FREEDOM OF INFORMATION ACT IN NIGERIA: EXPLORING THE GULF BETWEEN ENACTMENT AND OPERABILITY

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ABSTRACT
Two years after the enactment of Freedom of Information Act (FOI Act) in Nigeria, scholars have often asked whether the FOI Act marked a departure from the secrecy usually associated with public information and how the passage of the age-long Freedom of Information Bill (FIB) has affected press freedom in Nigeria. Empirical findings have often shown the contrary. It is generally agreeable that the enactment of the Freedom of Information (FOI) Act is a huge victory for press freedom in Nigeria; it is equally a valid contention that the passage of the Act does not guarantee freedom of information in the country. In this study, we review research findings in local and international studies related to the functionality of the FOI, and argue that there is an obvious difference between the enactment and practice of the FOI, particularly in the absence of mechanisms that must be in place to facilitate the workability of the Act and to guarantee the transition from sheer legislation to effective practice of the Act.

Keywords: Freedom, Enactment, Operability and Information Act

INTRODUCTION
Effective and professional journalism practice requires journalists to be able gather information in concrete files which are controlled by public authorities. To achieve that, a legal enabling environment that guarantees the conduct of this gathering activity must be in place. That means, there is a need for legislations that recognize the rights of public access to documents. The said legislation is the freedom of information act. In Nigeria, the age-long Freedom of Information Bill became a law on May 28, 2011. The preamble of the Act summarises it as one that makes public records and information more freely available, provides for public access to public records and information, projects public records and information to the extent consistent with the public interest and the protection of personal privacy; and protects serving public affairs from adverse consequences for disclosing certain kinds of official information without authorization and establishes procedures for the achievement of those purpose and related purpose thereof. The Freedom of Information Act explained how information records can be obtained such as right to access records, application for access to records due to refusal by Head of Government to public institution to disclose records; and getting access to record by court, exempted materials and documents under the security classification.
The Freedom of Information law has most definitely been enacted by the Nigerian government, but there is yet a yawning need to examine the workability of the Act, and probe the existence or non-existence of mechanisms that guarantee the effective application of the Act in Nigeria.

**FREEDOM OF INFORMATION ACT**

Freedom has an obvious claim to be considered as the basic principle of effective media practice from which other benefits should flow. That is why the pursuit of freedom of expression and information has been the central theme in most countries. Freedom of expression and that of the press is regarded by Ekpu (1998) as the grandmother of all freedom, which has been given an important place in virtually all international and national charters of human rights. According to Ndolo (2005), the concept of press freedom (which is the nucleus of freedom of information) means that the press is free from government control and the relationship to such a press to the form and stability of government and to economic growth and quality of life. Ndolo further outlines two other meanings of the concept of press freedom:

i) The right of the mass media to communicate ideas, opinions and information

ii) The right to criticize the political, economic and social institutions of the country.

McQuail (1987) notes that freedom of the press can be assessed according to different kinds of evidence, including:

1. Evidence at the societal level as indicated by the absence of laws and controls which limit the activities of the media.

2. Evidence at the level of media organizations where freedom can be measured in terms of the degree of control exercised by owners and managers over communication practitioners such as journalists, editors, and artists.

3. Evidence at the content level. Here, the concern is with the active use of editorial freedom which results in clear differences between editorial content and what is offered by sources, propagandists and vested interests, generally more expression of critical or controversial points of view, more self-production of news and other content by media (McQuail, 1987, p. 127).

Onagoruwa (1985) defines Press Freedom as the right of the press to publish without being subjected to intimidation, threat, molestation or blackmail. Alabi (2003) states that, press freedom simply means that the press should be allowed to publish without prior restraint. In this situation, Press should be free to publish or broadcast whatever it deems fit to the public without harassment. Press freedom is an essential ingredient of democratic culture and the higher the degree of press freedom allowed in any country, the better the degree of democracy its citizens enjoy as gain of democracy and freedom of expression.

According to Laursen (1998), freedom of the press or freedom of the media is the freedom of communication and expression through vehicles including various electronic media and published materials. While such freedom mostly implies the absence of interference from an overreaching state, its preservation may be sought through constitutional or other legal protections

The Freedom of Information Act is a legal extension of the constitutional provisions on freedom of expression designed partly to give practical expression to that provision. It is an act for accessing public information to service the people’s right to know, among its many functions. Freedom of information legislation, on the other hand, according to Alasdair (2006), comprises laws that guarantee access to data held by the state. They establish a "right-to-know" legal process by which requests may be made for government-held information, to be received freely or at minimal cost, barring standard exceptions

The International Federation of Journalists (IFJ, 2008) advanced two cogent reasons why the freedom of information act is important to the media, namely:

i) The test of any democracy is the quality of public debate, transparency and tolerance in society. It is to the media that people look for a variety of opinion, ideas and thoughts which exist in every community and which provide the raw material for democratic debate.

ii) Journalism can be a catalyst for social change, but media require improved conditions to be able to make a contribution to the process: a sound legal framework, a fair allocation of public resources, improved training facilities, safer workplaces, and a more tolerant society. The media needs freedom improve on the accuracy and credibility of its reports. The public has oftentimes blamed the media for its inability to come up with accurate figures when disasters involving many lives and property are involved.
According to Banisar (2006), over 85 countries around the world have implemented some form of such legislation. Sweden's Freedom of the Press Act of 1766 is the oldest in the world. Most freedom of information laws exclude the private sector from their jurisdiction. Information held by the private sector cannot be accessed as a legal right. This limitation entails serious implications because the private sector is performing many functions which were previously the domain of the public sector. As a result, information that was previously public is now within the private sector, and the private contractors cannot be forced to disclose information. Ossai-Ugbah (2012) adds that Freedom of Information Act (FOI) is ability of citizens of a country to have free access to information enabled by legislation. Other countries are working towards introducing such laws, and many regions of countries with national legislation have local laws. For example, all states of the United States have laws governing access to public documents of state and local taxing entities, in addition to that country's Freedom of Information Act which governs records management of documents in the possession of the federal government (Momoh, 2002)

A related concept to freedom of information legislation is open meetings legislation, which allows access to government meetings, not just to the records of them. In many countries, privacy or data protection laws may be part of the freedom of information legislation; the concepts are often closely tied together in political discourse (Siraj, 2010). A basic principle behind most freedom of information legislation is that the burden of proof falls on the body asked for information, not the person asking for it. The person making the request does not usually have to give an explanation for their actions, but if the information is not disclosed a valid reason has to be given (Staples, 2000)

The legislation makes public records and information more freely available and to also protect public records and information to the extent consistent with the public interest and protection of personal privacy (Ajulo, 2011). The Freedom of Information legislation also seeks to protect serving public officers from any adverse consequences of disclosing certain kinds of official information without authorization, and to establish procedures for the achievement of these purposes (Roberts, 2010). Freedom of Information Act enhances transparency and good governance and to work towards achieving a zero tolerance for corruption and impunity.

Following the passage of freedom of information act in Nigeria, Adefaye (2011), the media has expanded the frontiers of press freedom for Africa’s most vibrant press. No more will it be permitted for the journalists to hurry to press with half truth and misinformation when they can officially verify their facts. In Africa, some of the countries that have adopted various forms of the FOI include (Ojo, 2010): Ghana (Right to Information Bill, 2003); Kenya (Freedom of Information Bill, 2005); Liberia (Freedom of Information Bill, 2008); Malawi (Access to information Bill, 2004); Morocco and Mozambique respectively (Right to Information Bill, 2005); Nigeria (Freedom of Information Bill, 1999); Sierra Leone (Freedom of Information Bill, 2006); Tanzania (Right to Information Bill, 2006); and Zambia (Freedom of Information Bill).

**DEVELOPMENT OF PRESS FREEDOM IN NIGERIA**

According to Anyanwu (undated), there has been a long clamour for press freedom in Nigeria. It started in 1859. The first newspaper in Nigeria was established in 1859 called Iwe Irohin, the paper existed from 1859 to 1867 and subsequently some newspapers begun to appear in the late 1880s. According to Malemi (1999), in the early 1900s, the British Colonial Government started feeling uncomfortable with the press and started enacting laws that were harsh for the operation of the press and finding ways of checking the excesses of the press especially towards the colonial administration. Omu (1978) stated that, the heightened tone of press criticism which marked political opposition from the last days of the nineteenth century to the eve of the First World War could not but irritate the colonial administration. In view of the situation, the colonial government enacted a law called the Newspaper Ordinance of 1903 followed by Seditious Offences Ordinance of 1909 etc. However, the Nigerian Press began to struggle for press freedom as rightly observed that most of the press laws enacted in Nigeria from colonial times were obnoxious impositions by those in power to protect themselves from the legitimate searchlight of a dutiful and patriotic press (Akinfeleye and Okoye(eds.), 2003).

Incidentally, the struggle for press freedom in Nigeria was tied to the struggle for political independence. The early newspapers used their editorials and columns to crusade relentlessly for political independence. According to Daramola (2003), as far back as 1881, when the Colony of Lagos was being administered
from Sierra-Leone, the struggle for independence from colonial masters had started to appear in newspaper editorials. As expected there were provisions for freedom of expression in the Independence Constitution (Nwabueze, 1982), but there was no specific provision granting freedom of the press. The struggle to have definite constitutional provisions guaranteeing press freedom was still on. The Nigerian press continued to clamour for the Press freedom and the Freedom of Information Bill (Anya, 2000)

The FoI bill was first submitted to Nigeria’s 4th National Assembly in 1999 but it did not make much progress. It returned to the legislative chambers in the 5th National Assembly in 2003 and was passed by both chambers in the first quarter of 2007. However it was vetoed by President Olusegun Obasanjo. It returned to both chambers of the 6th National Assembly in 2007 and was finally passed on 24 May, 2011. President Goodluck Jonathan signed into law the Freedom of Information (FoI) Bill, on May 28, 2011 (nassng.org/foi. Retrieved 2012-08-11)

THE SUBSTANCE OF THE FOI ACT IN NIGERIA

The opening paragraph of the FOI Act 2011 stated that it makes public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes. Moreso, it instructs that all institutions spending public funds will have to be open about their operations and expenditure while citizens will have the right to access information about their activities. Whistleblowers who report malfeasance by their employers or organisations will be protected from reprisals (Ugbah, 2011) Ononche (2011) hints that if the Act is properly implemented, it will transform quite significantly the way government conducts its business and the way people perceive government. She notes that by allowing citizens’ access to information places an obligation of disclosure and makes public institutions more responsible, particularly when they are aware that information and records that they handle can now be scrutinized by the public. It is without doubt that the FOIA will promote accountability, transparency, rule of law and ensure people’s participation in the process of governance which is very crucial for any democratic system to thrive.

Madu (2011) summarises the substance of the FOI Act by indicating that democracy, the world over, is founded on the principle of popular participation through exercise of the right to freedom of speech and the press. Government, being trustee of the people’s power, is accountable to the people and should lay bare for public access and scrutiny information needed to enrich the debates in the political marketplace. According to Ossai-Ugbah (2012), the essence of the FOI Act is to enable the public to access certain information from government and institutions with undeterred access. The FOI act aims to make public records and information more freely available, and to protect public records and information in accordance with the public interest and protection of personal privacy. Information as contained in this act includes all records, documents and information stored in whatever form, including written, electronic, visual images, sound, audio recording, etc.

The Freedom of Information Act has the following provisions:

- Guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services.
- Requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act
- Provides protection for whistleblowers.
- Makes adequate provision for the information needs of illiterate and disabled applicants;
- Recognizes a range of legitimate exemptions and limitations to the public’s right to know, but it makes these exemptions subject to a public interest test that, in deserving cases, may override such exemptions.
- Creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and the public.
• Requires the Federal Attorney General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

THEORETICAL FRAMEWORK
Regardless of the ideological differences in the various socio-political systems of the world, press freedom – a logical extension of man’s inalienable freedom of expression – is today a universal phenomenon. Therefore the concept of press freedom and its related legal components like the freedom of information act, the first amendment right, etc., have been justified by various theoretical postulations, such as the social responsibility and libertarian theories, among others. However, of relevance to our discussion is the Libertarian theory.

The basic drive of the freedom of information act is to guarantee a free access to information and enhance press freedom. In Nigeria, with the signing into law in 2011 of the Freedom of Information bill, it is expected that effective application of the act will ensure that the Nigeria media landscape is made an open marketplace of ideas by guaranteeing the free access to information by journalists and protection of news sources.

In libertarian theory, the press is not an instrument of government, but rather a device for presenting evidence and arguments on the basis of which the people can check on government and make up their minds regarding policy. Therefore it is imperative that the press be free from government control and influence. In order for truth to emerge, all ideas must get a fair hearing; there must be a “free market place” of ideas and information. Minorities as well as majorities, the weak as well as the strong must have access to the press (Siebert, Schramm and Peterson, 1956).

According to Ndolo (2005), the purpose of the theory is to help find truth, inform, interpret, and entertain. A central and recurring element is the claim that free and public expression is the best way to arrive at truth and expose error. The media are controlled by private owners in a free market place of ideas. According to Milton cited in Konkwo (2003), there should be provided an open marketplace of ideas and a self-righting process.

There are other major ingredients of press freedom under libertarian theory. One is the assumption of the presence of a multiplicity of voices on public issues at all times (McQuail and Windhal, 1993). The libertarians assumed that in a democratic society, there would be a multiplicity of voices available to, if not actually reaching the public. Let every man who has something to say on public issues express himself regardless of whether what he has to say is true or false and let the public ultimately decide (Siebert, Schramm and Peterson, 1956).

According to Livingstone (2003), the proponents of the libertarian theory were against state control and or involvement in the operation of the news media. News organizations need to be independent of both government and big business so that it can deliver disinterested accounts of the key sources of power affecting people’s daily lives. That is why libertarian theory summarises the whole substance of the FOI Act.

THE OPERABILITY QUESTION
Nigeria has a freedom of information act; but does Nigeria have freedom of information? Anyanwu (nd.) notes that once the access to information law is passed, the Nigerian government claimed credit for the passage but fail to follow through to ensure that the law will succeed in practice. Anyanwu’s observation captures the gap between the policy and the practice of the FOI Act. According to Alaisdair(1996), when countries realize the enormity of the tasks necessary to implement the law, they fail to commit the appropriate resources or simply lose interest. Still others that have demonstrated the requisite political will to implement it may find it difficult to sustain. The indicators of political will vary from country to country, but some might include the government’s preparedness to include the right to information in the constitution, or the provision of sufficient and continued resource allocations. Is there political will to implement the FOI Act in Nigeria? Recent experiences have shown the contrary.
The legislation itself requires some supporting legal framework to be operable. For the Act to be workable, certain laws must be repealed and expunged from our law book. Two of such laws are law of sedition and official secrets act. The existences of those laws make the freedom of information act laughable. Ajulo (2011) states that the FOI implementation could be beset by three problems: lack of good leadership; inadequate support for those who are administering access requests; and a failure to realize that Freedom of Information implementation is not an event: it is a process which demands long-term commitment. This brings us back to political will. There is obvious lack of political will and mind shift to implement the freedom of information act in Nigeria. Effective implementation demands political commitment from the leadership, both to ensure that the necessary resources are allocated and to overcome entrenched mindsets of vagueness. The resource demands are significant, particularly in societies where a culture of secrecy has dominated the past and where there are no processes already in place to facilitate the archiving and retrieval of documents, such as in Nigeria (Ossai-Ugbah, 2011).

There is a culture of secrecy in Nigeria. The past governments in Nigeria are accustomed to working in a secretive fashion, and government has been brutally militarized. The notion of transparency is way beyond the frame of experience and mind-set of most public bureaucrats. Therefore, a fundamental mind shift is necessary, prefaced with political will for a change in approach. The mind-set of opacity is common; it seems that in general, bureaucrats have developed an ingrained sense of ownership about the records for which they are responsible. Releasing them to the public seems to them as ceding control and, therefore, power (Coker, 2012).

Nigerian government has not established the internal systems and processes to generate and provide information and training of civil servants to ensure understanding and compliance — what Omolola (2011) calls the mechanics of the supply side.

For instance, the Freedom of Information law in Nigeria faced its first major setback, with Ogun state refusing to respect the new FOI law. Responding to the first ever FOI request from the Nigeria Association for the Care and Resettlement of Offenders (NARCO) for access to certain public records, Ogun state Attorney General said: “the FOI is not binding on public institutions and no public institution in Ogun state is obliged, for now, to accede to any request for access to public record (Kamal, 2011).

Moreover, comprehensive information regimes can take an enormous amount of energy and resources. There is duplicity of ministries and agencies which makes information storage and retrieval complicated. On daily basis, government in Nigeria claim to be faced with a myriad of priorities and the reality that there are not enough resources in the national reserves to meet all demands. In a recent study in Great Britain, it is noted that resources are the single most important issue in FOI compliance (House of Commons, 2004). The report went on to explain, “By far the largest issue for local authorities is the lack of resources. They do not have the time, money, or personnel to easily organize information on a corporate basis in order to allow ready retrieval for FOI purposes.” In the United States, recent efforts to improve the functioning of the Freedom of Information Act have not been accompanied with additional resources, leading many advocates to question the intention and increasing the potential for their failure. Therefore, the gulf between policy and practice of FOI Act, like we put it earlier, is a global experience. It is not unique to Nigeria; only that they gulf is so wide in Nigeria.

Section 10 of the Act makes it mandatory for every Government or public institution to keep proper records or information about their operations, personnel, activities and other relevant and related information/records in a manner that facilitates public access to such information or record (Odigwe, 2011). Meanwhile, record keeping in Nigeria is so poor, and one wonders how one can access information that probably does not exist or kept in an orderly manner. Odigwe argues that if there are no records to be found, or they are so unorganized that locating them becomes an insurmountable obstacle, the best access to information law is meaningless. Many countries that have recently passed the FOI Act, have rather precarious record-keeping traditions. In countries with previously authoritarian or military governments, such as Nigeria, any records have been lost or deliberately destroyed (Coker, 2011).

A recent report of the United States Interagency Committee on Government Information addressed the need to improve accountability for records management, if the FOI Act must be implemented in any part
of the world. The report highlighted the “low priority assigned to information and records management” There is no value in a right to access to information if no reliable document exists. Record-making standards also must develop and mature (Diaz, 2004).

However, in general, costs for implementing the FOI Act regime may include a study of the extant archiving and record-keeping system, development of a new archiving system, preliminary training of civil servants, equipment purchases for processing requests, like photocopiers and printers; and expenses related to hiring and setting up a new coordinating unit for information (Ugbah, 2011). It is only left to be imagined when Nigeria will be ready for all these, which further throws more open the argument that the policy and practice of the FOI Act are worlds apart.

Moreso, in Nigeria, the penalties for non-compliance to the FOI Act are not clear. There is therefore hardly any fear of sanctions by the public bureaucrats.

CONCLUSION

The much heralded FOI Act was described as legal instrument that would not only radicalize reportorial engagement of journalists in Nigeria, there was high expectation that investigative journalism would flourish again, thereby fostering democratic process. But that has not been so. The implementation of the act has not been as urgent and exciting as it promised. After two years of enacting the Act, it does not seem to exist in Nigeria.

According to Oso (2012), one is yet to see any major difference between the pre-FOI Act journalism experience and now, in Nigeria. The media organizations are yet to put the FOI law into use. Only the NGOs have tried this law. This supports the argument that a law is useless or ineffective if not put to use/operated.

The problem of the flow of information in Nigeria is not one that can be solved by laws. It’s a cultural problem. In this country, we don’t have the culture of disclosure. In India, the U.K. and many other countries, citizens feel a sense of duty to report wrong-doing. In this country, they will just see it; keep their mouths shut and move on. All the policemen in the world cannot give Nigerians safety without the disclosure of wrong-doing.

RECOMMENDATIONS

The recommendations below would be needed to ensure effective practice of the FOI Act in Nigeria. They are:

i) Every conflicting law in the Nigerian law book, such as the Official secrets act, Sedition law, etc. must be absolutely repealed to ensure the unhindered application of the FOI Act.

ii) Oso (2012) recommends six measures that can be adopted to achieve a level of success in the implementation process. This include publishing of information, allocating responsibility to specific staff, training information officers and other public officials, setting up or improving existing information and records management systems, publicizing the existence of the freedom of information law and reporting on freedom of information activities.

iii) The choice of agency or individual to implement the new access to FOI Act regime is a political decision that will provide the foundational message to other parts of the administration, public service, and civil society that the government is serious in its efforts and libraries need to be adequately funded, equipped, and well staffed in order to effectively carry out the provisions of the FOI act as in Nigeria.

iv) Governments must establish the internal systems and processes to generate and provide information and training of civil servants to ensure understanding and compliance.

v) Nigerians need to be oriented on the need to eschew the culture of secrecy in their daily lives.
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