information ideas and opinions.

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

In addition to the restriction imposed in the private ownership of the broadcast media, section 39(3) further imposes a derogation clause as follows:

Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society-

(a) “For the purpose of preventing the disclosure of information in confidence, maintaining the authority

and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph film”.

It is intriguing that the substantive constitutional provision provides for freedom of information and expression while the marginal note seems to widen the scope of the freedom when it makes provision for “the right to freedom of information and the press”. The non-inclusion of the freedom of the press in the substantive provision has left people in bewilderment. The reason for this omission has been queried. According, to Akin Ibidapo-Obe, (2005) <sup>[9]</sup>, this omission is intentional because the Nigerian legislature does not have genuine interest in press freedom.

Furthermore, it should be noted that the scope of freedom of expression and information guaranteed by the Nigerian Constitution is very similar to that of both the European Convention on Human Rights (1950) and the African Charter on Human and Peoples’ Rights (1981), but narrower than the equivalent provisions of the Universal Declaration of Human Rights (1948), the International Convention Civil and Political Rights (1966), and the American Convention on Human Rights, (1969) because section 39 of the 1999 Nigerian Constitution only provides for the right to “receive” and “impart”, not the right to “seek” information, just like the article 10 of the European Convention on Human Rights. This means that based on this omission the courts may refuse to grant redress for refusal of information requests as was decided in the cases of *Gaskin v United Kingdom* (Application No. 10454/83 12EHRR 36, 7 July 1989) and *Guerra and Others v Italy* in February 1998. Hence the need for a Freedom of Information. The enactment of the Nigerian Freedom of Information Act 2011, has substantially filled this *lacuna* by widening the scope of freedom of information in Nigeria.

Commenting on section 39(2) of the Constitution relating to private ownership of the broadcast stations Peters (2000) <sup>[16]</sup> is of the view that by this provision private ownership of broadcast stations is subject to a prior authorization by the President and a further compliance with the regulatory requirements which the regulatory agencies where the broadcast station is located may prescribe. In his own view, Ibidapo-Obe (2005) <sup>[9]</sup>, believes that the reason for the government attempt to monopolise ownership of broadcasting stations has not been convincingly articulated. He argues that it might be based on the assumption that proliferation of broadcast stations might endanger national security, and could be misused. He, however, contends that the possibility of misuse is not enough for the government monopoly of the electronic media because of many advantages derivable from private ownership of the broadcast media.

The Federal Government seemed to have been convinced by his argument with the promulgation in 1992 of the National Broadcasting Commission Decree No 38 of 1992, which is now the National Broadcasting Commission Act. Among other things, the Act empowers the National Broadcasting Commission (NBC) to receive, process and consider applications for the establishment, ownership or operation of radio and television station; and recommending applications through the Minister to the President for the grant of radio and television licences (Sections 2(1) (b) & (c) NBC Act).

Section 39(3) allows derogation from freedom of expression based on any law that is “reasonably justifiable in a

democratic society". The meaning of the expression "reasonably justifiable" was considered *Olawoyin v Attorney- General of Northern Nigeria* (1961) 1 All WLR 269) where the court adopted the meaning given to similar expressions in India and America and held as follows:

- (1) There is a presumption that the legislature has acted constitutionally and that the laws which they passed are necessary and reasonable.
- (2) Before a restriction on a fundamental human right may be considered justifiable it must: (a) be necessary in the interest of public morality or public order; and (b) not be excessive or out of proportion to the object which it sought to achieve.

Section 45(1) of the 1999 Nigerian Constitution also provides that nothing in sections 37 (right to privacy), 38 (freedom of religion), 39 (freedom of expression), 40 (right to peaceful assembly) and 41 (freedom of movement) shall invalidate any law "that is reasonably justifiable in a democratic society" (a) in the interest of defence, public health; or (b) for the purpose of protecting the rights and freedoms of other persons.

The Nigerian courts have had cause to pronounce on some of the constitutional provisions relating to freedom of Information and expression. In *Tony Momoh v The Senate of the National Assembly* (1982) 3 NCLR 394 AT 412, the trial court held that asking a newspaper editor to disclose his source of information was a breach of his freedom of expression and information. The Court of Appeal, however, reversed the decision. According to Nnaemeka- Agu, JCA, who read the lead judgment.

"I am of the view that the law is the same in the country and that the press or any other medium of information cannot claim any right to confidentiality of the source of their information in a proper investigation by a House of the National Assembly or the Police."

In *Innocent Adikwu v Federal House of Representatives* (1982) 3 NCLR (394), the court upheld the right of a newspaper editor to refuse to disclose his source of information. Similarly, in *Director of Public Prosecution v Chike Obi* (1961) 6 NCLR 228, the appellant was convicted of sedition. The Supreme Court held that the offence of sedition was reasonably justifiable in a democratic society and was, therefore constitutional.

Furthermore, section I of the Official Secrets Act (Cap 03 LFN 2004) provides that any person who transmits any classified matter to a person to whom he is not authorized on behalf of the government to transmit it, or obtains, produces or retains any classified matter, which he is not authorized on behalf of government to obtain, reproduce or retain, is guilty of an offence. Similarly, section 51 of the Criminal Code is to the effect that any person who prints, publishes, sells, offers for sale or reproduces any seditious publication is guilty of an offence.

Section 133 of the Nigerian Criminal Code also makes it an offence punishable with three months imprisonment for anyone while in the premises in which a judicial proceeding is being held, who refuses to answer a question or produce a document; or refuses to leave the room where proceeding is being taken; or publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private, among others. Besides that, section 374 of the Criminal Code further makes defamation an offence punishable with a minimum of one-year imprisonment. High costs of mass communication materials, the harsh

economic conditions and the excesses of the mass media regulatory agencies like the National Broadcasting Commission and the Office of the Minister for Information in imposing heavy fines and sanctions on any erring media house also serve as strong impediments to the realization of the obligation of the mass media under the Nigerian Constitution.

### Conclusion

The 1999 Nigerian Constitution guarantees freedom of expression and the press. This is further complemented by the freedom of information Act, 2011. The same Constitution also provides for the obligation of the mass media, which has strong theoretical foundations. While the constitutional provision on freedom of expression can be founded on the development media theory, the obligation of the mass media is based on the social responsibility theory. The non-justiciability of the provisions relating to the obligation of the mass media is a major problem in the fulfillment of this obligation. Other problems include the derogation clause in the Constitution, the Official Secrets Act, the statutory provisions of the Criminal Code relating to contempt of court and criminal defamation. The prohibitive costs of mass communication materials and the excesses of mass communication regulatory agencies further compound the problem.

As a way of getting out of this quagmire, it is proposed that section 6(6)(c) of the 1999 Constitution which renders chapter II dealing with the obligation of the mass media non-justiciable should either be repealed or transferred to the justiciable part of the Constitution. In the alternative, the National Assembly can invoke its powers under Item 60 Part I, Second Schedule of the Exclusive Legislative List which gives the National Assembly the power of the establishment and regulation of authorities to promote and enforce of the observance of the fundamental objectives and directive principles of state policy contained in the Constitution as decided in the case of *Attorney – General of Ondo State v Attorney- General of the Federation* (2002) 9 NWLR Part 772) p. 222. Furthermore, the government can also grant tax rebate and import duty waivers on imported mass communication materials. The regulatory agencies of the mass media should also reduce their excesses and perform their statutory functions with a human face. On their own part the mass media practitioners should also not hesitate to approach the court for redress anytime they notice any excess from the regulatory agencies. Finally, as the last hope of common man, the members of the judiciary are enjoined to give expansive interpretation to any law that restricts press freedom and obligation of the mass media. It is only when all the above suggestions are implemented with sincerity of purpose that a positive answer can be returned for the question: "How obligatory is the obligation of the Mass Media Under the 1999 Nigerian Constitution."

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