IGBINEDION UNIVERSITY LAW JOURNAL

Volume 11 June 2024

Published by
College of Law
Igbinedion University Okada
Edo State, Nigeria.

ISSN: 1595-5141

Citation: (2024) 11 I.U.L.J.

Hate Speech and State Censorship: An Imperative for the Reappraisal of the Constitutional Right to Free Speech in Nigeria*

Abstract

Freedom of speech is one of the fundamental human rights embodied in the Nigerian constitution. However, different approaches exist as to what should be agreeable speech around the world. Some countries are more liberal than others for probably certain forms of speech and even the expression of certain views. While hate speech is a matter of controversy nationally and internationally, there are legitimate concerns about unwarranted repression stemming from the frequent lack of focus and clarity in the discourse surrounding hate speech and freedom of speech. The aim of this study is to re-evaluate whether there is any merit in the allegation regarding Nigerian government's invasion of citizens' and lawful residents' constitutional rights to free speech and privacy on the basis of hate speech. The methodology employed in this research is doctrinal. This paper recommends that the Nigerian government should amend the existing statute relating to hate speech censorship to include unequivocal definitions and sanctions. Comparably, through exhaustive and unbiased investigations, an independent judicial and supervisory body should be in place to restrain the abuses of law enforcement agencies concerning the suppression of free expression in general and hate speech in particular. In balancing the conflicting interests between the freedom of speech and the protection from hate speech, the courts should proceed from the principle that the right to free speech being a fundamental human right, must be given preferential protective consideration although not absolute. Therefore, the paper argues that any claim on restriction or derogation on constitutionally protected rights must be construed strictly.

Keywords: State Censorship, Right to free speech, Hate speech, Nigerian Constitution, Nigerian government.

1. Introduction

"I disapprove of what you say, but I will defend your right to say it to the grave." A remark attributed to Voltaire is a common catchphrase among free speech advocates.[1] Civil libertarians frequently defend and support the idea that the right to freely communicate objectionable beliefs is a fundamental human right that should not be restricted except in extreme cases. The Nigerian constitution states that everyone has a right to freedom of expression.[2] However, the question of what communication should or may be outlawed because it incites people to hatred, also known as "hate speech," is

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[1] E Hall and S Tallentyre, *The Friends of Voltaire* (Smith Edition: France 1906) p. 12

[2] See Constitutional of Federal Republic of Nigeria 1999 (as amended), s. 39

a source of heated debate around the world. Many countries have laws that restrict or censor certain forms of communication or words that encourage violence and hatred. There is no doubt that a person's boundaries of freedom cannot impede the freedom of others in view of the fact that there are freedoms to do things and freedoms from things.

Essentially, where a particular right violates someone else's freedom, such freedom is expected to be limited by any responsible government that seeks to promote a safe and respectful community for its citizens.[3] Proponents of free speech favour an unfettered access to ideas in which no expression is limited.[4] The advocates believe that the greatest way to respond to damaging speech is through dialogue, which allows diverse shades of opinions to freely criticise it.[5] Others say that hate spèech regulations are critical in protecting minority populations from the harm that such speech creates.[6] Different perspectives on what constitutes appropriate speech can be found all over the world. Some countries appear to be more tolerant of particular forms of speech and even the presentation of certain opinions than others. For example, the United States of America has traditionally been a country that actively defends the constitutional right of free expression.[7]

Even so, there are various restrictions on free speech, such as speech inciting 'imminent lawless action' and those that censor vulgarity.[8] Even proponents of free speech believe that hate speech warrants particular treatment, especially when directed towards minority who are unable to respond.[9] It has a serious and disastrous impact on people's life, health, and safety. It is destructive and disruptive to communities, stifling social progress in the battle against prejudice. Hate speech has the potential to lead to war and genocide.[10] Although free speech is a fundamental right, it should not be allowed to trump other people's essential human rights.[11]

Owing to the likelihood of the abuse or perhaps the weaponisation of the right to free expression among the various interests in the society, the government takes it upon itself to regulate and censor the expression of individuals' freedom within its jurisdiction. The practice of suppressing, limiting, or eliminating disagreeable or any other sort of communication is known as censorship. Despite the fact that all political regimes engage in some form of censorship, liberal democracies have distinguished themselves from illiberal politics by limiting censorship and ensuring free speech

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[3] N Mohammed 'Tackling Hate Speech in Nigeria. Blueprint' at <https://www.blueprint.ng/ tackling-hate-speech-in-nigeria-by-mohammed-ndakogi-mohammed/> accessed 30 July 2024.

[4] Ibid.

[5] Ibid

[6] N Brown *Report to the Minister of Justice of the Special Committee on Hate propaganda in Canada.* (Queen's Printer 1996) p. 23

[7] K Ruane *United States Congressional Research Service, Freedom of Speech and Press Exceptions to the First Amendment. Federation of American Scientists* (2019) at <https://www.sgp.fas.org/crs/misc/95-815.pdf> accessed 30 July2024

[8] Ibid

[9] Ibid

[10] Ibid

[11] N Uzoka 'Hate Speech and Freedom of Expression: Legal Boundaries in Nigeria' (2021) Library Research Journal 1-15

guarantees.[12] Like Nigeria, many liberal democratic states across the world have entrenched freedom of expression in their national constitutions, and it is one of the cardinal features of the United Nations Declaration of Human Rights (UNDHR) in 1948.[13]

The article is divided into six parts. Part one is the introduction. Part two is the conceptual analysis. Part three discusses the state censorship on free speech. Part four dwells on the implications of hate speech and state censorship on constitutional right to privacy and free speech. The last part concludes and recommends the ways forward. This paper contributes to academic scholarship as it aims to clarify further on what constitutes hate speech by analysing the existing legal framework available in the regulation of hate speech in Nigeria. It also addresses whether there should be a limit to freedom of expression in a democracy or otherwise. Ultimately, this paper hopes to construe hate speech from a state censorship purview in order to establish its relativity to the constitutional right to privacy in Nigeria.

2. Defining hate speech

There is no generally accepted definition of hate speech worldwide.[14] The definition of what constitutes 'hate speech' is still debatable. However, hate speech has been described as speech that has no meaning other than the expression of hatred for some group, such as a specific race, especially in circumstances where communication is likely to provoke violence.[15] Hate speech has also been defined by the 2007 Committee of Ministers of the Council of Europe as 'covering all forms of expression that spread, incite, promote, or justify racial hatred, xenophobia, anti-semitism, or other forms of hatred'.[16] Hate speech is when someone or something attacks, threatens, or insults someone or something because of their national origin, ethnicity, colour, religion, gender, sexual orientation, or disability.[17] Hate speech is defined as speech that denigrates, harasses, intimidates, or incites hatred toward a person or group based on a trait such as race, ethnicity, religion, gender, or sexual orientation.[18] The term 'speech' encompasses spoken inscriptions and utterances as well as pictorial representations and symbols.[19]Hate speech is also defined as any form of communication, whether in speech, writing, or behaviour, that targets or uses derogatory or discriminatory language in relation to a person or a group based on who they are, such as their religion, ethnicity, nationality, race, colour, descent, gender, or other identity factor.[20] Hate speech makes people feel bad about themselves because of their race or ethnicity, religion, gender,

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[12] JS Mill. *On Liberty* (John W. Parker & Son, 1859) p. 23
[13] UDHR 1945, art 19.
[14] Uzoka (n 12).
[15] B Garner *Black's Law Dictionary* (9th Edition Thomson: West Publishing Co, 2004)
[16] Uzoka (n 12) 3
[17] Ibid.
[18] Ibid.
[19] H LaFollette *The International Encyclopedia of Ethics* (2nd Edition: Wiley, 2019) p. 16
[20] A Guterres, *United Nations Strategy and Plan of Action on Hate Speech* (United Nation, 2019) <https://www.un.org> accessed 30 July 2024.

age, physical condition, disability, or sexual orientation.[21] Hate speech, according to Neisser is "any communication (verbal, written, or symbolic) that insults a racial, ethnic, or political group, whether by suggesting that they are inferior in some way or by signalling that they are disliked or not welcomed for any other reason".[22]Hate speech has also been defined as 'war perpetrated on others through words'.[23]

Scholars have referred to a variety of variables as encouraging hate speech including a lack of tolerance, political confrontations, discrimination, animosity, and the openness of social media.[24] Some of the effects of hate speech include that; it undermines an individual's dignity, results in humiliation, discomfort, and psychological or emotional pain.[25] Nemes posits that hate speech can cause individuals grief, anguish, dread, embarrassment, and isolation.[26]While hate speech directed against certain groups of individuals can cause inequity and isolation, it also instils fear in them, discouraging them from participating in the community and expressing their thoughts.[27]In addition, Nielsen argued that the degradation and humiliation caused by hate speech might silence the 'victims' and therefore cement existing hierarchies in society,[28] whilst Parekh claims that it can also encourage victims to become aggressive and dangerous.[29]

Numerous criticisms have been levelled against hate speech. It has been portrayed as a threat to liberty, a violation of autonomy, an impediment to self-realisation, a stifling of truth finding, and the source of chilling forms of valuable speech.[30] In the name of free expression, hate speech should not be condoned. It has genuine and catastrophic consequences for people's lives, as well as putting their health and safety at risk.[31]On the other hand, freedom of expression should go beyond limiting the ability to prohibit speech and rather aim to create truly equal conditions. Nigerians have recently benefited from technological advancements that have allowed them to openly express their opinions on problems that directly or indirectly influence or impact their lives. As a result of the social media expansion, hate speech transmission has

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[21] A Cortese *Opposing Hate Speech* (Praeger Publishers, 2006) p. 13

[22] E. Neisser, 'Hate Speech in the New South Africa: Constitutional Consideration for a Land Recovering from Decades of Rational Repression and Violence' (1994) *South African Journal of Human Rights* 336-356

[23] E. Kayambazinthu and F Moyo, 'Hate Speech in the New Malawi' in H. Englund (ed.) *A Democracy of Chameleons: Politics and Culture in the New Malawi*. (Elanders Gotab, 2002)

[24] T, Alakali, H Faga and J Mbursa, 'Audience Perception of Hate Speech and Foul Language in the Social Media in Nigeria Academicus' (2017) *International Scientific Journal* 164; S. Spiegel, 'Hate Speech, Civil Rights and the Internet: The Jurisdictional and Human Rights Nightmare' (1999) *Albany Law Journal of Science & Technology* 1-8

[25] L. Leets, 'Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech' (2002) 58 (2) *Journal of Social Issues* 341-361.

[26] I. Nemes, 'Regulating Hate Speech in Cyberspace: Issues of Desirability and Efficacy' (2002) 11(3) *Information & Communications Technology Law* 193

[27] Ibid

[28] L. Nielsen 'Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech' (2002) 58 (2) *Social Issues* 265.

[29] B. Parekh, 'Hate Speech: Is There a Case for Banning?' (2006) *Public Policy Research* 213.

[30] A Brown and A Sinclair, *The Politics of Hate Speech Laws* (Routledge 2019) p. 23

[31] Ibid

become more decentralised, allowing audiences to participate in the creation and distribution of media material.[32] It is worth noting that Nigeria, like many countries, struggles to strike a balance between the right to free expression and the need to curtail individual's speech that is harmful to national harmony, unity, and peace.

3. Theories of Human Rights

a. Utilitarianism:

For the utilitarian, the just action is that which, relative to all other possible actions, maximises utility or the "the good."[33] The justice or injustice of an action or state of affairs is determined exclusively by the consequences it brings about.[34] If an action maximises utility, it is just. On this account, therefore, rights are purely instrumental.[35] Utilitarian will honour a right if and only if it will lead to the maximisation of utility.[36] This statement also indicates the limits of all rights. If the exercise of a particular right will not maximise utility, the utilitarian is obligated to violate that person's rights for the sake of utility.[37] The point at which the letter of right defeats the purpose is the point at which society may justly curtail that right. Rights are limited by the utility principle. If the exercise of a right maximises the good, the right ought to hold. If it fails to do so, the right may be justly abridged. Critiques of the utilitarian account of rights argue that in some cases it extends rights too far and in other cases it restricts rights unjustly.

b. Kantianism

Kant proposes that the essence of morality is captured by what has been called the categorical imperative.[38] This is a rule for testing rules of conduct.[39] According to the argument of this theorist, what is all right for one person is all right for another person if their relevant circumstances are similar.[40] This theory is relevant to human rights because human rights are collectively seen as universally applicable to all humans. This theorist states that what is morally permissible applies to all rational beings.[41] It is also relevant that this test tends to endorse rules of action that protect the most basic interest of humans. Kantianism is an explicitly non-consequentialist ethic given that the

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[32] D Agbese, *Hate Speech*: *Vanguard Newspaper* (December 2018) <https://www.google.com/amp/s/www.vanguardngr.com/2018/12/hate-speech/amp/> Accessed 30 July 2024)

[33] R B Brandt, 'Utilitarianism and Moral Rights' (1984) 14(1) *Canadian Journal of Philosophy*, 6.

[34] Ibid.

[35] Ikechukwu Anthony Kanu, 'Jeremy Bentham's Utilitarian Ethics and Human Rights: A Philosophical Analysis of the Morality of the Rights of Commercial Sex Workers' (2022) *Theology, Philosophy, and Education in the 21st Century*, 13.

[36] Ibid.

[37] Ephraim Ikegbu and Francis Diana-Abasi, 'Utilitarianism as a Veritable for the Promotion of a Just Society' (2017) 14(2) *Journal of Contemporary Research*, 122.

[38] Victor Chidi Wolemonwu, 'Richard Dean: The Value of Humanity in Kant's Moral Theory' (2020) 23(2) *Medicine, Health Care, and Philosophy*, 222.

[39] Ibid.

[40] Chris Abakare, 'Kant's Theory of Virtues and Doctrine of Rights Sanctioning Fair Business and Trade' (2021) 1(2) *South Asean Journal of Social Studies*, 183.

[41] Allen D. Rosen, *Kant's Theory of Justice* (New York: Cornell University Press, 2011) 16.

consequences of our actions are often determined by contextual factors beyond the control of the individual.[42] Honour and blame are only coherent concepts where the subject is responsible for what they have done.[43] In all appeals to consequences, the locus of responsibility must necessarily be displaced to a broad array of factors, only one part of which is the agency of the individual in question.[44] Moral responsibility for consequence, therefore, is incoherent. Ethics must be a matter of intentions, these being the only things we can evaluate without extrinsic influence.[45] The right action therefore is that which is done in conformity with our moral duty, regardless of consequence. Kant's concepts of human right are the moral foundation upon which basic political constitution produces and flourishes human culture because these concepts as a product of pure rationality are in congruence with human nature.

However, Kant's theory applies only to rational agents. It may not apply to non-humans or to human who are not rational. For instance, it does not apply to people with brain malfunctioning, illness or someone in a persistent vegetative coma. Similarly, the theory does not resolve the conflicts of duties phenomenon. For example, how would a person resolve a conflict between two perfect duties such as 'to never tell a lie' and 'to avoid harming someone?' What if telling the truth can still possibly harm someone? Nonetheless, the theory is still relevant is expanding the knowledge on human right and humanity in general.

c. Laski's theory of rights:

Harold Laski, an influential figure and creative writer of political science expounded the theory of rights.[46] He describes rights as "those conditions of social life without which no man can seek, in general, to be himself at his best."[47] Laski calls rights as conditions of social life.[48] Rights are social concept and deeply linked with social life. The essentiality of rights is established by the fact that individuals claim them for the development of their best self. He places rights, individuals and state on the same board in the sense that they cannot be separated from each other and there is no antagonism between them.[49] Laski recommends the long-cherished view that the state has a very important role to play in the realisation and, before that, recognition of human rights.[50]The central principle of the legal theory of rights is that they completely depend

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[42] Ibid.
[43] A Kellner, 'States of Nature in Immanuel Kant's *Doctrine of Right*' (2019) 73(3) *Political Research Quarterly*, 9.
[44] Ibid.
[45] Ibid.
[46] Peter Lamb, 'Laski on Rights and the Problem of Liberal Democratic Theory' (1999) 19(1) *Political Research Quarterly*, 17.
[47] Ibid.
[48] Ibid.
[49] Ting Xu, 'Harold Laski, Travelling Concepts, and the Evolution of the Human Rights Idea in Republic China (1919-49)' (2023) *British Association of Comparative Law* available at <https://british-association-comparative-law.org/2023/06/09/harold-laski-travelling-concepts-and-the-evolution-of-the-human-rights-idea-in-republic-china-1919-49-by-ting-xu/> accessed 10 August 2024.
[50] Loughlin Martin, 'The Political Jurisprudence of Harold J. Laski' (2021) 50 *LSE Research Online*, 252.

upon the institutions and recognition of state.[51] An individual cannot claim rights if those rights are not recognised by the state. Mere recognition, moreover, is not sufficient for the exercise of rights. The state must, through law and institutions, implement the rights.

The main impression his writings on law give is that he puts little faith in lawyers to bring about worthwhile change. Reform will come, if at all, through pluralist group pressure on the state or a transformation of the state brought about by pressure from organised labour. And, for him, law is almost always state law, so it has limited independent theoretical interest.[52] Although Laski noted that churches claimed autonomous regulatory jurisdictions, and trade unions needed legal recognition of their corporate character, he did not develop a theory of legal pluralism to match his political pluralism.[53]Another way to critique the entirety of Laski's thought is to recognise it as a purely political theory, without any substratum of social or legal theory. Legal theory features in his early work mainly as something to be rejected as unhelpful.[54] His lack of access to or perhaps interest in social theory and sociological underpinnings of rights, coupled with the limited resources of legal theory affected his ambitious efforts on the analysis of rights.

d. Legal and human rights

Legal rights are those rights which are accepted and enforced by the state.[55] Any violation of any legal right is punished by law. Law courts of the state enforce legal rights. These rights can be enforced against individuals and also against the government. In this way, legal rights are different from moral rights. Legal rights are equally available to all the citizens. All citizens follow legal rights without any discrimination.[56] Theoretically, even if a satisfactory basis for the existence of human rights can be constructed, further fundamental challenges emerge to both the `human' and `rights' dimensions of human rights. It is not self-evident what it is about humans that generates the moral entitlement to certain benefits, neither is the status clear of those humans who do not share these qualities. A particular problem is posed by the manner in which these benefits are asserted to be `rights', since this concept can operate in practical circumstances as a liberty, power, immunity, or claim-right. The locus of any corresponding duty for a claim-right is no less problematic. Consequently, human rights must be examined more closely, because they are at once so important and yet so vulnerable to probing questions about their origin, foundation, justification, substance, and application.

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[51] Ibid.

[52] Roger Cotterrell, 'Harold Laski: A Comment on Rights in Theory and Practice' (2022) *Queen Mary Law Research* Paper No. 394/2022), paper presented at a workshop on 'Harold Laski and his Chinese Disciples, 'University of Sheffield, July 2nd, 2020, available at SSRN: <https://ssrn.com/abstract=4263046> accessed 12 August 2024.

[53] Ibid

[54] Ibid

[55] J Raz, 'Legal Rights' (1984) 4(1) *Oxford Journal of Legal Studies*, p. 3.

[56] Stephen Marks, 'Human Rights: A Brief Introduction' (2014) *Harvard Library* available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA> accessed 10 August 2024.

4. Concept of state censorship of free speech

Censorship takes two basic forms: state-imposed and self-imposed.[57] However, our paper is principally concerned with state-sponsored initiatives to restrict mass media, which are allegedly justified by claims of defending the public interest but with far-reaching ramifications for democratic societies. State censorship of communication in the modern sense is connected with large, complex, metropolitan civilisations with a degree of centralised authority and technological methods of effectively reaching a mass audience. It entails determining what can and cannot be stated to a larger audience in light of established political, religious, cultural, and artistic standards. Censorship can include withholding or modifying existing information, as well as blocking the creation of new information. Content deemed objectionable or harmful to public welfare is repressed or restricted in order to keep it from reaching a wider audience.

At the most fundamental level, any restriction prohibiting self-expression or the surveillance and repression of personal or organisational communication within the jurisdiction of a country might be considered government or state censorship of speech. In defending state censorship, proponents argue that particular ideas and forms of expression, as defined and decreed by those in authority or those engaged in a moral crusade, pose a threat to individual, organisational, and social well-being, and hence must be outlawed. It assumes that there are standards that must not be broken.[58]

In comparison to other legal kinds of concealment, governmental censorship is primarily placed publicly. The protection of public good is constantly used to justify official censorship. Much of government's speech censorship policies are based on the assumption that everyone is weak and needs to be protected from offensive information, whether it is hateful utterances or radical criticism of existing political and religious authority. As a result, random people cannot be trusted to choose what they want to hear and read, or to form their own opinions freely. In contrast to a nondisclosure agreement that parties to a court settlement willingly agree to, state censorship is involuntary.[59] It is unidirectional and non-discretionary. Individuals who are susceptible to it are unable to communicate. State speech censorship aims to keep verbally passed information and knowledge from a large group of people rather than a single person in order to attain and preserve public peace, order and morals.

Freedom of expression can be curtailed in the name of preventing incitement to hatred only if there is a direct link between the expression in question and the risk of harm, and only when the danger is imminent. The intended risk should not be remote or speculative, and the utterance in question should be genuinely hazardous to the public interest. Furthermore, the state should guarantee that the restriction imposed is the least restrictive option for safeguarding the threatened interest. To put it in another way, international law requires striking a careful balance between maintaining the right to

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[57] M Sweeney, *Censorship. Encyclopedia of International Media and Communications* (2003) p. 189.
[58] G Marx, 'Censorship and Secrecy: Legal Perspectives' (2021) *International Review of the Social & Behavioral Sciences* 1582.
[59] Ibid.

freedom of expression on the one hand, and forbidding advocacy for hatred based on country, race, or religion on the other.[60]

Thus, the speaker, the audience, the speech itself, the social and historical context, and the means of transmission can all be used to predict the risk that hate speech would trigger violence in any particular setting. One or more of these characteristics may be particularly essential in each circumstance. A speaker can have a significant impact on a certain audience, and certain audiences may be particularly vulnerable due to economic hardship, fear, or previous complaints. Certain language-related events, which are widely defined to include actions of speech such as the burning of a holy book, can be very powerful. In some circumstances, the last criterion, the means of distribution, is the most important, particularly when it comes to new media. In several nations, text messaging is increasingly being used to arrange riots and massacres.[61]

5. State Censorship of Hate Speech in Nigeria

The Constitution of the Federal Republic of Nigeria 1999 (as amended) is the fundamental law dealing with human right provisions in Nigeria and other laws are subordinate to it. Every Nigerian has the fundamental right to privacy,[62] freedom of speech and expression under the constitution.[63] Every person has the right to freedom of expression, which includes the ability to hold opinions and to receive and impart information without interference.[64] The freedoms enumerated in sections 37-44 of the 1999 constitution are not absolute but can be derogated.[65] For instance, hate speech, defamation, libel, and other abusive languages are rooted in the fact that these rights are not absolute but subject to other laws enacted in a democratic manner which is reasonably justifiable.[66]

Section 45 of the Constitution of Federal Republic of Nigeria 1999 (as amended) allows for the suspension or restriction of the right to freedom of expression under appropriate circumstances. It provides that:

> Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society
> (a) in the interest of defence, public safety, public order, public morality or public health; or
> (b) for the purpose of protecting the rights and freedom of other persons.

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[60] I Udofa 'Right to freedom of expression and the law of defamation in Nigeria' (2011) 2(1) *International Journal of Advanced Legal Studies and Governance* 22

[61] A Callamard *Striking the Right Balance in Words & deeds: Incitement, Hate Speech & the Right to Free Expression.* Index on Censorship (2005).

[62] Section 37 CFRN 1999 (as amended)

[63] Ibid, s.39.

[64] Ibid, s.39(1)

[65] Ibid, s.45

[66] Ibid. Uzoka (n 12)

This constitutional provision authorises any law to be enacted in Nigeria to limit the use of specific terms for the objectives listed above.

Article 20 of the International Covenant on Civil and Political Rights (ICCPR), which Nigeria ratified by accession in 1993, also contains this requirement. It clearly stipulates that member states must pass legislation against "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence".[67]

In light of foregoing, Nigeria has established two laws that have direct implications for hate speech and profanity. Because of the prevalence of politically-driven hate speech and foul language encroaching on elections and party politics in Nigeria, section 95 of the 2010 Electoral Act (as amended) makes it illegal to use the following words or expressions during electioneering campaigns: It provides thus:

> (1) No political campaign or slogan shall be tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings.
> (2) Abusive, intemperate, slanderous or base language or insinuations or innuendoes designed or likely to provoke violent reaction or emotions shall not be employed or used in political campaigns.

Although, even by the most basic meaning of the term, this rule does not constitute a restriction of hate speech, it does prohibit profane language, which is common in Nigeria during electioneering campaigns. However, one obvious flaw in this provision is that it only prohibits such offensive political conduct during election campaigns; however, evidence of political rivalry in Nigeria, and indeed the entire African continent, shows a long history of continuous violence between political parties, setting the stage for power grabs using any means necessary.[68]

Apart from the Electoral Act, the Political Party Code of Conduct (2013) has rules prohibiting political parties in Nigeria from using foul or abusive language or expressing hatred. The instrument expressly states in paragraph 7 that:

> No political party or candidate shall during campaign resort to the use of inflammatory language, provocative actions, images or manifestation that incite violence, hatred, contempt or intimidation against another party or candidate or any person or group of persons on grounds of ethnicity or gender or for any other reason.

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[67] L Leo, F Gaer and E Cassidy, 'Protecting Religions from Defamation: A Threat to Universal Human Rights Standards' (2011) 34 *Harvard Journal of Law and Public Policy* 769–795; UN, *Office of the United Nations High Commissioner for Human Rights* (2011). *Conclusions and Recommendations Emanating from the Four Regional Expert Workshop Organized by the OHCHR* in 2011 and Adopted by Experts in Rabat, Morocco on 5 October 2012. <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 30 July 2024.

[68] C Cohen ,'Violence Between and Within Political Parties in Nigeria: Statistics, Structures and Patterns' (2006 - 2014) 2015 *Institut Français de Recherche en Afrique au Nigeria* at <http://www.ifra-nigeria.org/IMG/pdf/violence-political-parties-nigeria.pdf> Accessed 4 July 2024. S Elischer, *Do African Parties Contribute to Democracy? Some Findings from Kenya, Ghana and Nigeria* (Afrika Spectrum, 2008) 43.

> Accordingly, no Political Party or candidate shall issue any poster, pamphlet, leaflet or other publication that contains any such incitement.

This clause, like the Electoral Act, only applies to political parties' behaviour during elections, and while it professes to control it, it lacks any enforcement mechanism and does not specifically prohibit hate speech. Thus, rather than imposing legal obligations and punishments, the Political Party Code of Conduct (2013) holds political parties and organisations in Nigeria ethically responsible for political peace and stability.

The Cybercrime (Prohibition and Prevention) Act (CPPA) 2015, on the other hand, is a national law that criminalises a variety of damaging online activities in Nigeria, including hate speech on social media platforms. Unlike the Electoral Act, the Cybercrime Act expressly defines and criminalises hate speech in Nigeria's cyberspace in its various forms.

According to Section 24(1) of the CPPA 2015, anybody who knowingly or intentionally sends a message or other content via computer systems or networks:

> (a) is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent or;
> (b) knows to be false, for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent commits an offence under this Act and shall be liable on conviction to a fine of not more than N7,000,000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment.

Section 24(2) CPPA provides thus:

> Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network commits an offence under this Act and shall be liable on conviction.

Threatening or insulting a person or group of people over a computer system or network is illegal under section 26(1) of the Act 'for the reason that they belong to a group differentiated by race, colour, descent, national, or ethnic origin, as well as religion.' The clause also makes it illegal to distribute 'any racist or xenophobic content' to the public via a computer system or network, as well as material that 'denies, accepts, or justifies acts constituting genocide or crimes against humanity.' The term 'racist or xenophobic content' is defined as follows in section (2). It provides that:

> Any written or printed material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual, group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion.

A person who is convicted under this section faces a sentence of not more than 5 years in jail or a fine of not more than ten million naira, or both. The section is broad enough to cover a wide range of conduct and expressions by people in Nigerian cyberspace, including activity on social media networks that may originate from online or offline sources. It not only makes individual beliefs and statements in the form of words, images, or symbols illegal on any platform in cyberspace, but also makes any belief system attributed to any group of people in Nigeria illegal. As a result, the region is at the crossroads of the Nigerian polity's key fault lines and conflicts, which have the potential to spark a system of enmity among Nigeria's ethnic groups, political divisions, and faith-based institutions.[69]

Apart from these sections of the Cybercrime Act, the introduction of the Digital Rights and Freedom Bill 2016 (DRFB) in the Nigerian National Assembly is another attempt to regulate the balance between free speech and expressions of hatred on online platforms in Nigeria. The proposed bill aims to limit the right to free expression in cases where an expression expressed on any computerised platform infringes on other people's or group of persons' human rights, such as the right to life and the right to equality which were provided under Clause 14(11). Clause 13(13) defines hate speech as:

> Any speech, gesture or conduct capable of inciting violence or prejudicial action against any individual or group, by disparaging or intimidating an individual or group on the basis of attributes such as gender, ethnic origin, religion, race, disability or sexual orientation.

Hate speech on the internet is particularly prohibited under Clause 16(3). It carries a maximum sentence of one year in prison and a maximum fine of one million naira. If any online publication of hate speech results in the death or destruction of property, the publisher of such speech faces a sentence of not less than seven years in prison, a fine of not less than five million naira, or both fine and imprisonment, as well as compensation to the victims, if convicted. In the instance of a corporation, a fine of not less than one million naira shall be imposed, in addition to such compensation to the victims' families as the court may determine.

The aforementioned proposed bill features are highly striking as both deterrents and remedial legal remedies (victim compensation) against the phenomena of hate speech in Nigeria. However, because the bill has not yet been enacted into law, perpetrators of hate speech and foul language in Nigeria may currently only be held

[69] I Chiluwa and A Adegoke 'Twittering the Boko Haram Uprising in Nigeria: Investigating Pragmatic Acts in the Social Media' (2013) 3 (59) *Africa Today* p.12.

liable under the offences set out in the Acts.[70] Nonetheless, a civil action may be brought against any perpetrator of hate speech for violating the constitutional prohibitions against discrimination and abuse of dignity included in sections 34 and 42 of the 1999 constitution (as amended). This is due to the fact that hate speech is essentially a type of discrimination[71] and indignity[72] against an individual or group of individuals.

6. Constitutional right to privacy in Nigeria: Overview

The right to privacy is a constitutional limit on the powers of the state and other individuals from encroaching into the personal and private space of others in the society. Succinctly described as "the right to be left alone", the constitutional right to privacy centres on the prerogative of individual freedom.[73] However, the need for the maintenance of order and the necessity of communal living has posed a big challenge to the absolute enjoyment of the right to private life. Jeremy articulates this reality by saying that "it would be a good thing if privacy could be protected, but the war and way of technology and the needs of security have de facto made the right to privacy a dead letter."[74]

The right to privacy covers a wide range of issues such as confidential correspondence, email and internet use, medical history, personal data, eavesdropping, sexual orientation and personal life styles. According to Solove,[75]there are six elements of privacy which are:

- personal autonomy;
- limited access to the self;
- confidentiality;
- the management of personal information;
- the right of individuality; and,
- the right to relationship(s).

It becomes evident from these components that privacy is only significant when it strives to preserve an individual's rights that he or she wishes to keep private. That is, events which are not supposed to be in the public domain. As a result, it seems reasonable to conclude that behaviours that an individual does not desire to keep hidden from the public eye or from the society in which he or she lives are not covered by the

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[70] Section 95 of the Electoral Act 2010, Section 26 of the Cybercrime (Prohibition, Prevention, and Other Measures) Act 2015

[71] J Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. (University of Pennsylvania Press 1999)

[72] K Pillay and J Azriel 'Banning Hate Speech from Public Discourse in Canada and South Africa: A Legal Analysis of both Countries Constitutional Court and Human Rights Institutions' (2012) *South African Public Law Journal* (7).

[73] L Brandei and S Warren, 'The Right to Privacy' (1890) *Harvard Law Review* 23-50

[74] J Miller, 'Dignity As A New Framework, Replacing the Right to Privacy' (2007) 30(2) *Thomas Jefferson Law Review* 10

[75] D Solove, *Understanding Privacy* (Harvard University Press 2018) 30

right to privacy. Simply expressed, the right to privacy refers to any activities that are intended to be kept private from the public eye.[76]

The right to privacy entails preventing the public from delving into an individual's affairs. Another important part of the right to privacy is the right to protect one's image and personality, as well as to have complete control over one's zones of exclusivity, space, and sensitive information. The right to privacy is a component of self-ownership. It is the moral liberty of an individual to do what he or she sees fit in order to maintain his or her individualism while keeping others beyond the realm of his or her self-ownership.[77]

Being a necessity for the practice of democracy and rule of law in Nigeria, the fundamental right to privacy is protected under municipal and international laws which is domesticated under statutory instruments applicable in Nigeria.[78]

Under the domestic law, the right to privacy is one of the fundamental human rights entrenched in the Nigerian Constitution. Section 37 of the 1999 Constitution provides that: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'

At the regional level, this is reflected in Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, (2002) Banjul, the Gambia. Article 2 states:

> 1. No one shall be subject to arbitrary interference with his or her freedom of expression.
> 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

Nevertheless, the omission of the privacy clause in the Charter, the African Charter on the Rights and Welfare of the Child (1990) provides the child with privacy rights. Article 10 states:

> No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

At the international plane, the Universal Declaration of Human Rights, (1948) (UDHR) Article 12 states that:

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[76] Y Olomojobi, 'Right to Privacy in Nigeria' (2017) <https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3062603> accessed 28 July 2024.
[77] Ibid.
[78] CFRN 1999, s. 12

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

To lay emphasis on the importance of the right to privacy, Article 17 of the International Covenant on Civil and Political Rights (1966) (ICCPR) reiterated the above provision of Article 12 of the UDHR.

7. State censorship of hate speech in Nigeria: Implications on the right to privacy

This part of article examines the social and legal impacts which state censorship of hate speech has on the constitutional and fundamental right to privacy in Nigeria. The paper argues that despite the utterance, spreading and condoning of hate speech is antisocial, particularly in a socio-culturally and religiously diverse country like Nigeria, the regulation of hate speech in Nigeria, statutorily and administratively, has been very open-ended and unchecked leading to a threat to the constitutional right to privacy of Nigerian citizens and lawful residents alike.

The vague and poorly definition of the regulation of hate speech in Nigeria has adversely impacted on the constitutional right to privacy of concerned citizens and lawful residents primarily because as at the time this paper was written, no domestic statute validly in force in Nigeria defined the concept of hate speech. The absence of statutory definition of hate speech has caused this concept to be defined as the Nigerian government deems fit.[79] This has enabled the government to shrink the Nigerian civic space by indiscriminate branding and proscription of social justice agitations and protests as hate speech.

Another cause for the adverse impact of governmental hate speech censorship on the right to privacy in Nigeria is the lack of institutional framework for the monitoring and enforcement of hate speech censorship. For example, on 23 August 2017, Director of Defence Information, Major-General John Enenche (now retired), made revelation on Channels Television's News – a Local News Channels- that the Nigerian military has commenced censorship of social media posts. According to him, the move to censor the internet and social media platforms became necessary in the light of troubling activities and misinformation capable of jeopardising the unity of the country.[80]It is worth noting that there is no law in Nigeria that empowers the military to undertake such assignment. This ultimately leads to the militarisation of the media, particularly the internet. International human rights norms require that any decision to suppress speech should be made on the basis that the surveillance is necessary to

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[79] A Ige, 'Online censorship and its implications of freedom of expression' *Vanguard Newspaper* (June 9, 2021) <https://www.vanguardngr.com/2021/06/online-censorship-and-its-implications-of-freedom-of-expression/amp/> Accessed 30 July 2024

[80] J Enenche 'We Now Monitor Social Media For Anti-Government And Anti-Military Information' *Channels TV News*. <https://www.channelstv.com/2017/08/23/now-monitor-social-media-anti-government-anti-military-information-military/amp/> Accessed 30 July 2024).

accomplish a legitimate goal and proportionate to the goal pursued.[81] None of the essential statutory instruments in the Nigerian legal system includes this international best practices requirement. The lack of a criterion for need or proportionality provides the government and its law enforcement agencies far too much freedom for operation which is easily abused and manipulated.

According to the International Principles on the Application of Human Rights to Communications Surveillance, every person subject to surveillance should be notified of the decision authorising surveillance; delays may be justified only in limited circumstances, such as when notification would jeopardise the surveillance's purpose, and for a limited time, typically until the reason for the delay has passed.[82]

However, no law requires authorities to notify persons or groups who are or have been the subject of authorisation. For example, the application for a court order to approve communication surveillance is by "ex parte" application.[83] This is in line with the provisions under section 29(1) Terrorism (Prevention) Act and section 45(1) Cybercrimes (Prohibition, Prevention, Etc) Act. As a result, individuals may only learn that they have been monitored if they are charged with a crime and evidence collected through surveillance presented in court. In all other circumstances, they have no official way of learning about the surveillance decision, severely limiting their ability to seek recourse for improper spying through the courts. If a person is unaware that they have been subjected to surveillance, they are practically without recourse if those surveillance methods infringe on their right to privacy.

The International Principles on the Application of Human Rights to Communications Surveillance also emphasise the importance of transparency in communications surveillance decisions, such as published reports containing aggregated information on authorisations, as well as public oversight through independent oversight mechanisms that can hold authorities accountable.[84]The Nigerian legislature is yet to include this standard into her domestic laws in Nigeria. As a result, the application of hate speech suppression in Nigeria is not transparent. Public supervision guarantees that unlawful actions are investigated and reported on, while robust transparency mechanisms provide for public scrutiny and the capacity to assess whether authorities are being utilised responsibly. Nigeria's security agencies are said to be poorly supervised, with parliamentary supervision confined to financial clearances.[85]

8. Conclusion

The paper has argued that the statutory and administrative shortcomings in hate speech censoring by the Nigerian government directly contravenes the constitutional right to

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[81] Privacy International *The Right to Privacy in Nigeria, Stakeholder Report Universal Periodic Review 31st Session – Nigeria*. 2008 <https://privacyinternational.org/sites/default/files/2018-05/UPR_The%20Right%20to%20Privacy_Nigeria.pdf> Accessed 30 July 2024.

[82] Ibid.

[83] Ex parte applications are those in which the targeted individual or group is not advised of the proceeding or is not represented at it.

[84] Ibid.

[85] J Uddoh *Corruption Risks in Nigeria's Defense and Security Establishments: An Assessment.* (Authorhouse, 2016) 10

privacy of Nigerian citizens and lawful residents. As the last hope of a common man, the courts are the institution society has invested with the responsibility of balancing conflicting interests, in a way as to ensure the enjoyment of liberty without destroying the existence and stability of society itself. In balancing the conflicting interests between freedom of expression or speech and the protection of the hate speech, the courts should proceed from the principle that the rights to freedom of expression or speech, being a fundamental human right, must be given preferential protective consideration although not absolute. Therefore, any claim on restriction or derogation on constitutionally protected rights must be construed strictly.

9. Reforms and Recommendations

It is the duty of the court to ensure the protection of the fundamental rights of citizens, and, in appropriate cases, to balance the conflicting interests of the parties involved. Ayoola JSC, in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*[86] posited that, the courts are the institutions society has invested with the responsibility of balancing conflicting interests, in a way as to ensure the enjoyment of liberty without destroying the existence and stability of society itself. In balancing the conflicting interests between freedom of expression and the protection of the hate speech, the courts would normally proceed from the principle that the rights to freedom of expression, being a fundamental human right, must be given preferential protective consideration. Therefore, any claim on restriction or derogation on constitutionally protected rights must be construed strictly. The European Court on Human Rights confirmed this approach in the Sunday Times Case (*The Sunday Times v. United Kingdom*,[87] when it ruled that, where the principle of freedom of expression is subject to a number of exceptions, such exceptions must be narrowly construed. It is recommended that Nigerian judges should continue to apply this hallowed legal principle as a proper law.

Second, the Nigerian government should modify the current legal framework and regulations governing hate speech censorship in Nigeria to ensure that they meet international and regional human rights standards including satisfying the requirement of the legality, necessity, and proportionality tests.

Third, judicial independence is required to ensure fairness in the administration of justice particularly on hate speech censorship cases among others.

Fourth, the government should ensure the conduct of fast and impartial investigations into credible reports of unlawful speech censoring of lawyers, journalists, human rights activists, and others, with the goal of bringing perpetrators to justice and delivering compensation.

Similarly, the Nigerian government should introduce the teaching of human rights in various educational institutions. Teachers should be trained and re-trained to teach humans rights in both public and private schools. Effort should be made to

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[86] (2002) AHRLR 159

[87] Judgement of 26 April, 1979, Series A no. 30s

minimise prejudices and to promote understanding and tolerance in all spheres of life particularly to the young people.

Also, public enlightenment programs should be diligently undertaken to raise public understanding about the importance of privacy, implement media and information literacy programme. As the fourth estate of the realm, the media should intensify the awareness campaign on the need to avoid hate speech and to focus more on what can unit us together rather than what can divide us.

At the global arena, conventions and agreements among nations to regulate the hate speech are recommended. Since the inception of social media, there have been varied shades of opinion on meaning of hate speech in comparison with freedom of speech. Multi-jurisdictional approach should be applied to usher in more collaboration among nations to establish a global framework.