A KEYNOTE ADDRESS

ON

THE IMPLEMENTATION OF FREEDOM OF INFORMATION ACT (NO. 4 OF 2011)

At the South-West Zonal Sensitisation 2-Day Workshop of CSOs

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The right of access to any information in the possession of government or its agencies is not given in the 1999 Constitution of Nigeria. It is not a fundamental right. The citizens' fundamental rights are set out at length in Chapter IV of the Constitution. These are the rights to which every citizen is entitled by virtue of being a human being. He does not owe them to the goodwill of government or of any of its agencies. Such rights are categorized as negative rights by Isaiah Berlin in his classic essay***: Two Concepts of Liberty***.

Fundamental rights are regarded as negative rights because they do not compel the ruler to do anything for the citizen. They only seek to prevent the ruler from interfering with the individual in the pursuit of his private life and interests. They are in contrast to positive rights which place on rulers the obligation to do for the citizens any and all such things as a democratic modern community, in its collective desire and wisdom, considers beneficial to the community. The right to free education, the right to work and the right to free healthcare are examples of positive rights.

But we all know that no right can be enjoyed in society without restriction. In other words, even fundamental rights cannot be enjoyed by the citizen without restriction, if only to protect the rights of other citizens and ensure orderliness in society. For example, while the right to impart and receive information is stated in the Constitution, any person aspiring to establish a medium for the dissemination of information, ideas and opinions must obtain authorisation

from the President. Before he is given such authorisation, he is required to show that he has fulfilled the conditions laid down by law. [Section 36 (1) & (2)].

Another example of the fact that no right can be enjoyed without restriction is that while the Constitution provides for court proceedings to be conducted in public so that the citizens may have access to the necessary information, at the same time it gives the Courts a discretion to exclude from court proceedings persons, other than the parties themselves or their Lawyers :

> "In the interest of defence, public safety, public order, public morality, the interest of persons who have not attained the age of 18 years, the protection of the private lives of the parties, and to such extent as the court may consider necessary by reason of special circumstances in which publicity would be contrary to the interest of justice". (s. 36 (4)(a))

In a democracy, every citizen should have access to any information in the possession of government or its agencies which may be used against his interest in the course of governance so as to be able to take any action he may deem appropriate. The possession of such information would also give him a rational basis for assessing the performance of government, criticize policies and actions and enable him to make a well-informed choice at election time.

The right of access to information is one of the positive rights a democratic society may create for itself. The right belongs not only to individual citizens but also to groups of individuals and organisations. In particular, the possession of such a right by the Press is absolutely essential for the health of a democratic society.

It is a great achievement by Nigeria that the National Assembly has enacted the Freedom of Information Act. The Act is elaborate in its provisions as well as in the procedures by which any person may obtain the information he desires. In its opening section, the Act provides:

> "1-(1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.
>
> (2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.

(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act."

Furthermore, the Act makes it mandatory for public institutions to keep all necessary information in proper form and order so as to enable members of the public to access such information. Thus it provides in section 2 (2):

"(2) A public institution shall ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information."

In section 7 the Act provides:

" – (1) Where the government or public institution refuses to give access to a record or information applied for under this Act, or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of this Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a Court."

In order to enhance the effectiveness of its provisions the Act stipulates sanctions for its breach in section 7(5) thus:

"(5) Where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500,000."

The Act goes on to provide in section 10 that

"10 It is a criminal offence punishable on conviction by the Court with a minimum of one year imprisonment for any officer or head of any government or public institution to which this Act applies to willfully destroy any records kept in his custody or attempt to doctor or otherwise alter same before they are released to any person, entity or community applying for it."

Section 20 provides:

"20 Any applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution

denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow."

"In any proceedings before the Court arising from an application under section 20, the burden of establishing that the public institution is authorized to deny an application for information or part thereof shall be on the public institution concerned." (Section 24)

Section 29-(1) On or before February 1 of each year, each public institution shall submit to the Attorney-General of the Federation a report which shall cover the preceding fiscal year and which shall include –

(a) The number of determinations made by the public institution not to comply with applications for information made to such public institution and the reasons for such determination;
(b) The number of appeals made by persons under this Act, and the reason for the action upon each appeal that results in a denial of information;
(c) A description of whether the Court has upheld the decision of the public institution to withhold information under such circumstances and a concise description of the scope of any information withheld;
(d) … .. ..(h)

Section 29 stipulates that

"(5) The Attorney-General shall develop reporting and performance guidelines in connection with reports required by this section and may establish additional requirements for such reports as the Attorney-General determines may be useful.

… .

(7) The Attorney-General shall submit to the National Assembly an annual report on or before April 1 of each calendar year … .."

giving particulars of applications dealt with the previous year.

STATES AND THE FREEDOM OF INFORMATION ACT.

Under the 1999 Constitution (whether as originally promulgated or as subsequently amended) the States of the Federation have no legislative competence to enact a Law on freedom of information. The competence of the House of Assembly of a State to make Laws is confined to the items listed for that purpose in the Concurrent Legislative List contained in Part II of the Second Schedule to the Constitution. On the other hand the National Assembly's competence to legislate on the subject, even though not specifically contained in either the Exclusive or Concurrent legislative List, may be predicated on the provisions contained in Items 60 (a) and 67 in the Exclusive Legislative List taken together with section 14 (2)(c) of the Constitution. The said item 60 (a) confers on the National Assembly the power by law to establish and regulate authorities empowered:

> "(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution."

Section 14 (2)(c) of the Constitution provides that:

> "(2)(c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution."

In addition to subjects enumerated in the Exclusive Legislative List, containing the subjects on which only the National Assembly can make Laws, the aforesaid Item 67 empowers the National Assembly to make Laws on

> "67 Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution."

It is true that in addition to the items on the Concurrent Legislative List, section 4 (7)(c) of the Constitution gives a State House of Assembly power to make laws on "(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution." This seemingly limitless legislative competence in fact adds nothing to the competence granted in the Concurrent List in as much as its exercise must rest on some specific provisions of the Constitution. I have not been able to identify any such provision, unlike an apparently similar blanket legislative competence conferred on the National Assembly in section 4 (4)(b) as shown above.

In conclusion, it is only the National Assembly that possesses the competence to legislate on this subject matter. In any case, even if a House of Assembly has the legislative competence, concurrent with the National Assembly, to legislate on the subject, once the latter has enacted on the subject an Act manifests a clear intention of providing the law comprehensively on the subject, any Law made by a State House of Assembly on the same subject will be, and remain, in abeyance, and be of no effect, for as long as the Federal Law (Act) remains in force. This is a judicial principle called "the doctrine of covering the field".

In Attorney-General of Abia State vs Attorney-General of the Federation (2002) FWLR (Pt 101) 1419 at 1511, Eso JSC, took the following stand on the doctrine of covering the field:

> "Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government, it is indeed void and of no effect for inconsistency. Where, however, the legislation enacted by the State is the same as the one enacted by the Federal Government where the two legislations are in *pari materia* I respectfully take the view that the State legislation is in abeyance and becomes inoperative for the period the federal legislation is in force. I will not say it is void. If for any reason the federal legislation is repealed, the State legislation, which is in abeyance, is revived, and becomes operative until there is another federal legislation that covers the field."

Is the Act binding on State Governments Oficials?

In my considered opinion, the Freedom of Information Act is binding on public officers and other persons employed by both the Federal and State governments since the law is validly made by the National Assembly for the whole Federation. However, some of the provisions of the Act (notably in its section 3) which seek to impose certain obligations on officials of State Governments may require judicial clarification by the Courts

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